
CARISSIMA MATHEN

PATRICK MACKLEM

Canadian Constitutional Law

SIXTH EDITION





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Canadian Constitutional Law

SIXTH EDITION

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PREFACE TO THE SIXTH EDITION

The sixth edition of *Canadian Constitutional Law* continues and, in our opinion, strengthens a truly national project. Drawing upon an editorial team rich with regional, linguistic, and scholarly diversity, this text remains true to the structure and purposes of previous editions while reflecting timely preoccupations in the field, touching upon such diverse areas as the separation of powers, federalism, and the role of the courts. Throughout, we have placed increased emphasis on the intersection of constitutional and administrative law and the crucial role of executive actors.

From the beginning, *Canadian Constitutional Law* has embraced the idea that understanding constitutional history is critical to comprehending the present and future of Canadian constitutional law. Like its predecessors, in order to illuminate present-day issues, this edition reaches back to pre-colonial and colonial times, to the earliest encounters between Indigenous peoples and European colonies, and to conflicts between European empires over control of the continent.

A number of chapters have been substantively re-written. Highlighting a functional approach, Chapter 1, Introduction, now focuses exclusively on constitutive elements of Canadian constitutionalism. Chapter 2, Judicial Review and Constitutional Interpretation, has been narrowed to introduce the mechanism of judicial review and the practice of constitutional interpretation. Chapters 4–6, on the history of the division of powers and early related cases, have been greatly refreshed, as has Chapter 8, Interpreting the Division of Powers. Chapter 9, Peace, Order, and Good Government, required substantial reworking to incorporate ground-breaking decisions—most notably, though not limited to, the 2021 *References re Greenhouse Gas Pollution Pricing Act*.¹ Chapter 10, Economic Regulation, has been overhauled, with greater attention paid to s 91(2) and the Canadian common market. Chapter 13, The Judiciary, has also been extensively re-written, with less focus on early s 96 cases; it also now incorporates material previously appearing in Chapter 2 on constitutional litigation and constitutional references. Chapter 14, Indigenous Peoples, reflects the remarkable evolution of scholarly, political, and judicial treatment of Indigenous peoples, nations, and issues. The final chapter to be re-written, and the one about which we are particularly excited, is Chapter 23, Equality. Aside from these extensive revisions, all chapters have been thoroughly updated to reflect recent developments in constitutional jurisprudence.

For reasons of space, a number of chapters have not been included in the print version of the sixth edition: Chapter 12, Instruments of Flexibility in the Federal System; Chapter 16, The Advent of the Charter; Chapter 24, Language Rights; and Chapter 26, Amending the Constitution. These chapters can be found online at <<https://lemond.ca/ccl06>>.

This edition continues to have a flexible design so that different teachers can use it to teach constitutional law in different ways. Each part is designed to be relatively free-standing; the book can operate as a reader for a course on any combination of issues relating to federalism, Indigenous peoples, and the Charter. Those who wish to underscore the historical dimensions of the field may want to follow the order of the chapters; others can bypass the early chapters and commence with contemporary issues and approaches.

¹ 2021 SCC 11.

We wish to thank our publisher, Paul Emond, and his staff, including Darren Smith, Kelly Dickson, Natalie Berchem, and Jennifer Ditta, as well as the copy editors, Dancy Mason and Ward Jardine, and the proofreaders, Darryl Kamo and Valerie Adams, for their support and institutional dexterity in publishing this edition so quickly. We also wish to thank our academic colleagues and student readers for their constructive comments on the previous edition. Finally, we note with gratitude the many contributions of Professor Carol Rogerson, who has retired from her role as general editor.

Carissima Mathen
Patrick Macklem
February 2022

ABOUT THE GENERAL EDITORS

Carissima Mathen, LSM, is a professor of law at the University of Ottawa. She holds degrees from McGill University, Osgoode Hall Law School, and Columbia University. A noted constitutional scholar, she is the author of *The Tenth Justice: Judicial Appointments, Marc Nadon and the Supreme Court Act Reference* (Vancouver: UBC Press, 2020) (with Michael Plaxton) and *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019), which won Second Place Distinction in the prestigious Walter Owen Book Competition. As the former director of litigation for the Women's Legal Education and Action Fund (LEAF), Professor Mathen undertook path-breaking litigation in equality rights cases before the Supreme Court of Canada. An award-winning media commentator and Ontario Law Society medalist, Professor Mathen is committed to public education and legal literacy. In addition to her books, Professor Mathen has published on all aspects of constitutional law, as well as criminal law, legal theory, and law and technology.

Patrick Macklem is an emeritus professor of law at the University of Toronto. He holds law degrees from Harvard University and the University of Toronto and an undergraduate degree from McGill University. Professor Macklem is the former William C Graham Professor of Law and a Fellow of the Royal Society of Canada. He served as law clerk for Chief Justice Brian Dickson of the Supreme Court of Canada and as constitutional advisor to the Royal Commission on Aboriginal Peoples. Professor Macklem is a respected constitutional law expert and a long-standing author and general editor of *Canadian Constitutional Law*. In addition to this title, he authored and co-edited several books and published numerous articles on constitutional law, labour law, Indigenous peoples and the law, and human rights.

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PART ONE

INTRODUCTION TO CANADIAN CONSTITUTIONAL LAW

CHAPTER ONE

INTRODUCTION

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I. INTRODUCTION

Welcome to the study of constitutional law. It is an important and fascinating subject, and we hope that you will come to appreciate its place in both our system of law and our political culture. Constitutional law affects all aspects of our lives. Because of its development over time and application in diverse contexts, constitutional law also expresses deep social divisions—between, for example, following community commitments and respecting individual autonomy. It reflects the profound challenge in any society of finding the means to live together in mutual respect. In this chapter, we briefly describe the subject, expecting that lectures and classroom discussions will attend in greater detail to the issues and themes discussed below.

Any definition of constitutional law runs the risk of being too wide, too narrow, or too vague. Remembering that constitutional law broadly engages the organization of our social life, we suggest that a constitution is an assortment of foundational rules, principles, and practices relating to the governance of a society.

Constitutions address a wide range of subjects and relationships. Typically, they deal with the structures, procedures, and powers of governmental institutions and the nature and scope of personal rights and responsibilities. Often, they address relations among groups and between groups and governments. In Canada, the latter relationship characterizes the complex and evolving relationship between Indigenous peoples and the state. In some countries, the constitution includes protection for individual rights against the exercise of private

power or imposes general economic and social obligations—for example, a right to housing or basic income.

Constitutional provisions perform several different kinds of functions. They often establish legally enforceable obligations. They serve to ground judicial decisions concerning the exercise of power. And by setting out the fundamental values and aspirations of a country, they perform a significant symbolic role.

In many countries, including Canada, the term “constitution” has at least two meanings. The first refers to all the rules by which a country has chosen to govern itself, regardless of where they might be found. On this meaning, a constitution can include rules found in ordinary statutes and the common law. The second is a particular document or set of documents that has special legal and political significance. In Canada, that set of documents is called “the Constitution of Canada.” They have the character of “the supreme law of Canada,” and they can be changed only in accordance with specially prescribed rules.

Given the preliminary definition above, what, then, is “constitutional law”? In our view, it is an open-ended set of rules, principles, and practices that identify, define, and reconcile competing rights, responsibilities, and functions of governments, communities, and individuals. Responding more fully to that question is a central task of this book. We hope as well that, in reading the chapters that follow, students will gain some insight into the nature of law itself.

II. BREAKING DOWN CANADA’S CONSTITUTION

A. ELEMENTS

The Canadian Constitution encompasses five components: parliamentary democracy, federalism, individual and group rights, Aboriginal rights, and the principle of constitutionalism. These five components interact with each other in complex ways.

Parliamentary democracy is the mechanism that ensures that primary legal rules (statutes) are created by elected legislative bodies. Those bodies confer extensive authority on executive actors (the chief one of which is the Cabinet), whose members remain formally accountable to the legislature, to administer those laws. Additionally, laws are interpreted and applied by courts and quasi-judicial bodies such as administrative tribunals.

Federalism is the division of “orders of government” along territorial lines. Generally, it consists of a national order and one or more subnational orders (here, provinces). In Canada, federalism’s most critical function is to allocate the powers of different legislatures: Parliament at the national level and assemblies/legislatures at the provincial level. Parliament enacts laws over matters of general concern to the country, whereas provincial legislatures enact laws in relation to more local concerns. As you will discover, the distinction between those two kinds of matters is hotly contested and has changed over time.

The third feature of our Constitution is rights: claims that citizens, either individually or in particular communities, have against the state. Among other things, they include rights to democratic government, to mobility, to fundamental freedoms such as religion or expression, to fair criminal justice processes, and to equality.

Aboriginal rights, the fourth feature, are recognized by the Constitution as belonging to Indigenous peoples in light of the fact that they lived on this continent in organized societies long before their contact with European nations. The precise nature and scope of such rights are still being worked out by Indigenous peoples, politicians, and courts.

The principle of constitutionalism refers to the requirement that state power be limited by overarching rules and norms that cannot be changed by ordinary legislative processes. It means that state decisions that are inconsistent with a provision of the Constitution of Canada are considered (and will be so declared by courts) to be “of no force or effect.”

Another feature of the Constitution is the rule of law, an expansive, complex, and challenging concept. At its most basic, the rule of law means that governments exercise power

according to law, not arbitrarily. Somewhat related, and thus worth mentioning, is the collection of constitutional conventions, which, although they are not legally enforceable, nonetheless form an essential part of the Canadian constitutional order.

For centuries, legislative supremacy has been a central principle of the British Constitution. Under this principle, any law passed by the British Parliament is supreme and may not be modified or circumscribed by any other institution. In theory, Parliament can make laws about whatever it wishes, however it wishes, and expect those laws to be followed and enforced. Because British colonial constitutions were formed in the model of the British Constitution, legislative supremacy carried over to Canadian legislatures. That supremacy, however, was tempered by imperial power. Since Confederation, legislative supremacy has also been modified by the principle of federalism, under which Parliament and the provincial legislatures are “supreme” only insofar as they exercise powers the Constitution confers on them. Legislative supremacy was further modified by the 1982 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, the focus of many of the following chapters.

B. SOURCES

Constitutions take different forms. Some, like the US Constitution, primarily derive from a single document that is amended from time to time. Others, including the Canadian Constitution, are made up of a variety of sources, often generated over a long period.

An important source for the Canadian Constitution is the common law—the case law rendered by judges first in Great Britain and now in Canada. The common law is a source for recognizing such things as the rights of Indigenous peoples and the law of parliamentary privilege. It also provides a measure of protection for individual rights, through presumptions for the interpretation of statutes. Other constitutional rules are found in ordinary statutes created by legislatures and can modify and even overrule common law rules. For example, the Supreme Court of Canada was created by a federal statute, the *Supreme Court Act*, RSC 1985, c S-26, but is still considered to be part of the fabric of the Canadian Constitution (in a 2014 advisory opinion discussed in Chapter 13, The Role of the Judiciary, the Court confirmed its own distinct constitutional status).

Another source, constitutional convention, develops from long-standing patterns of behaviour of elected political actors. They are “enforced” not by the courts but through political means—by public rebuke and, potentially, defeat at the ballot box. Although conventions are not legally enforceable, they often lie at the heart of constitutional tradition. For example, the principle of responsible government, whereby the executive actors forming the government are chosen from the party or parties with the greatest support in the elected chamber of the legislature, is one of our most important constitutional practices. Yet it is a convention—not a judicially enforceable rule.

Some of Canada’s most significant constitutional sources are the result of actions by the British Crown and the British Parliament. An example is the *Royal Proclamation* of 1763. Issued by King George III after the British conquest of the French colony of New France, it continues to be an important source of constitutional protection of Aboriginal rights. Similarly, the *Quebec Act*, enacted by the British Parliament in 1774, ensured the continuation of French civil law in Quebec. Another important British statute, the *British North America Act*, 1867 (renamed the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, in 1982) (BNA Act), created the new federal state of Canada by uniting the colonies of New Brunswick, Nova Scotia, and Canada, which was divided into Ontario and Quebec. The BNA Act gave the new dominion a constitution, in the words of its preamble, “similar in Principle to that of the United Kingdom.” By conferring on provincial legislatures powers to pass laws in relation to property and civil rights and local and private matters, the BNA Act also acknowledged Quebec’s strong desire to retain its civil law tradition.

As other provinces joined Confederation, they too became bound by the BNA Act. However, the conditions, or “terms of union,” on which they joined varied. Thus, for example, the *Manitoba Act, 1870* provided for settlement of Métis land claims and protection of the French language; Prince Edward Island’s 1873 Terms of Union guaranteed a steam ferry link; the three prairie provinces were not given the same jurisdiction as the other provinces over their natural resources (until a constitutional amendment in the Natural Resources Transfer Agreements in 1930); and Newfoundland saw not only special provisions for denominational schools but also a guarantee for the continued manufacture and sale of, of all things, “oleomargarine.”

Although the BNA Act clearly was meant to provide a measure of self-government, it applied to a colony (Canada) expected to remain fundamentally “British.” That probably explains why so much was left unsaid about the operation of the colony’s parliamentary institutions and structures, such as the Office of the Prime Minister or the Cabinet. Those practices would continue to be governed by long-standing British constitutional conventions. As well, there was no domestic mechanism to change the Act (save for s 92(1), which allowed the provinces to change their own provincial constitutions); there was no explicit provision for Canada to create international treaties and thus no process to implement them; and there was no requirement for a Canadian supreme court, although s 101 did confer the power on the federal Parliament to create one.

III. INSTITUTIONS AND THE SEPARATION OF POWERS

A. SEPARATION OF POWERS

The Constitution is primarily a mechanism for ordering the rules by which a nation-state is governed. As such, it is important to delineate how that governance is structured. This section briefly considers the main institutions of the Canadian state. The following excerpt explains an important overarching concept: the separation of powers.

Carissima Mathen, Courts Without Cases: The Law and Politics of Advisory Opinions

(Oxford: Hart, 2019) at 20–21, 26–28 (footnotes omitted)

The separation of powers is a doctrine that sets out how the various entities that wield state power ... should function, both singly and in relation to each other. There are many different versions of the doctrine, which is inescapably political. But the core of the doctrine, whatever the particular version on offer, is that the state is optimally divided into three branches of government—legislative, executive and judicial—and that each branch should stay in its respective “lane.” The legislative branch has primary, and usually exclusive, authority to create positive legal rules. The executive branch is charged with administering those rules, as well as any number of other tasks (which may themselves be either delegated or conferred by statute). Finally, the judicial branch is charged with interpreting and applying legal rules in a variety of contexts.

The concept of separating government functions goes back (at least) to the origins of Western political thought. In the *Politics*, Aristotle identified deliberative, magistral and judicial elements of government action. Even so, the idea of three distinct branches of the state was not a common feature of early accounts, which tended not to distinguish between executive and judicial functions. Indeed, American

political scientist Martin Shapiro has described the modern focus, in separation of powers doctrine, on the institutional separation of courts as "the most deviant case."

• • •

It is sometimes said that there is no separation of powers in Canada. It is true that the country does not adhere to the peculiarly strong version of that doctrine that operates in, say, the United States. As a parliamentary democracy ... Canada's governance is incompatible with such a rigid division of the state. Instead, there is an explicit connection between the legislature and executive.

• • •

Another feature of the Canadian Constitution that may appear to complicate the application of separation of powers doctrine is the fact that the judiciary is appointed exclusively by the executive branch with no formal input from the legislature. Indeed, Canada appears to be virtually alone among constitutional democracies in allocating such a broad appointment discretion to "the leader of the government"

At first, Canadian courts did not pay much attention to the separation of powers. The Canadian Supreme Court did not even mention the term until 1975, and only in 1981 did it address the doctrine's role in constitutional terms. The Court's early references tended to be dismissive, noting, for example, that "there is no general 'separation of powers' in the British North America Act, 1867" and that the Constitution "does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function."

After the Constitution Act 1982, the Court started to view the doctrine in starkly different terms: as "essential," "defining," and "fundamental." In 1993, it said:

While we do not share the turbulent history of the United Kingdom with respect to the relationships between the different branches of government, there is no question that the maintenance of the independence of the different branches from one another is necessary to their proper functioning.

As you read the materials throughout the book, consider how much they adhere, or do not, to the idea that the state is best served by some separation of governance functions.

As a federal system operating in the Westminster tradition, the organization of the Canadian state is somewhat complicated. Below are set out its primary institutions and actors.

B. THE CROWN

Canada is a constitutional monarchy. Although Canada is governed by the "supreme law" of its Constitution, that political order is organized around a hereditary monarch who also acts as the sovereign ruler of the United Kingdom (at the time of writing Queen Elizabeth II). Note that under our Constitution the Queen acts as the Queen of Canada, not the United Kingdom.

With one exception, the Queen never takes any personal decisions vis-à-vis Canada. The exception is the appointment of her viceregal representatives: the governor general for Canada and lieutenant governors for individual provinces (the territories have a different position called "commissioner"). Although the Queen personally appoints her representatives, she does so on the advice of the prime minister.

The notion of "advice" is core to the monarchical, or sovereign, role in Canada. The basic principle is that the sovereign always acts on the advice of executive actors (namely, the prime minister) who are themselves accountable to elected members of the House of Commons (discussed below). The sovereign follows this convention as long as the prime minister enjoys the confidence of a majority of elected members in the House of Commons. In this way, the Crown operates consistently with Canada's democratic character. Although it is

possible for the Crown to disregard a prime minister's advice, by convention that would cause the prime minister to resign—a grave outcome that the sovereign would do their utmost to avoid. Such a situation has occurred only once in Canada: an incident known as the "King–Byng" affair of 1926, which created a constitutional crisis. For a discussion, see Eugene A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford: Oxford University Press, 1943, reprinted 1968) chs 5, 6.

C. PARLIAMENT

Parliament is the legislative branch of Canada. Its name reveals both a historical and a conceptual link to the centuries-old Parliament of the United Kingdom (Westminster). Formally, Parliament is composed of three elements: the Queen through her representative, the governor general; the House of Commons, composed of 338 elected members; and the Senate, made up of 105 individuals appointed by the governor general on the advice of the prime minister.

Two of Parliament's most significant responsibilities are to ensure supply (funds) for the operation of the state and to pass legislation in areas of federal responsibility. Legislation may be introduced in either chamber (except for money bills, which must originate in the House). Upon majority votes by both chambers, the bill is then sent to the governor general for "royal assent," after which it gains the force of law. Note that, by convention, the Crown always assents upon being advised of the will of both Houses of Parliament. Therefore, royal assent does not involve the sovereign in the legislative process in more than a pro forma way.

It is common (if technically inaccurate) to hear references to "Parliament" as only the House and Senate or, indeed, the House alone. One reason that the House of Commons, especially, is thought of as Parliament is because of its critical function vis-à-vis the government. Through the votes of its members, the House demonstrates confidence in the prime minister and thereby empowers the Cabinet to govern. A prime minister only remains in office while holding that confidence; this is a key principle of "responsible government." The House is the one to give confidence because the House is elected by the general public.

D. CABINET AND EXECUTIVE

In Westminster-style democracies, the term "government" refers to the executive branch. At the centre of this branch is Cabinet. Cabinet is ordinarily composed of members of the legislative branch. Those members are selected by the prime minister, the head of Cabinet, who must maintain the confidence of the House in order to stay in office. Cabinet members are sworn in by the governor general. All ministers, including the prime minister, are "responsible" to the legislature, are expected to respond to its questions and demands, and must abide by its laws. Through the prime minister, Cabinet advises the governor general on things that require Crown approval—for example, judicial appointments. The term "governor in council" is used to refer to the governor general acting on that advice.

One of the less desirable features of the Canadian parliamentary system is that decision-making can become concentrated in the executive to the detriment of the accountability function of Parliament. This can occur when a political party has a majority of seats in the House, which mutes much of the potential conflict between the two branches. It can also occur in a minority Parliament, where, for whatever reason, the opposition parties are not motivated to register non-confidence in the government. Compared to other Westminster-style systems, Canada tends to cede a great amount of practical political control to the executive. For more discussion of this issue, see Donald J Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

E. JUDICIARY

The judicial branch interprets and applies primary and subordinate legal rules (statutes and regulations), reviews the actions of state actors, and evaluates laws and state action for consistency with the Constitution. It consists of a hierarchy of courts with the Supreme Court of Canada at the top. Other courts operate either in the provinces (provincial, superior, and appellate courts) or for the entire country (federal courts). The judiciary's role in Canada's constitutional order is a focus of much of this book, beginning with the next chapter. Its special features and constitutional character are covered in Chapter 13.

F. PROVINCES

Similar to the federal level, provinces operate under the separation of powers as modified by a framework of responsible government. Provinces have their own sovereign representatives: the lieutenant governors. In Canada, the term "Parliament" is used exclusively to refer to the national legislature. Provincial legislatures are known as "legislatures" or "assemblies." Note that, for over a hundred years, all Canadian provincial legislatures have been unicameral—with one elected chamber.

IV. CANADA'S CONSTITUTIONAL EVOLUTION

After Confederation in 1867, Canada grew in population and international stature. It moved gradually toward independence from the United Kingdom. Under the British Statute of Westminster in 1931 (found in RSC 1985, Appendix II, No 27), Canadian legislatures gained the power to repeal or amend imperial statutes applicable to Canada, and no further such statutes could be enacted without their consent. The sole exception was s 7(1) of the Statute of Westminster, which provided that the BNA Act could be changed only through the Imperial Parliament.

In 1949, another badge of colonial status was removed when appeals to the Judicial Committee of the Privy Council (JCPC) were abolished. From the British colonies' earliest days, the JCPC was the apex judicial body. Abolishing JCPC appeals was debated both during and after Confederation, especially when the Supreme Court was created in 1875. But the JCPC remained in place (albeit with a more narrow jurisdiction) until 1949. As the next few chapters demonstrate, the British law lords who presided over it had a large impact on the evolution of the Canadian Constitution.

Beginning in the early 1960s, there was increasing pressure for constitutional reform in Canada. This was spurred largely by demands from Quebec but attracted growing sympathy in many other regions. Advocates took primary aim at the BNA Act. Its status as a British imperial law was an irritant, if not an affront, to many Canadians. To see the Act "patriated," however, required agreement on a domestic amending formula. That would prove exceptionally difficult. There were demands as well to rearrange the powers and functions of the federal and provincial governments; to reform the Senate and replace it with a more regionally representative body; to give the Supreme Court constitutional status; to entrench individual rights; and to recognize the rights of the Indigenous peoples of Canada.

In 1982, a number of these objectives were achieved. In the *Canada Act, 1982* (UK), c 11, s 2, the British Parliament affirmed that "[n]o Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law." Thus, from April 17, 1982 (the date on which the *Constitution Act, 1982* was proclaimed), Canada took possession of a fully domesticated, or "patriated," Constitution.

The *Constitution Act, 1982* introduced fundamental changes to Canada's Constitution. Foremost is the protection for individual and group rights in the Charter. Equally important is

s 35(1), which recognizes and affirms existing Aboriginal and treaty rights. The Act implements a complex amending formula, described in more detail below, and has altered the distribution of powers in relation to natural resources. Crucially, it modifies the concept of legislative supremacy as a basic element of the Constitution. Section 52(1) of the Act declares that the Constitution is “the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is ... of no force or effect.”

For some, the changes brought by the *Constitution Act, 1982* were insufficient. The government of Quebec never agreed to the 1982 package, which had failed to address its traditional demands for controls on the federal spending power and increased legislative authority. Many in Quebec demanded further reforms. In an effort to win Quebec’s support, the provincial premiers and the prime minister agreed on the Meech Lake Accord in 1987. Among other things, the Accord proposed the recognition of Quebec as a “distinct society” and Canada as a country with two linguistic groups, controls on the federal spending power, a mechanism to constitutionalize federal–provincial immigration agreements, and changes to the amending formula. The Accord died in 1990 after failing to secure the necessary provincial support before the expiry of a three-year time limit.

Pressure for reform continued from Quebec, now joined by Indigenous peoples demanding recognition of the inherent right to self-government and Westerners committed to Senate reform. Once more, a package of constitutional amendments, the Charlottetown Accord, was agreed to by first ministers and Indigenous leaders. Far more comprehensive than Meech Lake, it included much of that document plus detailed provisions dealing with Aboriginal rights, a new elected Senate, and changes to the distribution of powers. The Accord was rejected by a majority of voters in a national referendum in 1992.

Despite public sentiment to the contrary, the prospect of constitutional reform never disappears completely. The strong commitment of many Quebecers to a different relationship with the rest of Canada persists, whether in the form of independence for Quebec or a new form of sovereignty association. Continued insistence by Indigenous peoples for explicit constitutional recognition of ancestral territories and rights of self-government also remains.

V. PERSPECTIVES ON THE CONSTITUTION AND CONSTITUTIONAL CHANGE

Much of the stuff of constitutional law involves disagreement over the meaning and relative weight to be accorded to various constitutional sources. For example, in 1867, the BNA Act was viewed within Quebec as a protection for its distinctive culture but within Ontario as a means of nation-building or opening up the West. For many Indigenous peoples, the *Royal Proclamation* signifies a fundamental commitment to the territory and autonomy of their nations. The transfer of natural resources to the Western provinces in 1930 may represent to a Westerner the affirmation of their equality with other provinces. And for many, the Charter is a strong guarantee of universal individual rights, creating a new “citizen’s constitution,” whereas for others it continues the Canadian tradition of respect for group rights and community values.

Differing perspectives on the Constitution also emerge from disagreement over the function of constitutional law. Some scholars emphasize constitutional law’s relationship to economic ordering. They examine the law’s relationship to the distribution of economic entitlements, as well as its capacity to maximize efficient allocations of goods and resources. Others focus on the nature and effect of constitutional rights as instruments of defining individual and collective identities, in light of political struggles over such matters as gender, race, and Indigeneity. Additional perspectives on the Constitution emerge from its relationship to democratic participation and accountability. Although the Constitution expresses basic

democratic aspirations, it is interpreted and enforced primarily by courts, which are not democratically accountable in the ordinary sense of that term.

Some constitutions are quite flexible. In Britain, the doctrine of legislative supremacy meant that Parliament could modify the Constitution through an ordinary statute, although social expectations did restrict what was politically possible. Other constitutions are more rigid, specifying special procedures for amendment on the theory that, as a form of supreme law, constitutions should change only by special mechanisms ensuring broad consensus.

In Canada, the supremacy of the constitution acts is affirmed by s 52 of the *Constitution Act, 1982*. Part V of the Act sets out rules for constitutional amendment. The rule to be used depends upon the type of amendment. The general formula, set out in s 38, requires the approval of the federal Parliament and at least two-thirds of the provincial legislatures representing at least 50 percent of the population of all of the provinces. Section 41 provides that other amendments, such as changes to the amending formula itself, require the approval of Parliament and all the provincial legislatures. Still other configurations are needed for other types of amendments.

Formal amendment of the Constitution is difficult and time-consuming. However, the Constitution also evolves in other ways. An important, if controversial, example is judicial interpretation. Through scores of decisions, courts explain and apply the words of the Constitution, often in ways never contemplated by its original drafters. Judicial decisions drive much of the study of constitutional law. Other, less formal constitutional arrangements include the use of taxation and spending powers. Over various periods of Canadian history, these powers have substantially altered the distribution of functions between the federal and provincial governments.

Whether it should be easy to change a constitution is fundamental to the idea of constitutional law, raising important questions about the balance between stability and evolution. Written constitutions codify discrete exercises of political self-determination. They aim to enshrine a society's most deeply held beliefs and to impose constraints and obligations on governments. Citizens want the Constitution to endure, as a public symbol and as a guide and limit for political conduct. Canadians expect the Constitution to guarantee such things as periodic elections, responsible government, and freedom of expression. Therefore, they tend to assume that those guarantees either will not be changed or will not be changed absent extraordinary reasons and justification.

At the same time, *some* constitutional change is inevitable. It is impossible for a constitution's original framers to perfectly predict the needs of future generations. Moreover, values considered by those framers to be fundamental may over time be understood quite differently, even negatively. In such circumstances, why should the framers' beliefs prevail? And if that is true, why should the rules for constitutional change be especially onerous?

Thinking about these questions raises broader, quite complex questions of legitimacy and social and political accountability. Over the course of this book, you will have many opportunities to consider these issues.

VI. THE LAWYER'S ROLE

Although a constitution is a profoundly political and social document, it has a special place in the world of law. Lawyers are frequently involved in drafting a constitution and are essential to how constitutional disputes get worked out—namely, litigation before courts. Courts are treated as primary constitutional actors, sometimes at the expense of the legislatures that craft legal rules and the executive that administers them. Lawyers make constitutions effective on the ground. If lawyers in government ignore the constitution in advising “clients,” then there is a very real sense in which the constitution is no longer the constitution.

As made plain throughout this book, constitutional law requires examining court decisions. This judicial focus is distinctive to legal studies. Political scientists, for example, tend to examine other state actors at least as frequently and view the singular focus on courts in law courses as overly narrow. For a discussion of the executive's role in constitutional decisions, see Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTJ 624.

As you work through the materials, remember that most Canadians never find themselves before courts. They tend not to think about the values implicated by our constitutional order in legal terms. Remember too that the very nature of litigation shapes the way that arguments are presented and decided. Litigation presses constitutional thinking into a formal and detached mode that can be quite different from the political dynamics that create constitutions and set public expectations for their use.

In other words, when learning about constitutional law, try to remember that courts are not the only institutions that matter. Although many important decisions about our Constitution are made by courts, decisions of constitutional significance occur in all branches of government, including administrative bodies that "adjudicate" on Charter rights. As you read the cases and notes that follow, consider: which values are furthered, and which are frustrated, by assigning primary responsibility for the Constitution to the judiciary?

Constitutions are often drafted in very general terms to allow for some degree of flexibility and change. The text of constitutional documents can be open to many meanings, and courts are often called on to decide which of these meanings is to prevail—a process called interpretation. Chapter 2, Judicial Review and Constitutional Interpretation, contains an excerpt from the "*Persons*" case, in which the main issue concerned whether the reference to "person" in the *Constitution Act, 1867* included women. Other examples appear throughout this book. Section 91(27) of the *Constitution Act, 1867* gives the federal government the power to legislate in relation to "the Criminal Law." Does this extend to legislation restricting abortions or requiring content labels on food? Section 7 of the Charter guarantees the right to "life, liberty and security of the person." Does this mean that individuals have a right to refuse vaccination, to access medical services, or to commit assisted suicide? In answering these questions, judges are faced with the difficult task of determining the meaning of highly contested concepts, sometimes holding invalid the actions of elected legislators who hold broad public support. Inevitably, this calls into question the legitimacy of what judges do, a question that will be considered at great length in many of the following chapters.

VII. THE CONSTITUTION AND THE ADMINISTRATIVE STATE

Although this book deals with issues specific to the Constitution of Canada, numerous other legal areas raise constitutional concerns. One of the most important is administrative law: the law relating to the actions and decisions of executive branch officials and agencies. Those decisions are critical to the operation of the Canadian state, overseeing such important functions as food safety, environmental protection, and tax collection. Canadians saw some of the administrative state in action during the COVID-19 pandemic, when various agencies and public officials made critical decisions to, for example, approve vaccines and impose public health measures to limit the spread of the virus.

Given that the decisions of public officials and agencies intersect with the Constitution in important ways, administrative law occasionally will surface throughout this book. The excerpt below gives a sense of the complexity of the relationship between administrative and constitutional law.

Kate Glover Berger, "The Constitutional Status of the Administrative State"

(2021) (footnotes omitted), online: SSRN

<http://dx.doi.org/10.2139/ssrn.3727613>

It goes without saying that administrative decision-makers engage widely and directly with the obligations and values of the constitution as they execute their mandates. Modern jurisprudence confirms that administrative decision-makers are bound to act in accordance with the Charter and must exercise their discretion in ways that are infused with Charter values and substantive commitments to proportionality. Further, public actors who are empowered to decide questions of law are correlatively empowered to answer the constitutional questions attached to those legal matters and to grant remedies under section 24(1) of the Charter, unless such authority has been clearly revoked. Moreover, administrative actors are on the front lines of interpreting and implementing constitutional rights and obligations in their interactions with the public, from the exercise of police power to the issuance of a passport to the termination of public service employment.

The courts have not always recognized a direct relationship between administrative decision-makers and the constitution. However, since the later decades of the twentieth century, public law jurisprudence in Canada reflects an overwhelming trend towards upholding the jurisdiction of administrative decision-makers over constitutional matters and loosening the exclusive judicial grip on constitutional interpretation. In the Supreme Court's words, the relationship between the courts, the constitution, and administrative decision-makers has been "completely revised" over time. The shift has been justified on the grounds of advancing access to justice, respecting administrative expertise, and responding to the realities of administrative justice, in which administrative actors are the primary legal decision-makers for most disputes and for most individuals interacting with or seeking an outcome from the public sector. It is again these shifts and justifications that contribute to a vision of the constitutional order in which administrative decision-makers are critical to carrying out the rule of law.

Consider three sets of cases in which we see expansion and affirmation of the authority and responsibility of administrative decision-makers in carrying out constitutional mandates.

First, in *Conway [R v Conway*, 2010 SCC 22, a case dealing with the medical confinement of a criminal defendant found not criminally responsible by reason of mental disorder], the Supreme Court examined separate strands of administrative law jurisprudence, each of which ultimately facilitated and entrenched direct access of administrative decision-makers to the constitution. Justice Abella, for the Court, held that the evolution in the jurisprudence lead to two observations: "first, that [certain] administrative tribunals ... have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the Charter and its values when exercising their statutory functions." ...

Second, the courts have adopted a deferential posture when reviewing the discretionary decisions of administrative decision-makers that engage Charter values. ... The claim is that administrative decision-makers are in a better position than the courts to assess how the Charter is relevant to the exercise of their statutory mandate and, as such, the rule of law counsels deference.

Third, the actions of administrative decision-makers can both trigger and fulfill the Crown's duty to consult Indigenous peoples in circumstances in which a public decision affects the rights and interests of Indigenous communities. As Justices

Karakatsanis and Brown explain in *Clyde River* [discussed in Chapter 14, Indigenous Peoples and the Constitution], "once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the [agency] is the vehicle through which the Crown acts. ... It therefore does not matter whether the final decision-maker on a resource project is Cabinet or the [agency]. In either case, the decision constitutes Crown action that may trigger the duty to consult. ... '[T]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet.'" Further affirming the expertise of administrative agencies in their statutory context, the Court held that administrative actors can also carry out consultation. While ultimate responsibility remains with the Crown, the "Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult" as long as "the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances." The effect of these holdings is that administrative actors are drawn into treaty relationships, are accountable for upholding and manifesting the Crown's obligation to act honourably in its dealings with Indigenous Peoples, and must assist in the pursuit of reconciliation between Indigenous Peoples and the Crown.

Together, these three brief descriptions again show shifts in the institutional vision and role of the administrative state. Reluctance to recognize the constitutional capacity and jurisdiction of administrative decision-makers diminished, replaced by a direct and close relationship between administrative actors and the constitution, with significant responsibility for administrative actors in upholding, fulfilling, and applying the constitutional obligations of the state and remedying the state's constitutional failures. It would be difficult to reconcile such a shift with the conclusion that the administrative state is not itself vital within the architecture of the constitution, embedded within the sprawling network of decision-makers responsible for carrying out the practicalities and manifesting the aspirations of Canadian constitutionalism.

VIII. A BRIEF TOUR OF WHAT IS TO FOLLOW

We end with a description of this book. Remember: it is designed as an introduction to an enormous subject. We have compiled a set of materials that is extensive but not comprehensive. Inevitably, certain topics are omitted. We have included most of what we think is important or useful. As well, at several points we have taken care to permit teachers to omit parts, or to change the order of the materials, to suit their purposes.

Chapter 2, introducing judicial review, follows this introduction. Next comes Part Two, which deals with federalism. It contains ten chapters, which can be divided into two sections: history and modern federalism. These two sections are not as different from each other as the names above might suggest because law is usually shaped in one way or another by an accumulation of past experience. Users of this book may follow the book as it is arranged; others may find it preferable to introduce the interpretation of the distribution of powers in the Canadian federal system by working through one or more cases in Chapter 8, Interpreting the Division of Powers.

After the federalism part of the book, there is a single chapter in Part Three: Chapter 13. It explores the essential role of the judiciary in our constitutional structure and the constitutional principles that underpin that role: the rule of law, judicial independence, and the separation of powers. It provides an overview of the basic structure of the Canadian judicial system, followed by an examination of the judicial interpretation of the constitutional provisions—especially s 96 of the *Constitution Act, 1867*—designed to preserve the institutional

role of the superior courts. It examines the special status of the Supreme Court, including the appointment process, which in recent years has undergone significant development. It offers an introduction to the issue of judicial tenure and discipline. Finally, it discusses how constitutional cases get to court, including the special reference function of Canadian courts, which sets Canada apart from many comparable countries.

Part Four, Indigenous Peoples, integrates a number of otherwise discrete areas of law, including the common law of Aboriginal title, the distribution of legislative authority as it affects Indigenous peoples, and constitutional recognition of Aboriginal and treaty rights.

Part Five, Rights, is dedicated to the role of rights in the Canadian Constitution. It is dominated by the Charter, although it begins with Chapter 15, Antecedents of the Charter, tracing other rights-protecting mechanisms in our constitutional structure. The treatment of the Charter begins with two chapters, Chapter 16, The Advent of the Charter, and Chapter 17, The Framework of the Charter, introducing basic and pervasive themes in Charter interpretation, followed by Chapter 18, Application, reviewing the scope of the Charter's application. The remaining chapters are about selected rights—for example, the right to freedom of expression (Chapter 20, Freedom of Expression) and the right to equality (Chapter 23, Equality Rights). The chapters on rights are presented according to their order in the Charter but are easily switched to suit the needs of the instructor. There is little material on Charter rights in the criminal justice system; because that material draws so heavily on criminal law and the law of evidence, we felt it would be more effectively studied in those courses. Part Five ends with Chapter 25, Enforcement of Rights, which primarily focuses on remedies but also deals with other procedural aspects of Charter litigation. The book concludes with Chapter 26, Amending the Constitution.

CHAPTER TWO

JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION

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I. INTRODUCTION

The purpose of this chapter is twofold: to introduce the practice of judicial review and to identify and provide a very brief discussion of some of the issues surrounding it.

II. JUDICIAL REVIEW AND THE LEGITIMACY ISSUE

"Judicial review" can describe more than one judicial function. For the purposes of this book, it refers to the power of the courts to determine whether law or state action is in compliance with the Constitution, and, if it is not, to declare such law or action to be unconstitutional. (The notion that governmental action has to comply with the requirements of the Constitution is known as the principle of constitutionalism: see *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793, excerpted below.) In contrast to the early days of the American republic (see in this regard *Marbury v Madison*, 5 US 137, 2 L Ed 60 (1803)), there was relatively little doubt that this power existed in Canada. As you will see in Chapter 4, The Late Nineteenth Century: The Courts Set an Initial Course, Canadian courts in the 1870s were quite prepared to rule on the constitutionality of federal and provincial laws. In their view, they were simply being asked to give effect to an imperial statute—the *British North America Act, 1867* (BNA Act)—which had long been a duty of colonial courts.

Today, s 52(1) of the *Constitution Act, 1982* provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." In addition, s 24(1) of the *Canadian Charter of Rights and Freedoms* states that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

For some, the fact that judicial review is a long-accepted tradition in Canada resolves the question of its legitimacy. For others, it does not. If "legitimacy" is understood to refer not only to whether a power exists, but also the appropriateness of its exercise, the question cannot be settled simply by pointing to tradition or text. In some instances, the Constitution makes it clear to all that governmental action of a particular kind is unconstitutional. For example, to maintain a Parliamentary session longer than five years would expressly

contradict s 4 of the Charter. In such instances, a judicial decision to that effect would be seen to be legitimate. But those kind of instances are rare, in part because governments do not habitually violate such clear rules. The disputes that come before the courts are precisely those where the text is less clear. In most cases, both the challenger and the responding state party make plausible arguments, grounded directly or indirectly in the relevant text. When courts decide that the impugned governmental action in these cases is unconstitutional, that implicates a separate—and, for practical purposes, more important—understanding of the legitimacy question.

In recent years, courts have been asked to declare legislation unconstitutional not because it conflicts with the text of the Constitution but because it contradicts one or more of the organizing or underlying principles of the Constitution. In *Reference re Secession of Quebec*, the Supreme Court of Canada said that federalism, democracy, the rule of law, and the protection of minorities are examples of such principles. Subsequently, the Court has added to the list judicial independence and the separation of powers. Should the courts rely on these unwritten principles to strike down legislation? The Supreme Court, at least partially, addressed these issues in two cases: *British Columbia v Imperial Tobacco Canada Ltd*, [2005 SCC 49](#) and *British Columbia (AG) v Christie*, [2007 SCC 21](#). (These cases are discussed in more detail below.)

Basic to the legitimacy of judicial review is whether unelected judges should have the power to declare unconstitutional the decisions of democratically elected majorities. If a court relies on extra-textual sources to strike down laws or other state action, from where does it get the authority to do so? How can such decisions be compatible with our commitment to democratic self-government? Bear these questions in mind as you work through the readings that follow. As you will see, some judges and scholars do not agree that judicial review is anti-democratic. Others think that it is, or at least can be, and suggest ways to eliminate or minimize the incompatibility between judicial review and democratic values. Still others take the position that that incompatibility is of no concern.

In the latter part of the 19th century and the first part of the 20th, the legitimacy issue did not dominate discussions of judicial review under the BNA Act. This is primarily because, in the overriding legal culture of that time, constitutional commentators either did not consider broader questions of "legitimacy," or were reluctant to say so. As well, commentators tended to be more willing to accept judicial statements at face value, for example, that courts were simply giving effect to constitutional text. That did not mean that those commentators never questioned court decisions; as you will see from the readings in Chapter 4 through Chapter 6, The 1930s: The Depression and the New Deal, some of them did, and with considerable vigour. It simply means that those criticisms did not explicitly challenge the legitimacy of those decisions.

In recent decades, a number of constitutional scholars have questioned the legitimacy of judicial review. One of them, Paul Weiler, author of *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974), went so far as to question whether the courts should ever intervene in division of powers disputes. In his view, such conflicts were better resolved through federal–provincial negotiations and the democratic process. Another scholar, Peter Hogg, author of *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007), was an advocate of judicial restraint, at least in federalism cases.

The legitimacy issue has featured more prominently in literature that relates to the Charter from the time it was first enacted—this is reflected in some of the readings in Chapter 16, The Advent of the Charter. It is also a recurring theme in many of the later, rights-focused chapters.

The special role of the courts in constitutional review is related to certain constitutional protections for the courts and the judiciary, in particular their independence, which is dealt with in Chapter 13, The Role of the Judiciary.

III. CONSTITUTIONAL INTERPRETATION

Important to any consideration of the legitimacy of judicial review is the question of how judges interpret a written constitution. In most cases the meaning of the relevant text is unclear. What sources can judges employ for guidance, and which ones do they in fact employ? These questions are explored throughout this book in the context of a broad range of readings, some taken from decisions rendered by the courts and others from scholarly commentary. An excerpt from a recent article by Robin Elliot provides a brief introduction to the subject, as do excerpts from the reasons for judgment of both the Supreme Court of Canada and the Judicial Committee of the Privy Council in a famous Canadian constitutional advisory opinion known as the "Persons" case, *Edwards v Canada (AG)*, [1929 CanLII 438](#), [\[1929\] UKPC 86](#).

Robin Elliot, "References, Structural Argumentation, and the Organizing Principles of Canada's Constitution"

(2001) 80 Can Bar Rev 67 at 72-74 (footnotes and citations omitted)

[In this article, Professor Elliot examines the increasing use by the Supreme Court of Canada of a kind of interpretive argument that has come to be called "structural argumentation," as well as some of the issues that that form of argumentation raises in the Canadian context. He provides a summary of six different forms of argumentation identified by American scholar Philip Bobbitt and suggests that all of them have been used at one time or another by Canadian courts. As you will see, each of these forms of argumentation relies on a different source of interpretive guidance. You will encounter most of the cases he refers to as you work your way through this casebook, and the citations have therefore been omitted.]

The first of these ... forms of argumentation is labelled *historical*. [H]istorical argumentation ... means "argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution." This form of argumentation has been a good deal less popular in Canada than in the United States, where it forms the basis of a theory of judicial review, known as "originalism," to which a number of American constitutional scholars and at least one current member of the Supreme Court of the United States, Justice Scalia, subscribe. However, it is clearly a legitimate form of argumentation in this country as well, in relation to both the *Constitution Act, 1867* and the *Constitution Act, 1982*. And while it generally is viewed as having little persuasive force, it can on occasion play quite a significant role in the resolution of disputes about the proper meaning to be given to a provision of the Constitution. For example, in *R v. Prosper*, the Supreme Court placed considerable weight on the fact that the drafters of the Charter chose not to constitutionalize a right to state-funded counsel under section 10 when it decided not to read such a right into section 10(b).

Textual argument comes next. This ... is "argument that is drawn from a consideration of the present sense of the words of the provision [in question]." Examples of its use in Canada are not difficult to find. One that comes quickly to mind is the interpretation given by the Privy Council in both the *Radio Reference* and the *Labour Conventions Reference* to section 132 of the *Constitution Act, 1867*, relating to the power of Parliament to implement treaty obligations. Because section 132 had been formulated in terms of the power to implement obligations towards foreign countries arising under treaties between the Empire and such foreign countries, the Privy Council was quick to hold that it had no application in relation to obligations undertaken towards foreign

countries in treaties that Canada itself had entered into with those countries. Another more recent example is provided by *Société des Acadiens v. Association of Parents*, in which Beetz J for the majority of the Supreme Court held that the right in section 19(2) of the Charter to use either English or French in the courts of New Brunswick did not include the right to be understood in the language chosen.

Third comes *doctrinal* argument, or argument from previously decided cases, which is also clearly accepted in Canada. In fact, it is probably fair to say that it is the predominant form of argumentation here. Examples of it abound—there is the definition of section 91(2) [“regulation of trade and commerce”] of the *Constitution Act, 1867* in *Citizens Insurance v. Parsons*, there is the analytical framework for freedom of expression cases under the Charter prescribed by *Irwin Toy v. Quebec*, and there is the analytical framework for section 1 of the Charter established in *R v. Oakes*, to name but three.

Next on the list comes *prudential* argument, or “argument about costs and benefits,” or simply “practical argument.” This is the form of argumentation that is used in the context of the final component of the proportionality test under section 1 of the Charter prescribed by *Oakes*, in which the question is in effect whether or not society loses more than it gains as a result of the impugned governmental action. But this form of argumentation can also be found in the federalism context, for example, in the tests devised in *General Motors v. City National Leasing* and *R v. Crown Zellerbach* respectively for the second branch of section 91(2) of the *Constitution Act, 1867* and the national concern branch of Parliament’s residual power. In both of these tests, explicit consideration is given to the question of whether or not the legislative initiative is one that can be effectively pursued at the provincial level, or whether, by contrast, the initiative is one that can only be effectively undertaken at the national level. In other words, the court is concerned about how best the governmental task in question can be performed—the very stuff of practical or prudential argument.

The last of these other forms of argumentation ... is *ethical* argumentation ... [meaning] “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people”; elsewhere [Bobbitt describes it] as “an appeal to the American ethos: not necessarily what we are, but perhaps what we think we are, and thus how we think about ourselves and our society” This form of argumentation may be peculiarly American. But it is possible that it too finds at least some resonance within our jurisprudence. For example, the concern underlying the admonition in Chief Justice Dickson’s reasons for judgment in *Edwards Books* that, “in interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons,” can be said to be what we might like to think of as an important part of the Canadian ethos. This admonition has ... now been formalized in the principle that the courts in exercising their power of judicial review the Charter should show considerable deference to Parliament and the provincial legislatures when they [are asked to review] action that can be said to further the interests of vulnerable groups within Canadian society.

That brings us to *structural* argumentation. This form of argumentation ... is based on “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.” “Structural arguments,” [Bobbit says], “are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts.” [I]t is clearly accepted as a legitimate form of argumentation in [Canada]. [Emphasis in original.]

[Professor Elliot then examines the use of structural argumentation in the Canadian context. The two main examples he gives of cases in which this form of argumentation

is used are *Reference re Provincial Court Judges*, [1997] 3 SCR 3, 1997 CanLII 317, in which the Court held that the true constitutional basis of the principle of judicial independence was the preamble to the *Constitution Act, 1867*, and *Reference re Secession of Quebec*, in which the court invoked four of the organizing principles of our Constitution—federalism, democracy, the rule of law, and the protection of minorities—to resolve the issue of the constitutionality of secession by a province.]

NOTES AND QUESTIONS

1. The American scholar Bobbitt argues that the six different forms of argumentation are the *only* viable forms of argumentation for purposes of determining the meaning of the American Constitution. From your admittedly early vantage point, does this seem plausible for a country like Canada? Or could there be other forms? What about arguments that are based on a particular community's collective memory of events that were foundational to its existence, such as an argument that Quebec is a distinct society within Canada in part because unique cultural and legal traditions have survived in Quebec despite the conquest of New France? Are such arguments historical or ethical? What is a court to do when the forms of argumentation yield conflicting answers, or when history is remembered differently by different communities? These questions are explored at greater length in Chapter 3, From Contact to Confederation.

2. Consider, as you read through the many decisions in this book, whether particular forms of argumentation feature more prominently in some historical periods than others, or in cases dealing with certain kinds of constitutional questions.

The excerpts below from the judgments of the Supreme Court of Canada and Privy Council in the *Persons* case provide a good opportunity to explore the differing approaches that courts and judges can take to the task of interpreting provisions of the Constitution. Some commentators view Lord Sankey's reasons for judgment in the Privy Council opinion as a dramatic departure from the approach to constitutional interpretation that had previously been taken by these two courts. That earlier approach, it is said, was grounded in the conviction that the BNA Act was no different from other statutes the Privy Council had to construe and should therefore be interpreted in the same way those other statutes were interpreted. See if you can find support for this view of Lord Sankey's judgment in his reasoning.

Reference re Meaning of the Word "Persons" in S.24 of the British North America Act, 1867

[1928] SCR 276, 1928 CanLII 55

ANGLIN CJ (Mignault, Lamont, and Smith JJ concurring):

By Order of the 19th of October, 1927, made on a petition of five ladies, His Excellency the Governor in Council was pleased to refer to this court "for hearing and consideration" the question:

Does the word "Persons" in section 24 of the *British North America Act, 1867* include female persons?

• • •

The *British North America Act, 1867*, does not contain provisions in regard to the Senate corresponding to its sections 41 and 52, which, respectively, empower the Parliament of Canada from time to time to alter the qualifications or disqualifications of persons to be elected to the House of Commons and to determine the number of members of which that House shall consist. Except in regard to the number of Senators required to constitute a quorum (s. 35), the provisions affecting the constitution of the Senate are subject to alteration only by the Imperial Parliament.

• • •

It should be observed that, while the question now submitted by His Excellency to the court deals with the word "Persons," section 24 of the *BNA Act* speaks only of "qualified Persons"; and the other sections empowering the Governor General to make appointments to the Senate (26 and 32) speak, respectively, of "qualified Persons" and of "fit and qualified Persons." The question which we have to consider, therefore, is whether "female persons" are qualified to be summoned to the Senate by the Governor General; or, in other words—Are women eligible for appointment to the Senate of Canada? ...

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the *BNA Act, 1867*, and upon that construction to base our answer.

Passed in the year 1867, the various provisions of the *BNA Act* (as is the case with other statutes, *Bank of Toronto v. Lambe* (1887), 12 AC 575 at 579) bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.

• • •

"In deciding the question before us," said Turner LJ, in *Hawkins v. Gathercole* (1855), 6 DeG M & G 1, 43 ER 1129,

we have to construe not merely the words of the Act of Parliament but the intent of the Legislature as collected, from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject.

Two well-known rules in the construction of statutes are that, where a statute is susceptible of more than one meaning, in the absence of express language an intention to abrogate the ordinary rules of law is not to be imputed to Parliament (*Wear Commissioners v. Adamson* (1876), 1 QBD 546 at 554); and,

as they are framed for the guidance of the people, their language is to be considered in its ordinary and popular sense," per Byles J, in *Chorlton v. Lings* (1868), LR 4 CP 374.

Two outstanding facts or circumstances of importance bearing upon the present reference appear to be

- (a) that the office of Senator was a new office first created by the *BNA Act*.

It is an office, therefore, which no one apart from the enactments of the statute has an inherent or common law right of holding, and the right of any one to hold the office must be found within the four corners of the statute which creates the office, and enacts the conditions upon which it is to be held, and the persons who are entitled to hold it; (*Beresford-Hope v. Sandhurst* (1881), 131 Mass. 371, per Lord Coleridge CJ);

(b) that by the common law of England (as also, speaking generally, by the civil and the canon law: *foeminae ab omnibus officiis civilibus vel publicis remotae sunt*) women were under a legal incapacity to hold public office,

referable to the fact (as Willes J said in *Chorlton v. Lings*), that in this country in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.

The same very learned judge had said, at p. 388:

Women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth. That would be quite inconsistent with one of the glories of our civilization, the respect and honour in which women are held. This is not a mere fancy of my own, but will be found in Selden, *de Synedriis Veterum Ebraeorum*, in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon motives of decorum, and was a privilege of the sex (*honestatis privilegium*): Selden's Works, vol. 1, pp. 1083-1085. Selden refers to many systems of law in which this exclusion prevailed, including the civil law and the canon law, which latter, as we know, excluded women from public functions in some remarkable instances. With respect to the civil law, I may add a reference to the learned and original work of Sir Patrick Colquhon (*sic*) on the Roman Law, vol. 1, c. 580, where he compares the Roman system with ours, and states that a woman "cannot vote for members of parliament, or sit in either the House of Lords or Commons."

[Anglin CJ then cited further cases on women's common law legal incapacity.]

• • •

Prior to 1867 the common law legal incapacity of women to sit in Parliament had been fully recognized in the three provinces—Canada (Upper and Lower), Nova Scotia and New Brunswick, which were then confederated as the Dominion of Canada.

Moreover, paraphrasing an observation of Lord Coleridge CJ, in *Beresford-Hope v. Sandhurst*, *supra* at 370, it is not also perhaps to be entirely left out of sight, that in the sixty years which have run since 1867, the questions of the rights and privileges of women have not been, as in former times they were, asleep. On the contrary, we know as a matter of fact that the rights of women, and the privileges of women, have been much discussed, and able and acute minds have been much exercised as to what privileges ought to be conceded to women. That has been going on, and surely it is a significant fact, that never from 1867 to the present time has any woman ever sat in the Senate of Canada, nor has any suggestion of women's eligibility for appointment to that House until quite recently been publicly made.

Has the Imperial Parliament, in sections 23, 24, 25, 26 and 32 of the *BNA Act*, read in the light of other provisions of the statute and of relevant circumstances proper to be considered, given to women the capacity to exercise the public functions of a Senator? Has it made clear its intent to effect, so far as the personnel of the Senate of Canada is concerned, the striking constitutional departure from the common law for which the petitioners contend, which would have rendered women eligible for appointment to the Senate at a time when they were neither qualified to sit in the

House of Commons nor to vote for candidates for membership in that House? Has it not rather by clear implication, if not expressly, excluded them from membership in the Senate? Such an extraordinary privilege is not conferred furtively, nor is the purpose to grant it to be gathered from remote conjectures deduced from a skilful piecing together of expressions in a statute which are more or less precisely accurate. (*Nairn v. University of St. Andrews*, [1909] AC 147 to 161.) When Parliament contemplates such a decided innovation it is never at a loss for language to make its intention unmistakable. "A judgment," said Lord Robertson in the case last mentioned, at pp. 165-6

is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

There can be no doubt that the word "persons" when standing alone *prima facie* includes women. (Per Loreburn LC, *Nairn v. University of St. Andrews*.) It connotes human beings—the criminal and the insane equally with the good and the wise citizen, the minor as well as the adult. Hence the propriety of the restriction placed upon it by the immediately preceding word "qualified" in ss. 24 and 26 and the words "fit and qualified" in s. 32, which exclude the criminal and the lunatic or imbecile as well as the minor, who is explicitly disqualified by s. 23(1). Does this requirement of qualification also exclude women?

[In answering his question, Anglin CJ went on to deal with the rule of statutory interpretation found in *Lord Brougham's Act, 1850, 13 & 14 Vict c 21*, where s 4 read as follows: "Be it enacted that in all Acts words importing the Masculine Gender shall be deemed and taken to include Females, and the Singular to include the Plural, and the Plural the Singular, unless the contrary as to Gender or Number is expressly provided."]

• • •

"Persons" is not a "word importing the masculine gender." Therefore, *ex facie*, *Lord Brougham's Act* has no application to it. It is urged, however, that that statute so affects the word "Senator" and the pronouns "he" and "his" in s. 23 that they must be "deemed and taken to include Females," "the contrary" not being "expressly provided."

The application and purview of *Lord Brougham's Act* came up for consideration in *Chorlton v. Lings, supra*, where the Court of Common Pleas was required to construe a statute (passed, like the *British North America Act*, in 1867) which conferred the parliamentary franchise on "every man" possessing certain qualifications and registered as a voter. The chief question discussed was whether, by virtue of *Lord Brougham's Act*, "every man" included "women." Holding that "women" were "subject to a legal incapacity from voting at the election of members of Parliament," the court unanimously decided that the word "man" in the statute did not include a "woman." Having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, Bovill CJ declined to accept the view that Parliament had made that change by using the term "man" and held that

this word was intentionally used expressly to designate the male sex; and that it amounts to an express enactment and provision that every man, as distinguished from women, possessing the qualification, is to have the franchise. In that view, *Lord Brougham's Act* does not apply to the present case, and does not extend the meaning of the word "man" so as to include "women." (386-87)

• • •

In our opinion *Chorlton v. Lings* is conclusive against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of "qualified persons" within s. 24 of the *BNA Act* by the terms in which s. 23 is couched (*New South Wales Taxation Commissioners v. Palmer*, [1907] AC 179 at 184), so that *Lord Brougham's Act* cannot be invoked to extend those terms to bring "women" within their purview.

We are, for these reasons, of the opinion that women are not eligible for appointment by the Governor General to the Senate of Canada under s. 24 of the *British North America Act, 1867*, because they are not "qualified persons" within the meaning of that section. The question submitted, understood as above indicated, will, accordingly, be answered in the negative.

[Duff J delivered a concurring judgment in which he rejected the idea that the common law disabilities of women established a rule of interpretation for the *BNA Act*. He found that the language of the Act as a whole did not give rise to a general presumption that the legislative and executive powers it conferred should be interpreted to preclude women from public office, but rather that they be interpreted to provide for adaptation over time. He reasoned, for example, that once women had been allowed to sit in the House of Commons, the principle of responsible government would require that the term "persons" in s 11 of the Act dealing with the constitution of the Privy Council—that is, the Cabinet—be interpreted to include women. He concluded, however, that the provisions in the *BNA Act* with respect to the Senate were intended to create a chamber whose constitution would in all respects be fixed and determined by the Act itself. Hence the rules for appointment would not be open to adaptation over time, and women were ineligible for appointment.]

Edwards v Canada (AG)

1929 CanLII 438, [1929] UKPC 86 [The Persons Case]

LORD SANKEY LC:

By s. 24 of the *B.N.A. Act, 1867*, it is provided that "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said Province; Emily F. Murphy is a police magistrate in and for the said Province; and Irene Parlby is a member of the Legislative Assembly of the said Province and a member of the Executive Council thereof.

[An account of the judgments of the Supreme Court of Canada is omitted.]

• • •

Their Lordships are of opinion that the word "persons" in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points—viz.: (i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases. (ii) The internal evidence derived from the Act itself. As the learned counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points—viz.: (i) The external evidence derived from extraneous circumstances.

[Lord Sankey then reviewed the history of the exclusion of women from public offices from before the time of the Roman Empire through to the early part of the 20th century. In the course of this review, he noted that the courts in England had recently held that women were not entitled either to sit in the House of Lords or to become barristers or solicitors.]

• • •

The passing of *Lord Brougham's Act* in 1850 does not appear to have greatly affected the current of authority. Section 4 provided that in all acts words importing the masculine gender shall be deemed and taken to include female unless the contrary as to gender is expressly provided.

The application and purview of that Act came up for consideration in *Chorlton v. Lings* (1868), LR 4 CP 374, where the Court of Common Pleas was required to construe a statute passed in 1861, which conferred the parliamentary franchise on every man possessing certain qualifications and registered as a voter. The chief question discussed was whether by virtue of *Lord Brougham's Act* the words "every man" included women. Bovill CJ, having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, declined to accept the view that Parliament had made that change by using the term "man" and held that the word was intentionally used expressly to designate the male sex. Willes J said: "It is not easy to conceive that the framer of that Act, when he used the word 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language."

Great reliance was placed by the respondents to this appeal upon that decision, but in our view it is clearly distinguishable.

The case was decided on the language of the *Representation of the People Act, 1867*, which provided that "every man" with certain qualifications and "not subject to any legal incapacity" should be entitled to be registered as a voter. Legal incapacity was not defined by the Act, and consequently reference was necessary to the common law disabilities of women.

• • •

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word "person" different considerations arise.

The word is ambiguous, and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word "person" could not include females but because at common law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is

not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.

As far back as *Stradling v. Morgan* (1560), 75 ER 305 it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute, and in *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] AC 498 Lord Halsbury LC said: "The subject matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act," but the argument must not be pushed too far, and their Lordships are disposed to agree with Farwell LJ in *Rex v. West Riding of Yorkshire County Council*, [1906] 2 KB 676, "although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight"; see Craies, Statute Law, 3d ed., p. 118.

Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the *B.N.A. Act* of 1867.

• • •

Their Lordships now turn to the second point—namely, (ii) the internal evidence derived from the Act itself.

Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act.

The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution.

His Majesty the King in Council is the final Court of Appeal from all these communities, and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another. ...

The *B.N.A. Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention". Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the *British North America Act* by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony": see Clement's Canadian Constitution, 3d ed., p. 347.

The author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 AC 46 at 50: "That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy v. Attorney-General of Manitoba*, [1895] AC 202, the question is not what may be supposed to have been intended, but what has been said.

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government. Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women but only a question as to their eligibility for a particular position. No one, either male or female, has a right to be summoned to the Senate. The real point at issue is whether the Governor General has a right to summon women to the Senate.

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Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate.

It will be observed that s. 21 provides that the Senate shall consist of seventy-two members, who shall be styled senators. The word "member" is not in ordinary English confined to male persons. Sect. 24 provides that the Governor General shall summon qualified persons to the Senate.

As already pointed out, "persons" is not confined to members of the male sex, but what effect does the adjective "qualified" before the word "persons" have?

In their Lordship's view it refers back to the previous section, which contains the qualifications of a senator.

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Their Lordships agree with Duff J when he says; "I attach no importance to the use of the masculine personal pronoun in s. 23 ..." and refer to s. 1 of the *Interpretation Act, 1889*, which in s. 1, sub-s. 2, provides that words importing the masculine gender shall include females.

The reasoning of the Chief Justice would compel their Lordships to hold that the word "persons" as used in s. 11 relating to the constitution of the Privy Council for Canada was limited to "male persons," with the resultant anomaly that a woman might be elected a member of the House of Commons but could not even then be summoned by the Governor General as a member of the Privy Council.

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Looking at the sections which deal with the Senate as a whole (ss. 21-36) their Lordships are unable to say that there is anything in those sections themselves upon which the Court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate—are there any other sections in the Act which shed light upon the meaning of the word "persons"?

Their Lordships think that there are. For example, s. 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly, and by a proviso it is said that until the Parliament of Canada otherwise provides at any election for a member of the House of Commons for the district of Algoma in addition to persons qualified by

the law of the Province of Canada to vote every male British subject aged twenty-one or upwards being a householder shall have a vote. This section shows a distinction between "persons" and "males." If persons excluded females it would only have been necessary to say every person who is a British subject aged twenty-one years or upwards shall have a vote.

Again in s. 84, referring to Ontario and Quebec, a similar proviso is found stating that every male British subject in contradistinction to "person" shall have a vote.

Again in s. 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all of any of the courts of Quebec. The word "person" there must include females, as it can hardly have been supposed that a man might use either the English or the French language but a woman might not.

If Parliament had intended to limit the word "persons" in s. 24 to male persons it would surely have manifested such intention by an express limitation, as it has done in ss. 41 and 84. The fact that certain qualifications are set out in s. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary, because it must be presumed that Parliament has set out in s. 23 all the qualifications deemed necessary for a senator, and it does not state that one of the qualifications is that he must be a member of the male sex.

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A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard: (1) To the object of the Act—namely, to provide a constitution for Canada, a responsible and developing State; (2) that the word "person" is ambiguous, and may include members of either sex; (3) that there are sections in the Act above referred to which show that in some cases the word "person" must include females; (4) that in some sections the words "male persons" are expressly used when it is desired to confine the matter in issue to males; and (5) to the provisions of the *Interpretation Act*; their Lordships have come to the conclusion that the word "persons" in s. 24 includes members both of the male and female sex, and that, therefore, the question propounded by the Governor General should be answered in the affirmative, and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.

NOTES

1. As one scholar notes:

In its own time, academic discussion of the reference was uniformly negative. British scholar Berriedale Keith said that "no decision of the Privy Council is probably harder to defend as sound in law." GF Henderson was equally cutting, charging that the case was "not written in strict accordance with well understood legal principles"; that the federal government had manipulated the situation to secure its preferred outcome; and that the JCPC had by "judicial legislation ... altered the constitution of the Senate of Canada."

See Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) at 136.

Does this criticism seem well-founded? What might explain it?

2. The procedure by which the *Persons* case got to court was the reference, a procedure often used in Canada in constitutional litigation. That procedure is invoked in two ways: when the federal Cabinet refers a question to the Supreme Court of Canada for an opinion; or a

provincial Cabinet sends a question to the provincial Court of Appeal, which can then be further appealed to the Supreme Court. The reference power is discussed in Chapter 13.

3. The approach to constitutional interpretation taken by Lord Sankey in the *Persons* case has not always prevailed in Canadian constitutional law. As we noted in Chapter 1, Introduction, there is a real tension between the desire for stability and the desire for change in constitutional interpretation. While the Privy Council spoke of a “living tree” in *Persons*, a few years later it emphasized the value of stability in the following passage from *Canada (AG) / Ontario (AG)*, [\[1937\] CanLII 362, \[1937\] AC 326 at 684 \(UKJCPC\)](#) [Labour Conventions]:

While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.

As you proceed through the cases in this book, the tensions between stability and change—between a “living tree” and “watertight compartments”—will emerge regularly, whether in disputes about federalism or the interpretation of the Charter. For a more recent discussion of the role of “original intent” in interpreting the division of powers in ss 91 and 92 of the *Constitution Act, 1867*, 30 & 31 Vict c 3, see *Reference re Employment Insurance Act (Can), ss 22 and 23, 2005 SCC 56*, in Chapter 8, Interpreting the Division of Powers. With respect to the interpretation of the Charter, see Chapter 17, The Framework of the Charter.

4. A detailed examination of the *Persons* case can be found in Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2007).

The next excerpt is from a paradigm-shifting 1998 advisory opinion called the *Secession Reference*. As you will see, the opinion reflects a number of the issues discussed in Chapter 1. As you read it, consider how the Court engages in constitutional interpretation. Which approaches are most prominent?

Reference re Secession of Quebec

[\[1998\] 2 SCR 217, 1998 CanLII 793](#)

THE COURT (Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, and Binnie JJ):

[After some introductory comments, the Court listed the three reference questions put to it:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The following excerpt deals with the principles used to answer these questions.]

• • •

(1) Introduction

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[32] As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [[1982] 2 SCR 793, 1998 CanLII 793], at p. 806, "The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules," as we recently observed in the *Provincial Judges Reference* [*Reference re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [[1997] 3 SCR 3, 1997 CanLII 317] at para. 92. Finally, as was said in the *Patriation Reference* [*Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25] at p. 874, the Constitution of Canada includes

the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

... In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. ...

(2) Historical Context: The Significance of Confederation

[33] In our constitutional tradition, legality and legitimacy are linked. ...

[34] Because this Reference deals with questions fundamental to the nature of Canada, ... it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.

[35] Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. ...

[36] ... On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

[37] The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

[38] Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. ... Thirty-three delegates ... approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the *Constitution Act, 1867*. ...

[39] Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However,

politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (1895), at p. 52 (emphasis added).)

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[41] Sixteen delegates ... met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made to the distribution of powers, provision was made for the appointment of extra senators in the event of a deadlock between the House of Commons and the Senate, and certain religious minorities were given the right to appeal to the federal government where their denominational school rights were adversely affected by provincial legislation. The British North America Bill ... was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

[42] There was an early attempt at secession. In the first Dominion election in September 1867, Premier Tupper's forces were decimated: members opposed to Confederation won 18 of Nova Scotia's 19 federal seats, and in the simultaneous provincial election, 36 of the 38 seats in the provincial legislature. Newly-elected Premier Joseph Howe [sought] to undo the new constitutional arrangements, but it was too late. The Colonial Office rejected Premier Howe's plea to permit Nova Scotia to withdraw from Confederation. As the Colonial Secretary wrote in 1868:

The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted. ... I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation. ...

(Quoted in H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997), 76 *Can. Bar Rev.* 155, at p. 168.)

The interdependence characterized by "vast obligations, political and commercial," referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

[43] Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. ... The *Constitution Act, 1867* was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. ...

[44] A federal–provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada.

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[46] Canada's evolution from colony to fully independent state was gradual. ... The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*.

[47] Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy ... derived from political decisions taken in Canada It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*... . It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution

[48] ... We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

[49] ... Behind the written word [of the Constitution] is an historical lineage stretching back through the ages, which aids in the consideration of the **underlying constitutional principles**. These principles ... are the vital unstated assumptions upon which the text is based. [The ...] **four foundational constitutional principles that are most germane for resolution of this Reference [are]** federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

[50] Our Constitution has an internal architecture The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference, supra*, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution." The same may be said of the other three constitutional principles we underscore today.

[51] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

[52] The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, **observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree,"** to invoke the famous description in *Edwards v. Attorney-General for Canada* [1929] CanLII 438, [1929] UKPC 86], at p. 136.

[53] Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference, supra*, at paras. 93 and 104, we cautioned that the **recognition of these constitutional principles ... could not be taken as an invitation to dispense with the written text** of the Constitution. On the contrary, we confirmed that **there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed ... that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, [and that it] "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."**

[54] Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words," as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada." It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

[55] It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the *Constitution Act, 1867*, the federal system was only partial. ... This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned

[56] In a federal system of government such as ours, political power is shared by ... the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*. ... It is up to the courts "to control the limits of the respective sovereignties." ... In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

[57] This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference*, *supra*, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ, dissenting in the *Patriation Reference*, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law." With the enactment of the *Charter*, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. ...

[58] The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] CanLII 426, [1919] AC 935 (UKJCPC) at p. 942, was

not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in *Haig v. Canada* [[1993] 2 SCR 995, 1993 CanLII 58], at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process." It was referring to the differential application of federal law in individual provinces, but the point applies more generally. ...

[59] The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities

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(c) Democracy

[61] Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

[62] The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario*, *supra*, at p. 57, confirmed that "the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels." As is apparent from an earlier line of decisions emanating from this Court, including *Switzman v. Elbling* [[1957] SCR 285, 1957 CanLII 2], *Saumur v. City of Quebec* [1953] 2 SCR 299, 1953 CanLII 3], *Boucher v. The King* [[1951] SCR 265, 1950 CanLII 2], and *Reference re Alberta Statutes* [[1938] SCR 100, 1938 CanLII 1], the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. ... [I]t is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

[63] Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition," the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)* [[1991] 2 SCR 158, 1991 CanLII 61], at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation." Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system—such as women, minorities, and aboriginal peoples—have continued, with some success, to the present day.

[64] Democracy is not simply concerned with the process of government. On the contrary, ... democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the

democratic process. In considering the scope and purpose of the *Charter*, the Court in *R v. Oakes* [[1986] 1 SCR 103, 1986 CanLII 46], articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

[65] In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. ... In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the *Charter*. ... In addition, the effect of s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

[66] It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

[67] The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. **Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.**

[68] Finally, we highlight that a functioning democracy requires a continuous process of discussion. The **Constitution mandates government by democratic legislatures, and an executive accountable to them, 'resting ultimately on public opinion reached by discussion and the interplay of ideas'** (*Saumur v. City of Quebec, supra*, at p. 330). ... No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the **best solutions to public problems will rise**

to the top Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

[69] The *Constitution Act, 1982* gives expression to this principle by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

[70] The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [[1959] SCR 121, 1959 CanLII 50] at p. 142, is "a fundamental postulate of our constitutional structure." As we noted in the *Patriation Reference, supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, ... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

[The Court then cites an earlier case, *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33, at para 71 that outlines the elements of the rule of law: (1) the law is supreme over the acts of both government and private persons; (2) the rule of law "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order;" and (3) "the exercise of all public power must find its ultimate source in a legal rule."]

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[72] The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*... . Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. ... The Constitution binds all governments, both federal and provincial, including the executive branch.... . They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

[73] An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

[74] First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. ... [T]here are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority

groups [can] maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power ... amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could ... allocate additional political power to itself unilaterally.

[75] The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to ... democracy and self-government. In short, it is suggested that ... the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

[76] Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

[77] In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. [It] ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

[78] It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates—indeed, makes possible—a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

[79] The fourth underlying constitutional principle we address here concerns the protection of minorities. ... As this Court observed in *Reference re Bill 30, An Act to amend the Education Act (Ont.)* [[1987] 1 SCR 1148, 1987 CanLII 65], at p. 1173, and in *Reference re Education Act (Que.)* [[1993] 2 SCR 511, 1993 CanLII 100], at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. ... Similar concerns animated the provisions protecting minority language rights, as noted in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education* [[1986] 1 SCR 549, 1986 CanLII 66], at p. 564.

[80] ... [E]ven though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter's* provisions for the protection of minority rights. ...

[81] ... [T]he protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

[82] Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in *R v. Sparrow* [(1990) 1 SCR 1075, 1990 CanLII 104] at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

[The Court went on to apply these constitutional principles to the secession context, ruling that while unilateral secession would be unconstitutional, a clear expression by the people of Quebec of their will to secede from Canada would impose a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. This portion of the judgment is reproduced in Chapter 26, Amending the Constitution.]

Answers to questions 1 and 2: No; not necessary to answer question 3.

NOTES AND QUESTIONS

1. Quebec refused to appear in the proceedings before the Court. Its position was that the Court lacked the jurisdiction to consider a matter—secession—that was fundamentally political in nature. Because the Court wished to hear all sides of the legal argument, it appointed a lawyer to make arguments on Quebec's behalf. The Court acted pursuant to s 53(7) of the *Supreme Court Act*, RSC 1985, c S-26, which provides that in the case of references (discussed in Chapter 13):

The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear

A lawyer acting in this capacity is known as an *amicus curiae*, or "friend of the court."

2. Like the *Persons* case, the *Secession Reference* was an advisory opinion. The *amicus curiae* argued that the Court should decline to answer the reference questions because they were political in nature, and hence incapable of legal resolution. The Court rejected this argument:

[26] Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. ... [T]he circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

- (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

[27] As to the "proper role" of the Court, it is important to underline ... that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. ... The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

[28] As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

Do you agree with the Court's analysis? What was the most likely effect of the judgment on "any democratic decision that the people of Quebec may be called on to make"? Does it seem like the Court confined itself to a consideration of the legal aspects of the reference questions, or did it address extralegal components as well? If it did, was it justified in doing so? If it did not, should it have? Why? How?

3. In cases both before and after the *Secession Reference*, the Court has articulated and elaborated on other "organizing or underlying principles of the Constitution": judicial independence: *Reference re Provincial Court Judges*; the foundational role of the Supreme Court of Canada: *Reference re Supreme Court Act, ss 5 and 6*, [2014 SCC 21](#); and the role of the Senate as an independent chamber of "sober second thought": *Reference re Senate Reform*, [2014 SCC 32](#). Excerpts from the *Provincial Judges Reference* and the *Supreme Court Reference* can be found in Chapter 13; excerpts from the *Senate Reform Reference* can be found in Chapter 26.

4. The Court's use in the *Secession Reference* of "unwritten" constitutional principles to generate legally enforceable constitutional obligations has generated confusion and controversy. While the use of such principles to guide the interpretation of written constitutional provisions is relatively uncontroversial, there are concerns about using them to ground free-standing constitutional obligations and, potentially, to invalidate legislation. The Supreme Court of Canada has partially addressed these issues in subsequent cases that involved the unwritten principle of the rule of law.

British Columbia v Imperial Tobacco Canada Ltd involved legislation that provided for special evidentiary and procedural rules, making it easier for the province to recover from tobacco manufacturers health care expenditures incurred in treating individuals exposed to tobacco products. The Court held that the judiciary has the authority to strike down legislation that conflicts with judicial independence, but that the law in question did not compromise judicial

independence. The Court also appeared to hold that it is not open for courts to strike down legislation on the ground that it conflicts with principle of the rule of law.

Subsequently, in *British Columbia (AG) v Christie*, the Court had occasion to determine whether the principle of the rule of law gives rise to an enforceable right to be represented by a lawyer in a court or tribunal proceeding where legal rights or obligations are at stake. The Court held that the text of the Constitution, the jurisprudence, and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel might be recognized in specific and varied situations. It held, however, that they do not support the conclusion that there is a general right to counsel in proceedings before courts and tribunals dealing with legal rights or obligations.

In *Toronto (City) v Ontario (AG)*, [2021 SCC 34](#), the Supreme Court considered a challenge arising from a 2018 Ontario law that greatly reduced the size of a city council in the middle of a municipal election. A narrow majority found that the law, while controversial, did not breach either s 2(b) (freedom of expression) or s 3 (the right to vote) of the Charter. Moreover, the majority rejected the idea that the unwritten constitutional principle of democracy could provide an independent basis for striking down otherwise valid provincial legislation, suggesting that unwritten constitutional principles generally may not be used in that way.

For further discussion, see Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 245.

5. The implications of the *Secession Reference* for constitutional amendment are discussed in Chapter 26.

For more readings on interpretation of the Charter specifically, see Chapter 17.

PART TWO

FEDERALISM

CHAPTER THREE

FROM CONTACT TO CONFEDERATION

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I. INTRODUCTION

For decades, many Canadian jurists have assumed that Canada was born after the British conquest of New France and the assertion of Great Britain's sovereignty over the territory of what is now Canada. For example, Bora Laskin, who later became Chief Justice of Canada, wrote in the introductory sentence of his 1969 Hamlyn Lecture that "[m]ore than two hundred years have passed since English law and English legal institutions were rooted in a yet *unborn Canada*" [emphasis added]: Bora Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 1. Jurists such as Laskin essentially believed that Canada's constitutional history started either with the *Treaty of Paris* of 1763, by which the French Crown ceded to the British Crown all of its rights over the territory of Canada, or, alternatively, with the creation of Canada as a confederation of colonies in 1867.

Such accounts often fail to acknowledge the presence of legal orders in North America prior to the imposition of British rule. Indigenous peoples exercised law-making authority over territory and persons prior to European contact (more on this can be found in Chapter 14, Indigenous Peoples and the Constitution). Contact led to the establishment of French colonies—again, with law-making authority over territory and persons—on the continent. These different legal orders expressed and produced diverse legal and constitutional norms that structured the economic, social, and political affairs of their citizens. They also interacted with each other and, later, with British North American colonial legal orders. A complex web of often competing narratives invested these legal orders, and their interaction, with constitutional significance. Some of these narratives diverge in important respects from those that inform and perhaps dominate contemporary constitutional discourse. But some nonetheless have become ingrained in the collective memory of various communities across Canada and continue to influence constitutional debates—sometimes directly affecting constitutional argument and interpretation.

What is the distinction between “history” and “memory,” and how can that distinction improve our understanding of constitutional law? How does memory influence the creation and evolution of “imagined communities,” to use an expression coined by Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev ed (New York: Verso, 2006)? To what extent can constitutional law be described as an intellectual tool by which an imagined community is institutionalized? According to Jean-François Gaudreault-DesBiens:

At the heart of the Canadian constitutional debate lies a clash of stories about Canada’s history. Contrary to a universally shared understanding of Canada’s founding historical events, these stories reflect divergent collective memories. This raises the distinction properly drawn between “history” and “memory.” History refers to an intellectual undertaking which attempts to look at past events from a self-described objective standpoint and, therefore, to view them as uncontested material facts. In contrast, memory describes a subjective interpretation of past events, that has been elaborated over a long period of time and that sheds light on contemporary events, while at the same time being fed by them. While history has more to do with the research of “hard facts,” memory is related to how a community remembers and interprets its past, and, ultimately, to the manner in which it perceives itself. It crystallizes the community’s particular remembrance of things past, [as Proust might have said].

From Jean-François Gaudreault-DesBiens, “The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity” (1998) 23 *Vt L Rev* 793 at 796.

This chapter provides an overview of some of the main features of these prior legal orders, the constitutional narratives that account for their presence, and the events marking their interaction, before turning to the events of 1867. Perhaps contrary to popular understandings, Canada’s constitutional evolution was not a tranquil and incremental process of development, but one that had its share of tragedies, collective traumas, and major conflicts. Canada is not a young country—the very word “Canada” is of Indigenous origins—which is why it is worth looking at what happened before 1867, most notably to determine the extent to which Canada was—and is—constituted by events that occurred before the formal confederation of British North American colonies in 1867. As we shall see, while not being entirely determined by these events, contemporary Canada cannot be abstracted from them—or from the competing constitutional narratives to which they gave rise.

II. PRE-CONTACT, CONTACT, AND THE MYTH OF TERRA NULLIUS

Prior to European contact, Indigenous peoples lived in North America in organized societies exercising law-making authority over territory and persons since time immemorial. Although the laws of these societies did not resemble, formally or substantively, European models of legality, they were laws nevertheless. European models of legality are of relatively recent origins, essentially linked to the emergence of the nation-state in the 16th century. Before this time, the law in much of Europe was customary, and it was only in the 12th century, with the rediscovery of Rome’s *Corpus Juris Civilis*, that the idea of “written law” was rekindled. Legal anthropologist Alain Bissonnette puts it this way:

[TRANSLATION] One must recognize a juridical character to any rule of social conduct that is rendered obligatory by the members of a given group. Native law is a traditional form of law; it is oral and unwritten. It has not been enacted by a supreme authority; it is customary. It reflects a cosmocentric view of the world which, in turn, is not reflected in dominant Western law.

See Alain Bissonnette, "‘Les droits des peuples autochtones: D’hier à demain,’ (*Étude réalisée pour la Commission royale sur les peuples autochtones, juin 1992*)” [“The Rights of Indigenous Peoples: From Yesterday to Tomorrow,” (Study conducted for the Royal Commission on Aboriginal Peoples, June 1992)] 24:1 Revue general de droit at 5.

Based mainly on oral traditions and customs, and modelling radically different views of the relationship between human beings and the world, Indigenous legal orders that existed at the time of contact belonged to the family of what anthropologists now call traditional legal systems. The commonalities among them should not obscure their differences. Some were more formalized—or at least more cognizable to European legal consciousness—than others, such as the legal order governing the Iroquois nations, which eventually culminated into a confederacy of nations. Given their diversity, and the paucity of available data, it is impossible to fully account for all the Indigenous legal orders that existed at the time of contact. And, given that they are based in oral, rather than written, legal traditions, relying on their existence in our current judicial context raises complex evidentiary problems. For more discussion of the rules of evidence in the context of constitutional claims of Indigenous rights, see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302, excerpted in Chapter 14.

Chapter 14 examines in some detail the contemporary constitutional status of Indigenous lands and peoples. In the remainder of this section, we wish to highlight how European nations asserted sovereignty over the lands newly “discovered” in the Americas by relying on what is known as the doctrine of *terra nullius*, or nobody’s land.

Patrick Macklem, Indigenous Difference and the Constitution of Canada

(Toronto: University of Toronto Press, 2001) at 113-15 (footnotes omitted)

The initial distribution of sovereignty over North America among European powers was generated not by a single decision-making authority, but by and through a series of acts of mutual recognition by European powers. Each colonizing power viewed itself and others as entitled to claim sovereignty to territory if it could establish a valid claim according to rules and principles that governed European colonial practice. According to “the doctrine of discovery,” sovereignty could be acquired over unoccupied territory by discovery. Sovereignty over occupied territory could be acquired only by conquest or cession. However, international law deemed North America to be unoccupied, or *terra nullius*, for the purposes of distributing sovereignty. European settlement thus vested sovereignty in settling nations despite an indigenous presence. Because North America was treated as vacant, neither conquest nor cession was necessary to transfer sovereignty from Aboriginal nations to European powers.

International law deemed North America to be *terra nullius* under the doctrine of discovery because European powers viewed Aboriginal nations as insufficiently Christian or insufficiently civilized to justify recognizing them as sovereign over their lands and people. An Aboriginal nation did not constitute “a legal unit in international law” [*Cayuga Indians (Great Britain) v United States* (1926), 6 RIAA 173 at 176]. [I]n the words of Chief Justice Marshall [of the United States Supreme Court, in *Johnson v M’Intosh*, 21 US 543, 8 Wheat 543 at 573 (1823)], “the character and religion of [North America’s] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.”

The doctrine of *terra nullius* has had a lasting impact on Western juridical and political thought: see generally Michel Morin, *L'usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* [The Usurpation of Aboriginal Sovereignty: The People of New France and the English Colonies of North America] (Montreal: Boreal, 1997). One of its underlying assumptions was that Indigenous societies were essentially lawless societies.

Although the influence of the *terra nullius* doctrine cannot be underestimated, in what was known as "Indian policy" in both England and France, practical reason often prevailed. For example:

The law of the Prairie West, according to the Hudson's Bay Company Royal Charter of 1670, was the law of England insofar as it applied to those people in Prince Rupert's Land who did not live under the authority of other previously established nations in the regions. While never expressed officially, the Company in practice accepted the rule of aboriginal law for domestic concerns of native people.

See Louis A Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada" in Louis A Knafla, ed, *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 31 at 35.

In other words, even under a legal regime not naturally receptive to the existence of Indigenous legal orders, there was still room for some degree of Indigenous self-government. That paradoxical logic also inspired the numerous treaties that were concluded between the French and British Crowns and different Indigenous nations.

As you will see in Chapter 14, contemporary Canadian constitutional law today recognizes that what is now Canada was not in fact *terra nullius* when the Europeans began to assert territorial sovereignty over it. It also recognizes that treaties between Indigenous nations and the Crown possess constitutional significance. What might constitutional recognition of Indigenous legal orders mean for the future of the Canadian constitutional order?

III. NEW FRANCE: CANADA'S FIRST EUROPEAN CONSTITUTIONAL REGIME

France was the first European nation to establish a colony on Canadian territory. New France comprised different administrative divisions, such as Acadie (now Nova Scotia), Canada (now Quebec), and Louisiane. Although Jacques Cartier claimed sovereignty over Canada on behalf of the French Crown in 1534, it was only in the early 17th century that the first settlements were established here.

The colony of New France was created at a time when the king of France personally ruled his kingdom with the assistance of a council placed under his direction. Recent historiography shows that the king's powers were not "absolute" and that his authority in a practical sense depended on the continuing support of the nobility in all of his kingdom's regions. In New France, in addition to the rules governing the monarchy itself, colonial laws included royal ordinances and edicts, rulings made by the council, customary laws governing private relations, and seigniorial rights. Concepts of Roman law and Canon law in its Gallican interpretation also were sources of law. Even though the king of France was vested with broad constitutional prerogatives, he could fully exercise his sovereignty over his kingdom and his colonies only by delegating some of his authority to act to colonial intermediaries. Thus, officials acting on his behalf in New France were mere delegates of the king and did not possess any original jurisdiction, or power, to do things.

Initially, the governor of New France exercised a virtually monopolistic jurisdiction. That was reduced as colonial institutions slowly took shape, a process that culminated in 1663, the year of a major administrative reform in the colony. After a brief period under the co-administration,

a council was created in 1647 that became responsible for the regulation of the fur trade, the control of public finances, and general protection of the public good. The council was composed of the governor, a representative of the clergy, and, from 1657 to 1663, four councillors elected by the inhabitants of the colony. It was abolished in 1663 and until the end of the French regime in 1760, the same functions were carried out by the Sovereign Council ("Conseil souverain" or "Conseil supérieur" beginning in 1703).

The creation of this council, based on similar arrangements in some French provinces, heralded a period of significant institutional changes in New France. Louis XIV regained the ownership of the colony from the Compagnie des Cent-Associés and eventually placed it under his direct administration, delegating functions to the above-named Conseil including police and appellate judicial powers. There was no real separation of legislative, executive, and judicial authority in the colony, which was the state of affairs in most European countries at the time.

At the end of the French regime, there were three major institutional actors whose responsibilities and prerogatives sometimes overlapped, partly because of the terms and conditions of the royal delegation under which they were working, and partly because of the absence of a separation between the branches of the state. These actors were the council, the governor, and the intendant. Although all of them were vested with executive powers, the intendant, practically, ended up exercising most of these powers. Under the terms of their mandate, which included military and Indian affairs, the intendant was responsible for justice, police, and finances. Although the governor exercised concurrent jurisdiction over "general police," the broad jurisdiction conferred on the intendant meant that, in practice, the intendant was responsible for everything that touched on agriculture, trade, industry, professions, health, public safety and order, and education.

Legislative authority was exercised by the king in France, whose edicts and ordinances there also applied in the colony. Officials such as the governor and the intendant were responsible for applying and enforcing these laws. However, the terms of their respective mandates allowed them to adapt those laws to the sometimes different situation of the colony, and to enact local legislation called "ordinances." This legislative power also fell under the responsibility of the intendant, one that they mostly exercised alone, except for ordinances concerning important issues in which the council was called on to participate. The council, through its "droit de remonstrance," could also ask the king to introduce changes in the ordinances enacted by the king himself.

This account of legislative authority points to the absence of an assembly composed of elected representatives, except for the period between 1657 and 1663 noted above. Indeed, formal representative institutions did not exist in New France. But from the beginning to the end of the French regime, public meetings where the inhabitants of the different cities of the colony could express their views were called on a relatively frequent basis by colonial officials. The need to hold such meetings arose out of practical necessity. Given its large territory and widely dispersed population, New France required the inhabitants' collaboration and input for its effective administration. In 1700, Intendant Bochart de Champigny even proposed, albeit unsuccessfully, to formalize the existence of these meetings. Although the inhabitants of the colony could express their views in such meetings, they could only do so on issues that had been previously identified by colonial officials. Moreover, although votes were sometimes taken, they could never constitute "decisions" because they had no binding legal effect on colonial officials. Another impediment to the effectiveness of these informal consultations was the absence in the colony of recognized rights to freedom of association and to petition colonial officials.

Finally, the exercise of judicial power in New France was characterized by the involvement of non-judicial actors. At the end of the French regime, the Superior Council, as the ultimate appellate tribunal in the colony, could hear civil and criminal appeals from lower courts in Quebec, Montreal, and Trois-Rivières. The governor, the intendant, the bishop, and the attorney general were among the 17 councillors. In addition to being members of a judicial body,

the Superior Council, the governor and the intendant could also directly adjudicate cases. On one hand, the governor could always review the rulings of the council, which they did a few times when they believed that a denial of justice had occurred. On the other hand, being responsible for the administration of justice in the colony, the intendant could adjudicate on cases raising the application of their own ordinances in respect to police and financial affairs and their rulings could only be appealed to the King's Council. The intendant could also rule on alleged crimes against the safety of the state, review decisions taken by all judicial bodies, and even decide to hear cases already brought before courts of competent jurisdiction. This has led two commentators to describe the intendant's judicial competence as follows:

[TRANSLATION] Relying on contemporary criteria presently applied in respect of the administration of justice, one could say that he [the Intendant] was vested with exclusive jurisdiction over the review of administrative action, could act as a "small claims" judge, in addition to which he had concurrent jurisdiction to hear cases that ordinary courts were competent to hear.

See Jacques-Yvan Morin, "L'évolution constitutionnelle du Canada et du Québec de 1534 à 1867" ["The Constitutional Evolution of Canada and Quebec from 1534 to 1867"] in Jacques-Yvan Morin & José Woehrling, eds, *Les Constitutions du Canada et du Québec: du régime français à nos jours* [The Constitutions of Canada and Quebec: From the French Regime to the Present Day], vol 1, *Études* (Montreal: Thémis, 1994) at 19. The above discussion summarizes Morin, above, at 9-27; see also Gustave Lanctôt, *L'administration de la Nouvelle-France* [The Administration of New France] (Montreal: Éditions du Jour, 1971).

As the colonists eventually adapted their way of life to the difficult conditions of New France, most notably through interaction with Indigenous peoples, their identity began to change. They started to define themselves as "Canadiens," as opposed to "Français." They were the first people in the Canadian territory to define themselves as "Canadians." This self-definition as unhyphenated "Canadians" lasted long after the birth of Canada as a federation in 1867, since it took some time for the population of British descent to define themselves as "Canadians." When they did, the ancient "Canadiens" increasingly became known as "French Canadians."

IV. FROM ACADIA TO NOVA SCOTIA: THE GENESIS OF THE MARITIMES

It was in Acadia that the clash between the French and the British North American empires first entailed major legal consequences. As early as 1689, sporadic conflicts had plagued relations between the two empires in Europe and in North America. The year of 1710 saw the fall of Port Royal (now Annapolis Royal) to an expedition of New Englanders. Three years later, this victory was confirmed in the Treaty of Utrecht, under which France yielded Acadia and Newfoundland to Great Britain but maintained its control over Cape Breton (then called "Isle Royale"), where it founded Louisbourg in 1720, Prince Edward Island (then called "Isle Saint-Jean"), and other islands in the Gulf of St Lawrence. It also kept the St Lawrence Valley.

For the French population of Acadia and its Indigenous allies, the Treaty of Utrecht heralded a period of significant change. Given their cultural ties and geographical proximity with the remaining French North American colonies, the inhabitants of the new British colony of Nova Scotia were required in 1713 to take an oath of allegiance, which they did on the condition that they would not have to bear arms against France. British authorities accepted that condition. The Acadians then came to be referred to as the "French neutrals." Despite the establishment of a military government in Nova Scotia and immigration from Great Britain, British authorities were still faced, in mid-18th century, with a problem in their Maritime colony—most of its inhabitants were not of British origin, and their population was expanding. By then, the Acadians considered themselves a people distinct from both the French and the English. The

Acadians had carved for themselves a relatively comfortable niche within the British colony of Nova Scotia, and their society felt secure enough to envisage the future with confidence. This was to last until the late 1740s, when conflict between the two empires resumed.

Fearing that the Acadians, despite their oath, could be tempted to support France in this new conflict, British authorities decided to strengthen their hold on Nova Scotia by promoting the settlement of the colony with migrants whose loyalty could not be questioned—that is, with British and non-British Protestants. Despite meetings with colonial authorities, and even the agreement of some Acadian communities to take an unqualified oath, British authorities ultimately decided to deport the Acadians. That decision was implemented in the last months of 1755:

The reality, even if it had been fully expected, would have been psychologically stunning. Settlements burnt, cattle driven off, lives now entirely at the command of the soldiery; within days the Acadians were turned from a free and flourishing people into a crowd of refugees.

See Naomi ES Griffiths, *The Contexts of Acadian History, 1686-1784* (Montreal: McGill-Queen's University Press, 1992) at 91.

The deportation, which would continue until 1762, saw between 12,000 and 18,000 Acadians uprooted from what are now Nova Scotia, New Brunswick, and Prince Edward Island. Thousands died due to diseases contracted on board ships, or because the vessels they were on sank. This led France to accuse England of having committed genocide. Eventually, the Acadians who wanted to return home were permitted to do so in 1764, only to realize that their former lands were now occupied by British settlers. As for the Mi'kmaq, even though they had most often sided with the French, they "had never stopped considering themselves the rightful tenants of the land": Griffiths, above at 82, and entered into discussions with the British that eventually culminated in the signing of treaties: for a judicial interpretation of these treaties, see *R v Marshall*, [1999] 3 SCR 456, 1999 CanLII 665, excerpted in Chapter 14.

Interpretations abound as to the reasons for the deportation. For example, an early commentator, Édouard Richard, was of the view that "the deportation, in the minds of its chief authors, was neither a justifiable act nor a deed of cruelty pure and simple, but a means of acquiring wealth by despoiling the Acadians of their cattle and lands": see Édouard Richard, *Acadia: Missing Links of a Lost Chapter in American History*, vol 1 (Montreal: John Lovell & Son, 1895) at 264. One thing is certain: the deportation of the Acadians was not an isolated incident, but rather the result of a public policy carried out as a part of Great Britain's plan to build its North American empire:

The policy in this case was followed systematically for years, and it would be a gross error to see in the expulsion the result of a sudden excess of violence—a monstrous fit of bad temper on the part of Lawrence and his colleagues, and foreign to the British government. No—the dispersal continued into 1762 and was neither incidental nor accidental.

See Guy Frégault, *Canada: The War of the Conquest*, translated by Margaret M Cameron (Toronto: Oxford University Press, 1969) at 186. Legal and political events before and after the deportation reveal that empire-building lay at the heart of the decision. In August 1754, Lieutenant Governor Charles Lawrence had informed the Board of Trade and Plantations in London—the authority responsible for overseeing the colonies—that the Acadians' loyalty was more dubious than ever and that he was of the view that they either had to take an unconditional oath or leave the colony.

This raised the question of the legal status of the Acadians in the colony. As described by Frégault, above, at 174:

The fact was ... that after the Treaty of Utrecht the Acadians could continue to live in the province only on condition that they become subjects of Great Britain, and in order to acquire this status, they must take the oaths required by the British authorities. It was

therefore most important to consider to what extent they could be treated as British subjects if they refused to take the oaths, and whether refusal to do so would not cancel their titles to their property. ...

The Lords of Trade were unwilling to commit themselves, but their statements sufficed to authorize the principle of massive deportation: if the Acadians had not the status of British subjects they had no right to the land they were cultivating, for it was British land; and if they had no right to the land, it would not be illegal to dislodge them from it. It would require only the decision of a colonial magistrate to give this reasoning the force of law.

That colonial magistrate would be Jonathan Belcher, Chief Justice of Nova Scotia, who was asked by Lawrence to clarify the Acadians' legal status and the nature of their title, if any, to their lands. On July 28, 1755, the same day that the final decision to deport the Acadians was taken, Belcher released an opinion in which he relied on legal technicalities to conclude that the law not only authorized but *required* the deportation. He reasoned that because Cornwallis, then lieutenant governor of the colony, had been instructed by London to request once again that the Acadians take an unqualified oath to the British Crown, a demand to which they responded negatively in 1749, the Acadians had impliedly declared their intention not to become British subjects. The instruction to Cornwallis also stated that the persons refusing to take the oath would not be eligible to retake it should they wish to, because such a profession of faith would not be reliable. Belcher concluded that, given the Acadians' prior refusal to take the oath, the government of the colony had lost the legal power to reoffer them the opportunity to take it. In his view, their deportation and the taking of their lands was therefore required by law.

Belcher added that to illegally allow the Acadians to take the oath would also threaten the survival of Nova Scotia, both at the military and socio-economic levels. According to Belcher, the Acadians had been un-submissive since the Treaty of Utrecht and, with the help of the Mi'kmaq who were allied with the French, had consistently plotted against the British Crown. Having acted with "perfidy and treacheries" in the past, the chief justice argued they could only act in the same way in the future. Moreover, not deporting them would mean refusing to take advantage of the fall of Beauséjour, these advantages being the weakening of the "Sauvages" power and of the repression of the insolence of the French inhabitants. To this military threat was coupled a socio-economic one. Belcher considered that the "surplus" of French inhabitants in the colony (5,000 more Acadians than settlers of British descent) would compromise the effective settlement of the colony. For him, the overall threat that the Acadians represented forced the British inhabitants to live in fortified burghs, thereby preventing them from cultivating land and earning their living—thus supporting Édouard Richard's economic interpretation of the deportation referred to above.

After giving the law's formal sanction to the deportation of the Acadians in his capacity as chief justice of Nova Scotia, Jonathan Belcher was later appointed lieutenant governor of Nova Scotia and dutifully carried out the last segments of the deportation policy up to 1762. However, Chief Justice Belcher's opinion did not end the law's role, or his own, in the deportation. Despite his legal opinion and assurances received from colonial authorities, the new British owners of the lands confiscated from the Acadians legitimately feared what would happen if the former Acadian owners of their lands were to return to Nova Scotia and challenge their successors' title to these lands. To alleviate these fears, Belcher, acting as a member of the legislative assembly of Nova Scotia, tabled a bill entitled *An Act for the quieting of Possessions to the Protestant Grantees of the Lands formerly occupied by the French Inhabitants, and for preventing vexatious Actions relating to the same*, which was eventually adopted as SNS 1758-1759, 30 Geo II, c 3. The Bill affirmed (at para 1) that the

Province of Nova Scotia or Acadie, and the property thereof, *did always of right belong to the Crown of England, both by priority of discovery and ancient possession*, and that no

grant of property to any of the lands or territories belonging thereto, is of any validity, or can give the possessor thereof any legal right or title to any part thereof, unless derived from thence. [Emphasis added.]

The preamble was followed by a narrative of the reasons for the deportation, its justification, and the subsequent grant by the Crown of Great Britain of lands formerly "occupied" by Acadians to "settlers" who came to Nova Scotia from New England.

Practically speaking, the Act purported (at para 5) to bar any lawsuit

for the recovery of any of the lands, ... by virtue of any former right, title, claim, interest, or possession of any of the former French inhabitants, or by virtue of any right, title, claim, or interest, holden under or derived from them, by grant, deed, will, or in any other manner whatsoever.

The Act literally rewrote the history of Nova Scotia, rendering it uninhabited territory "discovered" by the British, and therefore a colony of settlement and not of conquest. A French presence of 151 years (1604-1755) was symbolically erased by the law—not to mention the Act's attitude toward the Mi'kmaq nation, whose members it refers to as "Indian Savages." This legal rewriting of history was judicially reiterated in the case of *The King v McLaughlin* (1830), 1 NBR 218. Once Great Britain extended its rule over the entire region after 1763, the territory of Nova Scotia was divided in three different colonies—Nova Scotia; Prince Edward Island, created in 1769; and New Brunswick, created in 1784 after the influx of Loyalists fleeing the American Revolution.

How would you characterize the law's role in the deportation of Acadians? What is or ought to be the present constitutional status of the Acadians in Canada? Was the deportation an "act of war" justifiable in the context in which it took place? How would the deportation be characterized by today's standards?

V. THE EXPANSION AND CONSOLIDATION OF BRITISH NORTH AMERICA: FROM THE CONQUEST OF NEW FRANCE TO THE CONSTITUTIONAL ACT, 1791

In September of 1759, an event of extraordinary historical importance took place in the capital of New France, Quebec. That event, which lasted only a few minutes, was a battle that opposed British and French troops in a field known as the Plains of Abraham. The outcome of that battle changed Canada forever, as the British forces prevailed over the French. The following year, the city of Montreal also capitulated to the British. The days of New France were over.

The 1759 *Articles of Capitulation of Quebec* provided that "the inhabitants shall be preserved in the possession of their houses, goods, effects and privileges" (art II), and that "the free exercise of the roman religion is granted, likewise safeguards to all religious persons" (art VI). The 1760 *Articles of Capitulation of Montreal* granted the continued operation of local French law: "The French and Canadians shall continue to be governed according to the custom of Paris, and the laws and usages established for this country" (art XLII). As regards Indigenous nations who may have joined with the French against the English, the 1760 Articles provided that "The Savages of Indian allies of his Most Christian Majesty, shall be maintained in the lands they inhabit, if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall have their missionaries" (art XL): Adam Shortt & Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada, 1759-1791*, 2nd rev ed, part I (Ottawa: King's Printer, 1918) at 5-6, 33-34.

This state of affairs was confirmed in 1763 with the *Treaty of Paris*, which ended the seven-year war between Great Britain and France. Article IV of the *Treaty of Paris* similarly provided:

"His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and effectual orders, that his new Roman Catholick subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit". Shortt & Doughty, above at 115. However, at that time, British laws severely restricted the rights of Roman Catholics, who were prohibited from participating in government.

A few months after the *Treaty of Paris*, King George III of Great Britain issued a proclamation establishing a government for the newly conquered colony. It is in that *Royal Proclamation of 3 October 1763* (reprinted in RSC 1985, Appendix II, No 1) that the entity called "Quebec" makes its first appearance in a constitutional instrument. Two elements of that Proclamation are worth mentioning here. First, the Proclamation contained a pledge to create a legislative assembly in the province that, together with the governor and his council, could make laws, statutes, and ordinances for "the Public Peace, Welfare and good Government of our said Colonies." By making the pledge to establish a general assembly, the king lost the prerogative to legislate for the colony by means of proclamation, that prerogative being divested to Parliament: *Campbell v Hall* (1774), Lofft 655, 98 ER 848. Second, British imperial law provided that the laws of a conquered colony were to continue until altered by the conqueror. This was reflected in the Articles of Capitulation of 1759 and 1760, above. The Proclamation overrode this rule and imposed on the colony the laws of England in civil and criminal cases.

The Proclamation also contained a number of provisions concerning Indigenous peoples, some of which are still relevant today: see, for example, s 25 of the *Canadian Charter of Rights and Freedoms*. Among other things, the Proclamation provided that "Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds," and that "lands and territories not included within the limits of [the governments created under the *Royal Proclamation*, including that of Quebec], or within the limits of the territory granted to the Hudson's Bay Company" be reserved under the king's protection and dominion for the use of the Indians. Not only were these lands reserved, but they could not be purchased or settled, or taken by British subjects, without the Crown's consent and prior issuance of a licence. Practically, that meant that the Crown alone possessed the initial right to acquire these lands.

With respect to Quebec, the Proclamation introduced the British "Test Oath," which forced Roman Catholics to abjure central tenets of their faith if they wanted to participate in government. As well, the king imposed English laws in all matters. The imposition of laws unknown to the inhabitants of the colony soon proved to be counterproductive, especially in civil and commercial matters. Here is what Governor Guy Carleton had to say about that issue in 1767:

[L]aws, ill adapted to the Genius of the Canadians, to the situation of the Province, and to the Interests of Great Britain, unknown, and unpublished were introduced to their Stead; A Sort of Severity, if I remember right, never before practiced by any Conqueror, even where the People, without Capitulation, submitted to His Will and Discretion. How far this Change of Laws, which Deprives such Numbers of their Honors, Privileges, Profits, and Property, is conformable to the Capitulation of Montreal, and Treaty of Paris; How far this Ordinance, which affects the Life, Limb, Liberty, and Property of the Subject, is within the Limits of the Power His Majesty has been pleased to Grant to the Governor and Council; How far this Ordinance, which in a Summary Way, Declares the Supreme Court of Judicature shall Judge all Cases Civil and Criminal by Laws unknown and unpublished to the People, is agreeable to the natural Rights of Mankind, I humbly submit; This much is certain, that it cannot long remain in Force, without a General Confusion and Discontent.

"Letter by Guy Carleton to Lord Shelburne" in Shortt & Doughty, above at 289–90. In the same letter, Carleton noted that French law remained resilient despite its subordination to another legal system: "The people notwithstanding continue to regulate their Transactions by Their Ancient Laws, tho' unknown and unauthorised in the Supreme Court, where most of these Transactions would be declared Invalid": above.

The Proclamation's prohibition of the taking of Indian lands angered American settlers because it was perceived as unjustly inhibiting the expansion of these colonies. Some have argued that the prohibition played a role in fuelling revolutionary sentiments. Resentment increased after the enactment in 1774 of the Quebec Act, 14 Geo III c 83, which extended the territory of Quebec well beyond the St Lawrence Valley—that is, down to the Ohio Valley. As a result, the American colonies became effectively surrounded, which their settlers saw as an affront.

The Quebec Act also restored French laws, referred to as the "Laws of Canada," in "all Matters of Controversy, relative to Property and Civil Rights." Citing "Certainty and Lenity," and "Benefits and Advantages" from the use of the "Criminal Law of England," the Act provided for its continuation in the province. The pleadings of Guy Carleton, supported by petitions from the "Canadiens," had prevailed over British merchants based in Canada and the Quebec attorney general who opposed restoration of French civil law. While the Act heralded the return of the civilian tradition in Canada, it repealed the requirement that all persons appointed to the council of the colony abjure by oath the Catholic dogma of transubstantiation. In practice, that requirement, based on imperial public law introduced in the colony, had prevented all Catholics and, consequently, most of the French inhabitants, from taking part in the administration of the colony.

The Quebec Act constitutes one of the most important moments in Canada's constitutional history. It was significant both for what it achieved and what it provoked. First, as noted earlier, it may have contributed to the American Revolution. This, in turn, led to the exodus of numerous loyalists to Nova Scotia and Quebec, forever changing the visage of these colonies. Previously a colony with an essentially French Catholic population ruled by an English Protestant minority, the colony of Quebec became a locus of religious, ethnic, and linguistic competition. Second, and despite the pledge made by the king in 1763, the Quebec Act did not provide for the creation of a legislative assembly. This became a major concern after the emigration of American loyalists to Canada in the aftermath of the revolution. Indeed, all the British colonies from which they had emigrated had legislative assemblies at the end of the 17th century. The absence of such was cruelly resented from the moment they arrived in Canada.

Socio-demographic changes, as well as pressures for the creation of a legislative assembly, thus paved the way for a major constitutional change, which came about with the *Constitutional Act, 1791*, reprinted in RSC 1985, Appendix II, No 3. Its two main features were the division of Quebec into two distinct provinces, and the creation of legislative assemblies for both. Quebec was divided into Upper Canada, located west of the Ottawa River and north of Lake Ontario, where most of the Anglo-Protestant Loyalists had settled, and Lower Canada, where the huge majority of the population remained Franco-Catholic. The members of their respective legislative assemblies were to be elected by the eligible population; a legislative council would be comprised of appointed members. Twenty-eight years after the pledge made by the king in the *Royal Proclamation* of 1763, there began an era marked by a quest for self-government.

VI. TROUBLES IN THE COLONIES: THE QUEST FOR SELF-GOVERNMENT, THE REBELLIONS, AND THE UNION ACT OF 1840

Soon after the enactment of the *Constitutional Act, 1791*, conflicts between the legislative assemblies and the legislative councils erupted in both Canadas. The legislative councils opposed laws voted for by the legislative assemblies, spent moneys appropriated for certain purposes by the assemblies on other things, and constantly placed themselves in conflicts of interest. In sum, the executive branch of the state was completely unaccountable to the legislative branch. As well, there was no meaningful separation between the judiciary and the executive branches of government.

The problems were roughly the same in both Canadas. But the specific linguistic and religious fabric of Lower Canada increased the acrimony between the legislative council, essentially composed of English Protestants, and the legislative assembly, where the majority of members were French Catholics. The quest for self- and responsible government, and the particular problem that was posed by a French-speaking majority that perceived itself as forming a "Canadian nation," led some members of the British colonial elite to entertain ideas about the union of the Canadas. According to them, such a union would reinforce the power of the executive; strengthen London's grip over the colony; ease the defence of the colonies (which were potential military targets for the United States); eliminate the inconvenience of having to deal with an assembly controlled by a majority of French speakers; and, ultimately, facilitate the assimilation of the French population of Lower Canada. Although such projects, proposed in the early decades of the 19th century, did not immediately materialize, petitions in favour of responsible government emanating from both Canadas remained ignored by London. This led to a radicalization in the two colonies of the democrats, who were already influenced by republican ideas coming from the United States and, to a lesser extent, from France. London's insensitivity to their demands eventually led to armed rebellions in 1837-38, which were crushed, with particular ferocity in Lower Canada, by the British army.

Even though republican ideas enjoyed some popularity in both Canadas, they never appealed to a large enough segment of the population to significantly put in question British rule. The situation was once again more complex in Lower Canada, where the Catholic clergy, well aware of the anti-clerical tone of republicanism in France, took every possible step to ensure that the French population became immunized against the "corruption of liberalism" and submitted to the British Crown. That the overall population lent little concrete support to the rebellion movements led by Mackenzie in Upper Canada and by Papineau in Lower Canada seems to be evidence of a relatively weak penetration of the republican creed beyond a certain intellectual elite. This is not to say, however, that the larger population in both colonies did not support the principle of responsible government.

In the aftermath of the rebellions, Lord Durham was sent to Canada to examine the situation and to report to the Colonial Office and the Imperial Parliament. After five months in Canada, he tabled a report in which he proposed the legislative union of the two Canadas and the institution of responsible government. Durham acknowledged the existence of a Canadian nationality at the core of which were the French language and the Catholic religion. But he also saw in it the source of an irresolvable clash of "races" as well as an obstacle to the progress of a truly British colony. Given Anglo-Saxons' "superior knowledge, energy, enterprise and wealth," it was a "vain endeavour to preserve a French-Canadian nationality in the midst of Anglo-American colonies and states": *The Report of the Earl of Durham* (London: Methuen, 1902) at 169. Having characterized the French inhabitants of Lower Canada as members of an inferior race, he recommended the erasure of their nationality, not only through informal means such as an increased British immigration, but also through formal means such as a legislative union where the British citizens would eventually form the majority.

This new majority would be largely unfettered. "The colonists may not always know what laws are best for them, or which of their countrymen are the fittest for conducting their affairs; but at least they have a greater interest in coming to a right judgment on these points, and will take greater pains to do so." Durham therefore recommended that "internal government of the colony" be placed "in the hands of the colonists themselves" save for the money bills, which would originate with the executive council, and a few other matters that "affect their relations with the mother country": *Durham Report*, above at 169 and 181. On the political and constitutional theory underlying Durham's report, see Janet Ajzenstat, *The Political Thought of Lord Durham* (Montreal: McGill-Queen's University Press, 1988).

Responding, in part, to Durham's suggestions, in 1840 the Imperial Parliament passed the *Union Act* (reprinted in RSC 1985, Appendix II, No 4), which united Lower and Upper Canada into a new entity called United Canada. Going beyond what Lord Durham had asked for, the *Union Act, 1840* provided that the parliamentary representation of Upper Canada (now Canada-West) and Lower Canada (now Canada-East) would be equal, in violation of the democratic principle of representation by population. (In 1840, the population of Canada-East was still higher than that of Canada-West.) Moreover, the *Union Act* merged the public debts of the former Upper and Lower Canadas, despite the fact that the debt of the former was much higher than that of the latter. The Act also declared English as the sole language of the legislative assembly, a provision that soon proved to be practically unenforceable. However, the civil law tradition continued to prevail in Canada-East, at least in matters of private law. Furthermore, the legislative council of the new province of Canada remained unelected and, contrary to what Durham had proposed, responsible government was not instituted. It was granted only in 1846. Fiercely opposed in Lower Canada, the unitary regime instituted by the *Union Act* soon proved to be extremely difficult to administer, as ethnic and religious disputes were reinforced by economic rivalries between Canada-East and Canada-West.

VII. CONFEDERATION

The failure of the *Union Act, 1840* was only one of the many complex factors that led to the proposal that the British North American colonies form a confederation, a proposal that became a reality with the enactment of the *British North America Act, 1867* (BNA Act). The first excerpt below describes the circumstances leading up to Confederation, as well as some of the strategic and economic factors at play. The next reading examines the reactions of French Canadians to the proposed confederation.

Garth Stevenson, Unfulfilled Union: Canadian Federalism and National Unity

(Montreal: McGill-Queen's University Press, 1992) at 21-33
(footnotes omitted)

The event we call "Confederation" arose from a convergence of internal and external circumstances, and probably no single factor can explain it. Its complexity is enhanced by the fact that it simultaneously did three things, none of which would have been possible without the others. It reorganized the internal government of "Canada" in the pre-Confederation sense of Ontario and Quebec; it united this entity with New Brunswick and Nova Scotia; and it provided for the expansion of the federalized state westward to the Pacific. In the process of doing so it paved the way for economic development, and ended a potentially dangerous power vacuum in the northern part of North America.

The Internal Difficulties of the Province of Canada

On the recommendation of Lord Durham's report, the Province of Canada was established in 1841 by uniting the two colonies of Lower and Upper Canada. The distinction between the civil law of the lower province and the common law of the upper one was retained. Also, despite a brief attempt to impose unilingualism (one of Durham's recommendations), the status of the French language was eventually recognized. At about the same time, the principle was established that the government was dependent on the confidence and support of the elected lower house of the legislature.

In spite of these developments, the governing of both English-speaking and French-speaking Canadians within a unitary or at least a quasi-unitary state proved difficult, and discontent increased on both sides. ...

Each section of the province harboured the belief that it was being constrained and dictated to by the other. Since they were of roughly equal size and had equal representation in Parliament, such a belief was equally plausible on both sides. Once the western half became the more populous, its residents found the equal representation of the two sections to be an intolerable affront to liberal principles, although the injustice of it had somehow managed to escape their notice when they were a minority.

Ethnic and religious antagonisms were exacerbated by many of the issues which came before the legislature, and were reinforced by divergences of economic interest between the sections. Farmers and businessmen in the western part of the province, like their counterparts in the larger western hinterland of a later date, resented the commercial hegemony of Montreal and the measures that were taken with the aim of funneling their commerce through that city.

For all of these reasons it became increasingly difficult to construct governments that could retain the confidence of the lower house. By about 1857 things were widely believed to be approaching an impasse, and the territorial expansion of Canada began to be viewed as a possible means of escape from its difficulties, although this probably would not have been considered had not economic motives (which will be considered subsequently) pointed in the same direction. Expansion might be either eastward, to include the other British colonies on the Atlantic seaboard, or westward, to absorb the inland fur-trading empire of the Hudson's Bay Company, with each half of the Province of Canada tending to prefer the alternative that corresponded to its own point of the compass. Expansion in both directions at once might satisfy both sections, permit federalism (a separate government for each section with a central government over both) while avoiding the dangers of a double-headed monstrosity, and enable French-speaking Canadians to accept representation by population in the lower house at the same time as the more onerous conventions of the existing system could be safely eliminated.

Strategic and Economic Motives

The change that took place in the new decade was the emergence of an external threat to the security of British North America. ...

The threat, of course, came from the United States. British relations with the government in Washington had deteriorated during the American Civil War, a situation for which the British were more to blame than the Americans (and for which the Canadians bore little if any responsibility), but which exposed Canada to the threat of an American invasion in the event of war. By 1864 it was apparent that the industrial North would win the war and incorporate the southern states back into the union, presenting the British Empire with a very powerful and unfriendly opponent. Another

source of danger inherent in the outcome of the Civil War was the removal of the controversy over slavery from the agenda of American politics. Previously that controversy had prevented the United States from expanding northward, since to do so would have upset the delicate balance between slave states and free states. This obstacle to the annexation of Canada had now disappeared. Although the British government had discouraged efforts toward Confederation until 1864, it reversed itself in that year for reasons of military defence and security. A united British North America, especially one tied together by railways, would be more defensible and could bear a larger share of the costs of its own defence. In particular, the port of Halifax with its British naval base could be used to send British troops to Canada even when the St. Lawrence was frozen, and without the necessity of crossing American soil.

The American threat also made the need for Confederation more apparent to the colonists themselves, or at least to those who were exposed to it. ...

All historians of Confederation have emphasized, and with good reason, the decisive role of capitalist entrepreneurs and their interests in bringing about Confederation. There were few countervailing interests at a time when the working class was largely disenfranchised, the salaried middle class hardly existed, and prominent politicians were directly involved in railways, banks, and insurance companies to an extent that would seem scandalous today. Confederation was no different from contemporaneous nation-building ventures elsewhere or from the formation of the United States a century before with respect to the decisive role played by the entrepreneurial class. ...

Montreal had been the chief Canadian stronghold of merchant capital in the heyday of British mercantilism before 1849, and it was still the largest city and leading economic centre, as it remained for some time. The Bank of Montreal was the dominant financial institution and included the government of the Province of Canada among its customers. The Montreal bourgeoisie, and their political spokesmen, like Galt and Cartier, were particularly interested in uniting with the Maritimes and building the Intercolonial Railway, which would funnel more trade through their city.

Toronto, although then much smaller than Montreal, was rising rapidly as an economic centre. Its importance in the Confederation movement has been emphasized by J.M.S. Careless in his biography of George Brown. A number of Toronto businessmen, including Brown, had recently organized the Bank of Commerce as a counterweight to the Bank of Montreal. Manufacturing was also developing in and around the city and the production of railway locomotives in Toronto had begun as early as 1853, long before it began in most European countries. Toronto businessmen had little interest in the Maritimes, but looked with increasing enthusiasm toward the West, which they viewed as potentially a vast extension of Toronto's agricultural hinterland in Upper Canada. ...

This complex of interests was tied together by the Great Coalition of 1864. George Brown, the spokesman for Toronto business, joined forces with John A. Macdonald, whose political allies included Cartier and Galt, the spokesmen for Montreal business. Brown accepted expansion to the east, Cartier accepted expansion to the west, and Macdonald accepted federalism, despite serious reservations (even though he had been a long-time supporter of uniting the colonies). Macdonald's preference for a unitary state, which he called a "legislative union," was consistent with his relative detachment from specifically regional interests, part of the secret of his political success. However, a federal union was the only kind that could possibly be acceptable to French Canadians or Maritimers, and Brown shrewdly understood that a federal state would be "capable of gradual and efficient expansion in future years." The United States had convincingly demonstrated that federalism was ideally suited to facilitate the westward course of empire. ...

An additional economic motive for Confederation, which the Maritimes shared with the Province of Canada, was provided by the expectation that the United States would terminate its reciprocal trade agreement with the colonies, as it actually did in 1866. This forced all the colonies to reorient their trade on an east-west rather than a north-south basis. It threatened to end the arrangements by which Canada had used American seaports for its trade with Britain during the winter months. It also meant that Maritime fishermen could no longer fish in American waters, and would need help to defend their own waters from American encroachments. ...

The Terms of Union

The terms of what became Canada's constitution reflected both the diversity of interests and motives behind Confederation and the ideological preferences of the colonial politicians who attended the conferences at Quebec in 1865 and London in 1866. Prominent among these motives were enthusiasm for "a Constitution similar in Principle to that of the United Kingdom," a phrase which appears in the preamble to the *British North America Act*, and a desire to avoid what were considered the undesirable aspects of the American constitution. John A. Macdonald in particular was obsessed with the belief, a somewhat superficial one for a man so shrewd in other respects, that the American Civil War might have been avoided if the American constitution had granted only limited and specified powers to the individual states, rather than leaving them with all powers not granted to the federal government. He acknowledged that the political circumstances in 1787 had probably left the Americans with no alternative, but he was determined to avoid the same mistake himself.

Fortunately for Macdonald, circumstances were more propitious for him than they had been for Alexander Hamilton, whose views on federalism and on other political subjects had been very similar to his own. The forces of agrarian radicalism were much weaker in British North America than they had been in the thirteen colonies, and their political representatives, being on the opposition benches, were excluded from the conferences that drafted Canada's constitution. Canada also lacked any equivalent of the southern plantation owners, who had opposed the centralization desired by the Federalist merchants. In addition, there were no vested interests attached to provincial autonomy in what became Ontario and Quebec, since the governments of those provinces did not exist between 1841 and 1867. It was both easy and logical to give specifically defined powers to those governments which were to be established, while leaving the general, unspecified, or "residual" power with the government that already existed, that of Canada.

Only in the Maritimes did Macdonald have to deal with already existing governments that would have to be enticed into accepting a completely new level of government superior to themselves. Even there he was aided by discreet pressure from London and the fact that some of the Maritimers, like Charles Tupper, shared his preference for a centralized regime. The chief concerns of the Maritime delegates at the conferences were provincial revenues and representation in the Senate, rather than the division of legislative powers. The demands for provincial legislative powers came mainly from the French Canadians, for whom the establishment of a Quebec legislature was the major attraction of Confederation. The powers which they demanded for that legislature were mainly related to social institutions, education, the family, and the legal system. Even the celebrated provincial jurisdiction over "property and civil rights," expressly designed to protect Quebec's legal system by repeating a phrase first used in the *Quebec Act of 1774*, at first included the qualifying phrase "excepting portions thereof assigned to the General Parliament." These words were removed at the last moment by the British Colonial Office.

The stated preference for "a Constitution similar in Principle to that of the United Kingdom" combined a widely shared sentiment with more pragmatic and mundane considerations. Access to British capital and markets was essential to the economic objectives of Confederation, and British assistance would be needed to defend Canada against the United States. A firm assertion of loyalty to British principles might encourage pro-Canadian sentiments in the United Kingdom, where they were not particularly strong. Many influential people in the United Kingdom believed that the colonies were economically worthless and a source of friction with the United States, and that they should be encouraged to sever their connection with Britain.

British principles also had certain implications for the constitution itself. Monarchy, which is based on the principle that political authority flows from the top downward, had never before been combined with federalism, and in a sense they were logically incompatible. However, it suited the kind of union that Macdonald and most of his colleagues wanted to create. Ottawa would be subordinate to London and the provinces would be subordinate to Ottawa, with a British governor general in Ottawa and a federally appointed lieutenant-governor in each province, each of whom would have the power to "reserve" legislation for the final decision of the government that had appointed him. Both London and Ottawa could disallow the acts of the level of government immediately below them, even though such acts had received the assent of the governor general or lieutenant-governor. The judicial system revealed similar hierarchical notions. Ottawa would appoint the judges of the provincial courts, and it was understood, although not stated, that the final court of appeal would be the Judicial Committee of the (Imperial) Privy Council, which already exercised that function for all of the colonies.

The heart of any federal constitution is the division of legislative powers. In the Quebec and London resolutions, and in the *BNA Act* (which followed their provisions quite closely), powers were allocated so that the central government could carry out the major objectives of Confederation. For reasons already referred to, Parliament was given all legislative powers not specifically assigned to the provincial legislatures. The Quebec Resolutions described this as a power to make laws for "the peace, welfare, and good government of Canada," consciously or unconsciously recalling the "general welfare" clause of the United States constitution. Regrettably, the Colonial Office later changed this to "Peace, Order, and good Government," contributing to a lasting myth that the Fathers of Confederation were less "liberal," whatever that may mean, than their American counterparts.

The federal government was given unlimited power to tax and borrow, the latter being particularly important at a time when colonial governments depended on the London bond market. Tariff and commercial policy would also be under its control, as would the banking system and the currency, the postal service, weights and measures, and patents and copyrights. Jurisdiction over agriculture (and immigration) was shared with the provinces, while, at the London Conference, fisheries were placed under federal jurisdiction, for reasons already discussed. For the sake of uniformity the criminal law was placed under federal control, a departure from American practice that perhaps reflected Macdonald's experience as a defence counsel in criminal cases.

The provisions for transportation, an essential part of the economics of Confederation, were complex. The federal government was given jurisdiction over navigation and shipping, and was also required to begin building the Intercolonial Railway within six months of the union and to complete it as quickly as possible. Macdonald originally proposed to list all the means of interprovincial communication that were placed under federal authority, but roads and bridges were excluded at the suggestion of Leonard Tilley, the Premier of New Brunswick. This still left the federal government

with steamships, railways, canals, telegraphs, and other works and undertakings connecting two or more provinces, and with steamships connecting Canada with other countries. Parliament could also assume jurisdiction over "works" entirely within one province by declaring them to be for the general advantage of Canada. In the legislative debates on the Quebec Resolutions, Macdonald cited the Welland Canal between Lake Erie and Lake Ontario as an example of the "works" that would fall under this provision.

The provinces were given responsibility for the administration of justice, apart from criminal procedure, and the organization of the courts. They would also be responsible for municipal institutions, which were well developed in the Province of Canada although not in the Maritimes. The enumerated provincial responsibilities included those matters which were then viewed as defining the distinctiveness of French Canada: education, the family, social institutions, and the law relating to "property and civil rights." The prospect of provincial control over such matters was welcomed by the French Canadian clergy, who undoubtedly foresaw that they would be able to exercise considerable influence over Quebec's provincial legislature. Religious minorities whose rights to separate educational systems were already assured "by law," would be protected from provincial interference with those rights. This provision protected the Protestant anglophones of Quebec and the Roman Catholics—mainly Irish at that time—of Ontario. Its applicability elsewhere was less clear; a few years after Confederation, New Brunswick succeeded in abolishing its Roman Catholic separate school system on the grounds that the latter existed only by custom, and not by law.

The provincial governments were given certain powers over economic matters, which proved important later on. They shared jurisdiction over agriculture with the federal government, could borrow on their own credit, could incorporate companies "for provincial objects," and controlled roads, bridges, and whatever other "works" were not under federal jurisdiction.

The provinces were also given ownership of natural resources and the power to legislate concerning the public lands and the timber on those lands. With hindsight these provisions would appear to have been seriously mistaken, if the intention was to ensure the preponderance of the federal government. However, mineral resources, apart from Nova Scotia's coal, were then of little importance, and the timber trade, which had dominated British America for fifty years, was declining by the 1860s, the victim both of its own failure to conserve the resource on which it was based and of British and American actions that restricted its access to markets.

The fact that provincial powers and revenues were, by design, so closely associated with this declining industry may explain Macdonald's confident belief that the provincial level of government would also decline in importance. The future apparently belonged to agriculture, commerce, manufacturing, and the opening of the West, all of which would be mainly or exclusively under federal jurisdiction. ...

The terms of union clearly embodied a very centralist concept of federalism, which was perpetuated after 1867 when most of the politicians who had drafted the terms pursued their careers at the federal level, where they dominated Canadian politics for some time. The chief among them, of course, was John A. Macdonald, the principal author of the Quebec Resolutions and the *BNA Act*. As Prime Minister from 1867 until 1873, and again from 1878 until his death in 1891, Macdonald continued to expound the views that had inspired his constitutional draftsmanship, while at the same time he attempted to put them into practice. The Macdonaldian version of federalism, although it was increasingly challenged in the last years of Macdonald's life, thus enjoyed a more or less official status at the outset.

Macdonald was well aware, as was every other knowledgeable observer of Canadian life, that the new Dominion was a fragile and artificial creation whose impressive constitutional facade contrasted with a very limited degree of social and economic integration. He did not, however, consider the diversity of Canadian society and the persistence of local attachments to be an argument in favour of political decentralization. On the contrary, it was precisely these circumstances that made a strong central government essential. As a Hamiltonian conservative, Macdonald believed that the state could and should play an autonomous and creative role, rather than merely reflecting the social diversity that lay beneath it.

NOTE

As the author alludes to, there is a persistent trope that the United States' constitution is characterized by a commitment to "life, liberty and the pursuit of happiness," while Canada's is limited to a desire for "peace, order and good government" (POGG). This is simply inaccurate. As you will see, POGG (discussed most closely in Chapter 9, Peace, Order, and Good Government) is a discrete power of the federal order of government. It has never defined Canada's constitution, whether in 1867, 1982 or, indeed, today.

Arthur I Silver, The French Canadian Idea of Confederation, 1864-1900

(Toronto: University of Toronto Press, 1982) at 33-50 (footnotes omitted)

When French Lower Canadians were called on to judge the proposed confederation of British North American provinces, the first thing they wanted to know was what effect it would have on their own nationality. Before deciding whether or not they approved, they wanted to hear "what guarantees will be offered for the future of the French-Canadian nationality, to which we are attached above all else." ... [C]oncern for the French-Canadian nationality had geographical implications, ... Canadians in the 1860s generally considered French Canada and Lower Canada to be equivalent. When French Canadians spoke of their *patrie*, their homeland, they were invariably referring to Quebec. Even the word *Canada*, as they used it, usually referred to the lower province, or, even more specifically, to the valley of the St. Lawrence, that ancient home of French civilization in America, whose special status went back to the seventeenth century. ...

Throughout the discussion of Confederation, between 1864 and 1867, there ran the assumption that French Canada was a geographical as well as an ethnic entity, forming, as the *Revue Canadienne* pointed out optimistically, "the most considerable, the most homogeneous, and the most regularly constituted population group" in the whole Confederation. ...

It followed from this question that provincial autonomy was to be sought in the proposed constitution as a key safeguard of the interests of French Canada. "We must never forget," asserted the *Gazette de Sorel*, "that French Canadians need more reassurance than the other provinces for their civil and religious immunities. ..." But since French Canada was a province, its immunities were to be protected by provincial autonomy; hence, "this point is important above all for Lower Canada. ..."

On this key issue, French Canadians felt themselves to have different interests from those of other British North Americans. Thus, Cartier's organ [Cartier's newspaper, *La Minerve*]:

The English ... have nothing to fear from the central government, and their first concern is to ensure its proper functioning. This is what they base their hopes upon, and the need for strong local governments only takes second place in their minds.

The French press, on the contrary, feels that guarantees for the particular autonomy of our nationality must come before all else in the federal constitution. It sees the whole system as based on these very guarantees. ...

A confederation would be a fine thing, but only "if it limited as much as possible the rights of the federal government, to general matters, and left complete independence to the local governments." ...

While most papers did not go so far as to support the provincial sovereignty which that last implied, they did opt for co-ordinate sovereignty:

The federal power will be sovereign, no doubt, but it will have power only over certain general questions clearly defined by the constitution.

This is the only plan of confederation which Lower Canada can accept. ... The two levels of government must both be sovereign, each within its jurisdiction as clearly defined by the constitution.

What, after all, could be simpler than that each power, federal or provincial, should have complete control of its own field?

Isn't that perfectly possible without having the local legislatures derive their powers from the central legislature or vice versa? Isn't it possible for each of these bodies to have perfect independence within the scope of its own jurisdiction, neither one being able to invade the jurisdiction of the other?

To be sure, the fathers of Confederation were aware that French Canadians would reject complete centralization. John A. Macdonald told the Assembly that though he would have preferred a legislative union, he realized it would be unacceptable to French Canadians. Nevertheless, he felt the Quebec Resolutions did not provide for a real federalism, but would "give to the General Government the strength of a legislative and administrative union." They represented "the happy medium" between a legislative and a federal union, which, while providing guarantees for those who feared the former, would also give "us the strength of a Legislative union." In short, he appeared to understand the Quebec scheme to provide for the closest thing possible to a legislative union, saving certain guarantees for the French Canadians' "language, nationality and religion."

This interpretation was hotly rejected by French Canadians of both parties, including those who spoke for Macdonald's partner, Cartier:

Whatever guarantees may be offered here, Lower Canada will never consent to allowing its particular interests to be regulated by the inhabitants of the other provinces. ... We want a solid constitution ... but we demand above all perfect freedom and authority for the provinces to run their own internal affairs.

Let there be no mistake about it: anything close to a legislative union "cannot and will not be accepted by the French-Canadian population." A centralized union would be fatal to the French-Canadian nationality. The *Courrier de St-Hyacinthe*, in fact, summed up the whole French-Canadian position when it said:

But whatever guarantees they decide to offer us, we cannot accept any union other than a federal union based on the well-understood principles of confederations.

• • •

There was agreement between Bleus and Rouges [the major political groups] that the autonomy of a French-Canadian Lower Canada was the chief thing to be sought in any new constitution. Accordingly, the Confederation discussion revolved around whether or not the Quebec plan achieved that aim. As far as the opposition was concerned, it did not. The Rouges maintained that this was an "anglicizing bill," the latest in a line of attempts to bring about the "annihilation of the French race in Canada," and thus realize Lord Durham's wicked plans. And it would achieve this goal because it was not really a confederation at all, but a legislative union in disguise, a mere extension of the Union of 1840. "It is in vain," cried C.-S. Cherrier at a Rouge-sponsored rally, "that they try to disguise it under the name of confederation. ... This quasi legislative union is just a step toward a complete and absolute legislative union."

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In answering all [the] opposition arguments, the Bleus certainly did not attempt to defend the notion of a strong or dominant central government. But, they maintained, that was not at all what British North America was going to get. Lower Canada, liberated from the forced Union of 1840, would become a distinct and autonomous province in a loose and decentralized Confederation—that was the real truth of the matter.

The defenders of Confederation refuted the opposition's arguments one after another. Did the Rouges speak of Rep by Pop? Why, any schoolboy ought to see the difference between Rep by Pop, which the Bleus had opposed as long as the legislative union remained, and a "confederation which would give us, first of all, local legislatures for the protection of our sectional interests, and then a federal legislature in which the most populous province would have a majority *only in the lower house*." As long as there was only a single legislature for the two Canadas, Rep by Pop would have put "our civil law and religious institutions at the mercy of the fanatics." But Confederation would eliminate that danger by creating a separate province of Quebec with its own distinct government:

We have a system of government which puts under the exclusive control of Lower Canada those questions which we did not want the fanatical partisans of Mr. Brown to deal with.

Since we have this guarantee, what difference does it make to us whether or not Upper Canada has more representatives than we in the Commons? Since the Commons will be concerned only with general questions of interest to all provinces and not at all with the particular affairs of Lower Canada, it's all the same to us, as a nationality, whether or not Upper Canada has more representation.

This was central to the Bleu picture of Confederation: all questions affecting the French-Canadian nationality as such would be dealt with at Quebec City, and Ottawa would be "powerless, if it should want to invade the territory reserved for the administration of the local governments." As for the questions to be dealt with at Ottawa, they might divide men as Liberals and Conservatives, but not as French and English Canadians. "In the [federal] Parliament," said Hector Langevin, "there will be no questions of race, nationality, religion or locality, as this Legislature will only be charged with the settlement of the great general questions which will interest alike the whole Confederacy and not one locality only." Cartier made the same point when he said that "in the questions which will be submitted to the Federal parliament, there will be no more danger to the rights and privileges of the French Canadians than to those of the Scotch, English or Irish." Or, as his organ, *La Minerve*, put it, Ottawa would have jurisdiction only over those matters "in which the interests of everyone,

French Canadians, English, or Scotch, are identical." For the rest—for everything which concerned the French Canadians as French Canadians—for the protection and promotion of their national interests and institutions, they would have their own province with their own parliament and their own government.

• • •

[I]n the federal alliance thus formed, Quebec was to be the French-Canadian country, working together with the others on common projects, but always autonomous in the promotion and embodiment of the French-Canadian nationality. "Our ambitions," wrote a Bleu editor, "will not centre on the federal government, but will have their natural focus in our local legislature; this we regard as fundamental for ourselves." This was, no doubt, an exaggerated position, like the statement of de Niverville in the Canadian legislature, but what it exaggerated was the general tendency of the Confederationist propaganda. It underlined the Quebec-centredness of French Canada's approach to Confederation, and the degree to which French Quebec's separateness and autonomy were central to French-Canadian acceptance of the new régime. [Emphasis in original.]

Though much of the *Constitution Act, 1867* was the product of negotiations between Canadian and Maritime political leadership, once the principal negotiators headed to London to finalize the draft resolutions, the text was altered under the influence of the British Colonial Office. The following extract traces the salient changes to the distribution of legislative power from the initial draft to the final text.

John T Saywell, The Lawmakers: Judicial Power and the Shaping of Canadian Federalism

(Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2002) at 4-12 (footnotes omitted)

Although the political reconstruction of the colonies had long been discussed, by 1864 "such was the opposition between the two sections of the province, such was the danger of impending anarchy," said John A. Macdonald, that some solution was imperative. When the ninth ministry in a decade tottered to its fall in the spring of 1864, ancient animosities were set aside as George Brown agreed to a coalition with Macdonald and George-Étienne Cartier, whose purpose was to seek a federal union of all British North America or, that failing, a federal union of the Canadas.

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By the end of August the federal scheme was sufficiently well developed to be placed before the Maritime delegations who coincidentally had gathered at Charlottetown to discuss Maritime union. Press reports suggest that the proposed distribution of legislative powers anticipated the enumerations that would emerge in the Quebec Resolutions. The Canadians were also emphatic that the federal government would possess the residual power. When E.B. Chandler of New Brunswick proposed the reverse at Quebec, Charles Tupper interjected:

I have heard Mr. Chandler's argument with surprise. Powers undefined must rest somewhere. Those who were at Charlottetown will remember that it was fully specified that all the powers not given to the Local should be reserved to the Federal Government. This was stated as being a prominent feature of the Canadian scheme, and it was said then that it was desirable to have a plan contrary to that adopted by the

United States. It was a fundamental principle laid down by Canada and the basis of our deliberations.

Publicly, Macdonald stated in a speech at Halifax after the conference that all the dangers inherent in the American system would be avoided "if we can agree upon forming a strong central government—a great central legislature—a constitution for a Union which will have all the rights of sovereignty except those given to the local governments."

The Maritimers were at least sufficiently intrigued to give further consideration to the Canadian proposal for a broader federal union. For two weeks in October 1864, delegates from the four colonies put the finishing touches on what was essentially a Canadian agreement. Apart from some debate over the location of the residual authority, even the wisdom of adding the enumerations to the federal residual authority, there was surprisingly little discussion about the distribution of legislative jurisdiction. There seemed to be general agreement with the principles Macdonald outlined when the conference opened that the "primary error" in the American constitution must be reversed "by strengthening the General Government and conferring on the provincial bodies only such powers as may be required for local purposes. All sectional prejudices and interests can be legislated by local legislatures" while the minority would be protected "by having a powerful central government." But "great caution" was necessary for "the people of every section must feel they are protected, and by no overstraining of central authority should such guarantees be overridden." The constitution would be based on an imperial act, and "any question as to overriding sectional matters determined by 'is it legal or not?'" The judicial tribunals of Great Britain would settle any such difficulties should they occur."

What became the first version of sections 91 and 92 of the 1867 constitution emerged in the Quebec Resolutions as follows:

29. The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:

[Then followed a list of subjects, numbered 1 through 36, much like those in s 91 and including what became s 94.]

• • •

37. And Generally respecting all matters of a general character, not specially and exclusively reserved for the Local Governments and Legislatures.

• • •

43. The Local Legislatures shall have power to make Laws respecting the following subjects [then followed a list similar to that in s 92 and including the following subjects]:

• • •

15. Property and civil rights, excepting those portions thereof assigned to the General Parliament.

18. And generally all matters of a private or local nature, not assigned to the General Parliament.

The heads of the two sections are distinct, with the federal government's enumerations unqualified and prefaced by the word "especially" but the tails are identical in providing a home for matters either general or local not otherwise captured by the preceding enumerations and not to be found among those reserved for the other jurisdiction. (The so-called "sovereignty" of the central government apparently was

to be found in the head with the traditional enacting clause in which the imperial government had conveyed legislative power to colonial legislatures, although Macdonald seemed to find it in the tail or more generally in the breadth and importance of federal jurisdiction.)

The debate on the Quebec Resolutions in the Canadian Legislative Assembly in 1865 casts less light than shadow on precisely what had been accomplished, perhaps because amendments were prohibited: it was all or nothing. Macdonald maintained that the federal government had "all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature." The 37th subsection, he added, "confers on the General Legislature the general mass of sovereign legislation ... This is precisely the provision which is wanting in the Constitution of the United States."

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It remained for Joseph Cauchon to lecture ... Macdonald ... on the nature of sovereignty in the new federation. If sovereignty existed, "it must be in the Constitution. If it is not to be found there, it is because it does not exist." In the proposed federation "there will be no absolute sovereign power, each legislature having its distinct and independent attributes, not proceeding from one to the other by delegation, either from above or from below. The Federal Parliament will have legislative sovereign power in all questions submitted to its control in the Constitution. So also the local legislatures will be sovereign in all matters which are specially assigned to them." And, as in the United States, disputes between them would be settled by the courts.

After six weeks of partisan debate in February and March 1865, the Quebec Resolutions were approved by a vote of forty-five to fifteen in the Legislative Council and ninety-one to thirty-three in the Assembly. It was not until December 1866, however, that the delegates from Canada, New Brunswick, and Nova Scotia were able to meet in London to draft the final resolutions for submission to the imperial government. On Boxing Day 1866, after three weeks of work and play, but with the Quebec Resolutions virtually unchanged, Macdonald sent the London Resolutions to Lord Carnarvon ... to be embodied in an act creating the Canadian federation.

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... As discussion on the drafts began late in January 1867, Cartier and Hector Langevin were summoned to a meeting to face Lord Carnarvon, the new colonial secretary, Lord Monck, the governor general, and senior officials of the Colonial Office in a futile attempt to get them to agree to some special guarantees for their distinct society, presumably in return for some weakening of provincial jurisdiction over property and civil rights (or conceivably even its removal from the provincial enumerations). ...

Shortly after receiving the Quebec Resolutions, [the colonial secretary, Edward] Cardwell had set Sir Francis Reilly, "our best draughtsman," to work on a bill. Reilly was instructed to "get rid of some of the ambiguities" and was unquestionably made aware that Cardwell and the cabinet wanted "the Local Legislatures to dwindle down towards the Municipal as much as possible." Lord Carnarvon, who succeeded Cardwell in the summer of 1866, informed Cardwell (and certainly Reilly) that "my foremost object wd. be to strengthen, as far as is practicable, the central govt. against the exclusive power or encroachments of the local administration." Reilly had completed most of his first draft before the London Conference began in December 1866.

Reilly radically altered the structure of what became section 91. At its head he placed the now familiar enacting clause, an unambiguous assertion of residual legislative jurisdiction:

It shall be lawful for Her Majesty, Her Heirs and Successors, by and with the Advice and Consent of the Houses of Parliament of the United Colony, to make laws for the Peace, Order and good Government of the United Colony and of the several Provinces, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to Provincial Legislation.

He followed this with a declaratory clause:

and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that the Legislative Authority of the Parliament of the United Colony extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ...

The federal enumerations remained largely as they were in the resolutions. However, Reilly made two significant changes in the provincial enumerations. He removed the limitation on "property and civil rights"—"excepting those portions thereof assigned to the General Parliament" (which had been in the resolutions)—and completely eliminated the enumeration "matters of a local or private nature." Obviously well aware of the enormous potential of the breadth of property and civil rights with the qualification removed, Reilly added a very emphatic deeming clause at the end of what became section 91:

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Subject of Property and Civil Rights comprised in the enumeration of the Classes of Subjects by this Act assigned exclusively to Provincial Legislation.

After receiving the London Resolutions, Reilly touched up his draft and sent it to Carnarvon on 17 January 1867.

For two weeks, draft followed draft. "The difficulties, the suggestions, the amendments during the last week have been endless," Carnarvon informed the prime minister on 6 February. Three days later, the draughtsmen, Reilly and the colonial attorneys general, finished what Sir Joseph Pope called the "final draft." The enacting and declaratory clauses remained as in Reilly's draft; the deeming clause, which had been in and out, was in to protect against an interpretation of property and civil rights which could encroach on the federal enumerations; and matters "local and private," which had been in and out, was out. However, it was not until six o'clock on 12 February, when Carnarvon moved first reading in the House of Lords, that the real final draft was completed. . . .

In the three days after 9 February, three unquestionably interrelated changes were made to sections 91 and 92. Provincial jurisdiction over "generally matters of a merely local and private nature" had reappeared without the qualification in the Quebec and London resolutions but with the addition of the word "merely." Provincial jurisdiction over property and civil rights was listed without qualification. There were, however, two critically important additions and alterations in section 91. The exclusivity and paramountcy of the federal enumerations had been reinforced in the declaratory clause by the addition of italicized words:

... and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (*notwithstanding anything in this Act*)

the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ...

The second was an alteration in the application of the deeming clause, which had previously been used to protect against property and civil rights. The draftsmen obviously believed that the reinforced declaratory clause adequately protected all federal enumerations against all provincial enumerations, including property and civil rights. Although it may not have been necessary, they used the deeming clause as an additional safeguard—with the singular “Class” and the words “comprised in” unchanged—to refer explicitly to “Class of Matters of a local or private Nature comprised in the Enumerations of the Classes of Subjects assigned exclusively to the Legislatures of the Provinces.” No other plausible conclusions about the purpose and the interrelationship of the new provisions of the act can be reached on the basis of the drafting history and the language used.

The drafting in London had provided a structural coherence, or logic, to the relationship between sections 91 and 92. Moreover, Reilly had also created a sequential approach to determining the appropriate home for federal or provincial legislation. The Quebec Resolutions had given each jurisdiction power to make laws “respecting subjects” at the head of their respective sections and also “generally respecting all matters” of either a general or local nature at the tail. In his first draft Reilly had empowered governments to make laws “in relation to matters,” not subjects, “coming within” the enumerated powers which he categorized as “Classes of Subjects.” The sequence was first to identify the matter and then determine the “class of subjects” within which it came. Only at that stage might the relationship of sections 91 and 92 be critical in the allocation of jurisdiction.

Reilly and his Canadian associates in London had also made the exclusivity of the legislative jurisdiction of both levels of government much clearer than in the Quebec Resolutions. Within their allocated sphere, however they might be determined, both were autonomous and supreme. Jurisdictionally, coordinate or classical federalism was written into the constitution. The provision, based on the imperial model but with an undefined purpose, that the federal government could disallow provincial legislation qualified that legislative autonomy, but it could be exercised only at the discretion of the executive and was thus a matter of politics or policy, not of law, and its use was not justiciable. It would be the function of the courts to police the boundaries separating provincial and federal legislative jurisdiction.

NOTES

1. Was the Canada created by the BNA Act a true federal state? That depends, of course, on the attributes that a country must possess in order for it to qualify for that designation. What those attributes are, or should be, is a matter that scholars of federalism have debated for a long time. One view is that they include the following: (1) a division of legislative powers between two independent orders of government of coordinate (or equal) status, one national and the other regional; (2) which division of powers cannot be altered by the unilateral action of either order; and (3) which division of powers is protected and enforced by an impartial and independent arbiter. Assuming for the sake of argument that those are the appropriate attributes, did the Canada of 1867 possess them? If not, in what respects did it fall short?

2. When you have finished reading the remaining chapters of Part Two, Federalism in this casebook, ask yourself whether the Canada of today is any closer to being a true federal state (as defined in note 1) than the Canada of 1867.

3. Paul Romney emphasizes that "general" residual authority was allocated to both levels of government in the Quebec Resolutions. Only after the text went through several drafts was local residuary authority restored to the provinces in s 92(16). Without this history in mind, the final text left the impression that the federal government alone had residual authority. This was not the intention of the framers, Romney maintains, although, as you will see in the chapters that follow, the place where residual authority resides becomes a matter of some controversy: see Paul Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999) at 100-2.

A NOTE ON QUEBEC'S CIVIL CODE

Recall that in the 1760 *Articles of Capitulation of Montreal*, above, local laws and customs were preserved "according to the custom of Paris." The *Coutume de Paris* has been described as Quebec's first civil code:

Although no more than the body of customary law applicable to Paris and its environs, it had in fact attained in France, by the end of the sixteenth century, the status of the preeminent French custom. It was, in effect, a "common law" (*droit commun coutumier*) of Northern France and, as such, a logical choice for extension to a colony, even though the majority of the population in Canada came from areas other than Paris itself. In its final written redaction of 1580, however, it was far from providing a complete body of law.

See Martin Boodman, JEC Brierly & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 8.

The *Royal Proclamation* of 1763 imposed British civil and criminal law in the new colony of Quebec. To the extent that it was intended to displace Canadian laws and customs, it was described as "impossible [to do], as it would be injurious": see William Paul McClure Kennedy & Gustave Lanctôt, eds, *Reports on the Law of Quebec 1767-1770* (Ottawa: FA Acland, 1931) at 64. The *Quebec Act* of 1774 restored what were then called the "Laws of Canada" in "all Matters of Controversy, relative to Property and Civil Rights." As it evolved over the years, the diversity of sources associated with civil law in Quebec gave rise to what Durham called

a patch-work of the results of the interference, at different times, of different legislative powers, each proceeding on utterly different and generally incomplete views, and each utterly regardless of the other. The law itself is a mass of incoherent and conflicting laws, part French, part English, and with the line between each very confusedly drawn.

See *The Report of the Earl of Durham* (London: Methuen, 1902) at 81.

It was this mélange of laws and customs, with its diversity of influences, that was codified in the first *Civil Code of Lower Canada* of 1866, 29 Vict, ch 4. The *Civil Code* encapsulates the legal principles to be accorded to persons, property, and civil obligations, subjects that in English-speaking Canada are ordinarily associated with the "private law" or "common law."

That codification of Lower Canada's civil law came about alongside the push toward Confederation is not entirely coincidental. George-Étienne Cartier, attorney general for Canada East and one of the fathers of Confederation, is credited with having spearheaded the effort. By the time the Code was adopted, the general outlines of the Confederation scheme were sufficiently well known that the drafters steered clear of some obvious federal subjects. As Thomas McCord noted in the first English-language edition of the Code:

In view of a union of the British American provinces, the codification of our laws is perhaps better calculated than any other available means to secure to Lower Canada an advantage which the proposed plan of confederation appears to have already contemplated, that of being the standard of assimilation and unity, and of entering into new political relations without undergoing disturbing alterations in her laws or institutions.

See Thomas McCord, *The Civil Code of Lower Canada Together with a Synopsis of the Changes in the Law Effected by the Civil Code of Lower Canada*, 2nd ed (Montreal: Dawson, 1880) at i-ii.

Mere months before Confederation, codification thus "imposed a simple, written, organized, revised, unified and universal civil law across what in 1867 became the province of Quebec": Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: McGill-Queen's University Press, 1994) at 178. This process crystallized, practically and symbolically, Quebec's status as a mixed legal jurisdiction and Canada's status as a bijural federation. For an examination of the legal and cultural challenges facing bijuralism and mixity in Canada and the role of law as an identification marker, see Jean-François Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada: Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* [The Solitudes of Bijuralism in Canada: An Essay on the Power Relations Between Legal Traditions and the Resilience of Identity Atavisms] (Montreal: Éditions Thémis, 2007). Whatever the motivations for codification, it was a prescient exercise and its significance in future constitutional confrontations is immeasurable.

As you read the cases that follow, consider to what degree the *Civil Code* represents a convenient compendium of laws typically falling within the provincial enumeration called "property and civil rights." Do the subjects covered by Quebec's *Civil Code* serve as a proxy for jurisdiction for all provinces over such private law matters? Might they also have been intended to serve as a model for "the standard of assimilation and unity" represented by Confederation and embodied in the promise of s 94, which provides for the federal uniformity of laws respecting property and civil rights for those provinces outside Quebec that provide their consent?

CHAPTER FOUR

THE LATE NINETEENTH CENTURY: THE COURTS SET AN INITIAL COURSE

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I. INTRODUCTION

This chapter deals with the period from Confederation to about 1900. During this period, Canada experienced a dramatic expansion to the east, west, and north. In 1870, two British territories to the west and north of Ontario and Quebec, Rupert's Land and the North-Western Territory, were admitted to Canada and, as territories, were made subject to the jurisdiction of Parliament. In the same year, the province of Manitoba was established by Parliament out of part of Rupert's Land, and the remainder of that territory and the North-Western Territory was renamed the Northwest Territories. British Columbia joined Confederation the following year, and Prince Edward Island joined Confederation in 1873.

Also during this period, for the first time, judges and scholars faced the task of interpreting the *British North America Act* (BNA Act). In retrospect, the decisions they had to make involved two large and overlapping topics: (1) the general nature of Canadian federalism, especially decisions about the nature of the provincial legislatures and executives; and (2) the division of legislative powers. Both are included here, although the second is our primary concern and the first appears only briefly, in the middle of the chapter. The chapter concludes with a description of the establishment of Manitoba in the aftermath of a rebellion by the Métis people, and a subsequent constitutional dispute over religious education in the province.

One element of the context needs to be described. Within a few years after Confederation, a struggle for power began between the Dominion, led throughout most of this period by Sir John A Macdonald and the Conservatives, and the provinces, led by Ontario and its Liberal premier, Oliver Mowat. This story has come to be known as the story of "provincial rights." The name is a wonderful example of the effective use of words: the provinces appropriated powerful constitutional words, evoking the glories of centuries of British constitutional history by claiming to be fighting for their "liberty" or their "rights": on the discourse of rights in the late 19th century, see Richard Risk & Robert C Vipond, "Rights Talk in Canada: 'The Good Sense and Right Feeling of the People'" (1996) 14:1 L & Hist Rev at 1.

The reasons for the struggle are debatable. Some historians, perhaps most, explain it as a product of political opportunism by the provinces and inconsistent with the agreement at Confederation; others, understanding Confederation differently, see it as a continuation of a long tradition of local autonomy. Whatever the reasons, a wide range of issues were involved,

including the financial terms of Confederation, the location of the boundary between Ontario and Manitoba, the nature of the provincial legislatures, the powers of the provincial executives, the use of the disallowance power, and the division of legislative powers. The contest took place on a wide range of battlegrounds, including newspapers, election platforms, legislatures, and courts. By 1900, Ontario and Mowat had triumphed. The results in the courts were a measure of that triumph—the provinces won most of the cases, by far.

The Canadian courts began to hear challenges to statutes on division-of-powers grounds in the late 1860s, and the legitimacy of their function was soon challenged in a New Brunswick case, *R v Chandler* (1868), 1 Hannay 556, 12 NBR 556. If legislative supremacy was a fundamental constitutional principle, how could courts review statutes and declare them to be void? WJ Ritchie, Chief Justice of New Brunswick, responded at 556-57:

We must recognize the undoubted legislative control of the British Parliament, and give full force and effect to the statute of the Supreme Legislature, and ignore the Act of the subordinate, when ... they are repugnant and in conflict. ... The constitution of the Dominion and the Provinces is now, to a great extent, a written one, and where under the terms of the *Union Act* the power to legislate is granted to be exercised exclusively by one body, the subject so exclusively assigned is as completely taken from the others, as if they had been expressly forbidden to act on it; and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body.

That is, courts would interpret the BNA Act to determine whether it gave the power to enact the statute. That courts would have the final say about the scope of constitutional authority seems, in hindsight, inevitable and inescapable. Yet some politicians and judges took issue with this judicial role, particularly in New Brunswick in the early 1870s, believing that judicial review under the BNA Act was inconsistent with the notion of legislative supremacy enshrined in the Act. Instead, some thoughtful voices believed that the power of disallowance was the only means of controlling legislative activity beyond the jurisdiction of the provinces: see below, "Note: The Power of Disallowance." These debates in New Brunswick suggest that judicial review in Canada was not inevitable. Chief Justice Ritchie's views, however, quickly took hold in the Canadian legal imagination, and thereafter judicial review was so firmly established that it needed little or no explanation or justification. This history is discussed in Gordon Bale, "Judicial Review and Confederation" in *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press, 1991) ch 10.

The decisions of provincial courts of appeal could be appealed to the Supreme Court of Canada, which was established in 1875, and from provincial courts of appeal or from the Supreme Court to the Privy Council. Eventually, and no later than 1900, the Privy Council came to be dominant, not only in the sense that it was the final Court of Appeal, but, as well, in the sense that it determined the outcomes and doctrine with little or no restraint or respect for the Canadian courts. It became the oracle to which Canadian lawyers and courts deferred for more than half a century.

Citizens Insurance Co of Canada v Parsons

(1881), 7 App Cas 96, [1881-5] All ER Rep 1179 (UKJCPC), rev'g *Citizens' and The Queen Insurance Cos v Parsons*, [4 SCR 215, 1880 CanLII 6](#)

[In 1876, Ontario enacted legislation about fire insurance policies that specified a set of standard conditions, which were "deemed to be a part of every policy of fire insurance" made in the province and which were to be "printed on every such policy with the heading 'Statutory Conditions.'" An insurer could vary or omit any of these

conditions if it added the variations or omissions to the policy "in conspicuous type and in ink of a different colour."

Parsons brought an action on two fire insurance policies, written by two different insurers, to recover compensation for losses caused by a fire in his hardware store. Several issues were raised, but the central one was whether the Ontario legislation was valid. The insurers claimed that Parsons had failed to disclose information required by conditions in the policies. Parsons claimed that the conditions were void because they did not comply with the legislation, and the insurers argued that the legislation was *ultra vires*.

This dispute was between private parties, Parsons and the insurance companies, but nonetheless Premier Mowat participated by arguing Ontario's position at the Supreme Court and by preparing a thorough analysis for the benefit of Parsons' counsel in the Privy Council. He participated in this sort of way in other cases throughout this period, and this effort may have been one of the reasons for his success.

In the trial Court and the Ontario Court of Appeal, the plaintiff's claim succeeded. The Supreme Court of Canada dismissed the insurers' appeal by a majority of four to two. Because the companies appealed again, to the Privy Council, the decision of the Supreme Court was of little or no use as a precedent in arguing subsequent cases and it did not become part, even a small part, of the fabric of the doctrine. Nonetheless, we have included some parts of its judgments here, and we have done the same throughout this part for other judgments of Canadian courts that suffered the same fate. Note that Ritchie CJ is the very same WJ Ritchie, former Chief Justice of New Brunswick, quoted earlier.]

RITCHIE CJ:

Is, then, such legislation as this with respect to the contract of insurance beyond the power of local legislation? I think at the outset I may affirm with confidence that the *B.N.A.* Act recognizes in the Dominion constitution and in the provincial constitutions a legislative sovereignty, if that is a proper expression to use, as independent and as exclusive in the one as in the other over the matters respectively confided to them, and the power of each must be equally respected by the other, or *ultra vires* legislation will necessarily be the result.

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I think the power of the Dominion parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the local legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, ... unless, indeed, the laws of the provincial legislatures should conflict with those of the Dominion parliament passed for the general regulation of trade and commerce. I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because parliament, in the plenary exercise of its power to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the local legislatures of their powers—the exercise of the powers of the local legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe.

The Act now under consideration is not, in my opinion, a regulation of trade and commerce; it deals with the contract of fire insurance, as between the insurer and the insured. That contract is simply a contract of indemnity against loss or damage by fire, whereby one party, in consideration of an immediate fixed payment, undertakes to pay or make good to the other any loss or damage by fire, which may happen during a fixed period to specified property, not exceeding the sum named as the limit of insurance.

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I scarcely know how one could better illustrate the exercise of the power of the local legislatures to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of incorporation, whereby a right to hold or deal with real or personal property in a province is granted, and whereby the civil right to contract and sue and to be sued as an individual in reference thereto is also granted. If a legislature possesses this power, ... it must have the right to limit and control the manner in which the property may be so dealt with, and as to the [terms and conditions of the] contracts in reference thereto

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I am happy to say I can foresee, and I fear, no evil effects whatever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision recognizes and sustains the legislative control of the Dominion parliament over all matters confided to its legislative jurisdiction, it, at the same time, preserves to the local legislatures those rights and powers conferred on them by the *B.N.A. Act*, and which a contrary decision would, in my opinion, in effect, substantially, or, to a very large extent, sweep away.

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GWYNNE J (dissenting):

... [I]t seems to me to be difficult to conceive what greater assertion of jurisdiction to regulate trade and commerce there could be, than is involved in the assumption and exercise of the right to prescribe ... by what form of contract only, by what persons only, and subject to what conditions only, particular trades ... may be carried on If this may be done in one trade, obviously it may be done in every trade As to the Act under consideration, if it be open to the construction put upon it by the courts below, it seems to me to be impossible to conceive any stronger instance of the assertion of supreme sovereign legislative power to regulate and control the trade of fire insurance and of fire insurance companies, if the business of those companies be a trade. [None of] the items enumerated in s. 92 ... indicates the slightest intention of conferring upon the local legislatures the power to interfere in any matter relating to trade or commerce, or in any matter which in any manner affects any commercial business of any kind

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Within this Dominion the right of exercise of National Sovereignty is vested solely in Her Majesty ... and in the Parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the Comity of Nations. To prevent all possibility of the local legislatures ... presuming to interfere in any matter affecting trade and commerce, and by so doing violating, it might be, the Comity of Nations, all matters coming within those subjects are placed under the exclusive jurisdiction of the Dominion parliament; that the Act in question does usurp the jurisdiction of the Dominion parliament, I must say I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion. The object of the *B.N.A. Act* was to lay in the Dominion Constitution the foundations of a nation, and not to give to provinces carved out of, and subordinated to, the Dominion, anything of the nature of a national or quasi national existence. ...

[Henry J, with whom Strong J concurred, and Fournier J wrote similar judgments; Taschereau J dissented. Throughout this period, Gwynne J was the member of the Court most sympathetic to the Dominion and Sir John A Macdonald's vision of Confederation.]

The insurer appealed to the Privy Council.]

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SIR MONTAGUE SMITH:

The scheme of this legislation, as expressed in the first branch of s. 91, is to give to the dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If s. 91 had stopped here, and if the classes of subjects enumerated in s. 92 had been altogether distinct and different from those in s. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the dominion parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in s. 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the s. 91, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. ...

Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in s. 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in s. 92, and no one can doubt, notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in s. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by s. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in s. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

The first question to be decided is, whether the Act ... falls within any of the classes of subjects enumerated in s. 92, ... for if it does not, it can be of no validity It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects that the further questions arise, *viz.*, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in s. 91, and whether the power of the provincial legislature is or is not thereby overborne.

The main contention on the part of the respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in s. 92(13), *viz.*, "Property and civil rights in the province." The Act deals with policies of insurance ... for insuring property situate [in Ontario] against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and civil rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the status of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in s. 91.

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects of ss. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at s. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, *viz.*, "18, bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the dominion parliament.

The provision found in s. 94 of the *British North America Act*, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick ... if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law ... and not the English law which prevails in the other provinces. The words "property and civil rights" are, obviously, used in the same sense in this section as in s. 92(13), and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words "civil rights," contended for by the appellants were to prevail, the dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code ... as regards contracts and their incidents, would be subject to have its law on that subject altered by the dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.

It is to be observed that the same words, "civil rights," are employed in ... [the Quebec Act of 1774] which made provision for the Government of the province of Quebec. Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in s. 91. The only one which the Appellants suggested as expressly including the subject of the Ontario Act is s. 91(2), "the regulation of trade and commerce."

A question was raised which led to much discussion in the Courts below and this bar, *viz.*, whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by special description. Whether the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.

The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place the collocation of s. 91(2) with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in s. 91 would have been unnecessary; as, s. 91(15), banking; s. 91(17), weights and measures; s. 91(18), bills of exchange and promissory notes; s. 91(19), interest; and even s. 91(21), bankruptcy and insolvency.

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the Colonies; and Article VI enacted that all parts of the United Kingdom from and after the Union should be under the same "prohibitions, restrictions, and regulations of trade." Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors

notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing therefore the words "regulation of trade and commerce" by the[se] various [interpretative] aids ... they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by s. 92(13).

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects

On the best consideration they have been able to give to the arguments addressed to them and to the judgments of the learned judges in Canada, their Lordships have come to the conclusion that the Act in question is valid. ...

Appeal dismissed.

Much of the remaining material in this chapter is about challenges to legislation about liquor. In the late 19th century, people drank, debated drinking, and regulated drinking. Local governments had regulated taverns for decades before Confederation, and had powers to impose temperance measures, such as limitations on the numbers of taverns. Fees for tavern licences and taxes on the import and manufacture of liquor were important sources of government revenue, and tavern licences were a major source of patronage and political loyalty, especially for Mowat's government. After the late 1860s, campaigns for temperance and prohibition became one of the most powerful and divisive social and political movements of the late 19th and early 20th centuries. All of this concern and conflict produced a multitude of challenges to statutes, thereby providing the other meaning of our ambiguous subtitle.

The parts of the story that concern us here begin in the 1870s, when pressure from temperance groups mounted. Two statutes were enacted that made the political stakes much higher than they had been before. The first was the *Liquor Licence Act*, SO 1876, c 26, known commonly as the *Crooks Act*, which was enacted by Ontario in 1876 and is described later in this chapter. The second was the *Canada Temperance Act*, SC 1878, c 16, enacted in 1878 by the Dominion, which enabled local option across the nation. A majority of voters in any city or county could opt to prohibit retail sales of liquor. More precisely, the effect of a vote for local option was to prohibit sales, except for sales of quantities over specified minimums by brewers, distillers, and wholesale traders, as long as they had "good reason to believe" that the liquor would be taken "forthwith" from the city or county. Anyone who sold liquor in violation of this prohibition was liable, on summary conviction, to a fine of \$50 for the first offence and \$100 for the second. In *Russell v The Queen* (1882), 7 App Cas 829, 51 LJPC 77 (UKJCPC), a private citizen began a criminal prosecution under the Act against Russell, a tavern owner in Fredericton, for selling liquor in violation of its terms. Russell argued that the Temperance Act was *ultra vires* Parliament.

Russell v The Queen

(1882), 7 App Cas 829, 51 LJPC 77 (UKJCPC)

SIR MONTAGUE SMITH:

The general scheme of the *British North America Act* with regard to the distribution of legislative powers, and the general scope and effect of ss. 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the *Citizens Insurance Company v. Parsons* [4 SCR 215, 1880 CanLII 6]. According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in s. 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, *viz.*, whether the subject of the Act does not also fall within one of the enumerated classes of subjects in s. 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in s. 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order, and good government of Canada," full legislative authority to pass it.

Three classes of subjects enumerated in s. 92 were referred to, under each of which, it was contended by the appellant's counsel, the present legislation fell. These were:

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.
13. Property and civil rights in the province.
16. Generally all matters of a merely local or private nature in the province.

With regard to the first of these classes, s. 92(9), it is to be observed that the power of granting licenses is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes."

The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed it was a main objection to the Act that in the city of Fredericton it did in point of fact diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subject No. 9, and consequently that it could not have been passed by the Provincial Legislature by virtue of any authority conferred upon it by that sub-section. ...

Next, their Lordships cannot think that the *Temperance Act* in question properly belongs to the class of subjects, "Property and Civil Rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale ... on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence ... to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in s. 92. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of ... property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be

regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada. It was said ... in the case of the *Citizens Insurance Company of Canada v. Parsons*, that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects "Property and Civil Rights" within the meaning of ss. 92(13). ...

It was lastly contended that this Act fell within s. 92(16)—"Generally all matters of a merely local or personal nature in the province."

It was not, of course, contended for the appellant that the Legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of Canada, the provinces might have passed a local law of a like kind ..., and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, "by local option," the legislation was in effect, and on its face, upon a matter of a merely local nature. ...

Their Lordships cannot concur in this view. The declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it. It is true that the prohibitory and penal parts of the Act are only to

come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, *viz.*, to promote temperance by means of a uniform law throughout the Dominion.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localises the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should come in effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.

Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in s. 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, "the regulation of trade and commerce," enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada.

In the result, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Supreme Court of Canada, and with costs.

Appeal dismissed with costs.

The next major case was *Hodge v The Queen* (1883), 53 LJPC 1, 9 AC 117 (UKJCPC), which was decided by the Privy Council about a year and a half after *Russell*. It was a challenge to Ontario's Crooks Act, mentioned, briefly above. The Act transferred the powers over liquor licensing from the municipalities to newly created boards of licence commissioners, appointed and controlled by the provincial government, and added powers to enable the boards to limit the numbers of licences. The control over the commissioners greatly increased the government's patronage powers, which Mowat used openly and shrewdly to encourage loyalty to the provincial Liberal Party.

Hodge v The Queen

(1883), 53 LJPC 1, 9 AC 117 (UKJCPC), aff'g (1882), 7 OAR 246, rev'g (1881),
46 UCQB 141 (Ont H Ct J)

[Hodge, a tavern keeper, was charged with permitting billiards to be played in his tavern, contrary to the regulations made by the licence commissioners for Toronto. He challenged the Act on two grounds: first, it conflicted with the Dominion power over trade and commerce; and, second, the provincial legislature could not delegate law-making powers to the boards of commissioners. This second argument was based on the fact that the Canadian legislatures were created by the British Parliament. They were therefore delegates and not sovereign legislatures, and they were therefore limited by the common law maxim *delegatus non potest delegare*. Translated, this phrase means "a delegate may not delegate." It presumes that an individual (or institution) who is given responsibility to do something may not transfer the responsibility to another individual (or institution) unless there is something in the grant of power or the context that permits the transfer.

Another tavern keeper, Frawley, was charged with operating his tavern without any licence at all. He was convicted and, because it was his second offence, sentenced to imprisonment with hard labour. He challenged this sentence and raised a third ground: the province could not impose imprisonment with hard labour as a punishment because s 92(15) of the BNA Act, which gave the provinces power to impose punishment for enforcing their laws, spoke only of imprisonment. These two cases were consolidated and have become known by Hodge's name alone.

The trial judge was persuaded by the argument about delegation, but the Court of Appeal and the Privy Council dismissed all three grounds. The second and third grounds are not directly relevant to our major topic, the division of powers, but they prompted important responses about the nature of the provincial legislatures and about interpretation.

The Court of Appeal gave its decision a week before *Russell* was decided and said that the argument about regulation of trade and commerce was hopeless. About the delegation argument, Burton J said that the British Parliament was sovereign, but its sovereignty was "a power existing in name only, and one which it would never attempt to exercise." The provincial legislatures had "plenary powers of legislation within their respective spheres as large and ample as those of the Imperial Parliament itself," and their authority was "the same character as that of the Imperial Parliament" (at 278 OAR). Considering the third argument, about hard labour, Spragge J called for a liberal interpretation, and said at 271 OAR:

an instrument conferring a constitution should not by interpretation lose its character as the fundamental organic law of a Government and be brought to the level of an ordinary private statute, to be expounded with the technical and literal precision which would be appropriate to a penal code.

Hodge appealed, and argued that *Russell* gave the Dominion comprehensive control over liquor.]

LORD FITZGERALD:

The appellants contended that the legislature of Ontario had no power to pass any Act to regulate the liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the provincial legislature, by s. 91 of the *British North America Act, 1867*; and that it did not come within any of the classes of subjects assigned exclusively to the provincial legislatures by s. 92. The class in s. 91 which the *Liquor License Act, 1877*, was said to infringe

was s. 91(2), "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell v. The Queen* (1882), 7 AC 829 (UKJCPC) was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the provincial legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal.

The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order, and good government of the Dominion, to pass the *Canada Temperance Act, 1878*, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority, under s. 91 unless the subject fell within some one or more of the classes of subjects, which by s. 92 were assigned exclusively to the legislatures of the Provinces. ...

It appears to their Lordships that *Russell v. The Queen*, when properly understood, is not an authority in support of the appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the *Citizens Insurance Company* illustrate is, that subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.

Their Lordships proceed now to consider the subject matter and legislative character of ss. 4 and 5 of the *Liquor License Act of 1877*. That Act is so far confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-laws, or rules to define the conditions ... for obtaining tavern or shop licenses for sale ... [of] liquors within the municipality; for limiting the number of licenses; ... for defining the duties and powers of license inspectors, and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the *Canada Temperance Act*, which does not appear to have as yet been locally adopted. ...

Their Lordships are, therefore, of opinion that, in relation to ss. 4 and 5 of the Act in question, the legislature of Ontario acted within [ss. 92(8), (15), and (16) of] the *Imperial Act of 1867*, and that in this respect there is no conflict with the powers of the Dominion Parliament.

... [I]t was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the *British North America Act* enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

• • •

If, as their Lordships have decided, the subjects of legislation come within the powers of the provincial legislature, then s. 92(15) of the *British North America Act*, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with s. 91(27); under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labour"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour" ...

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

Appeal dismissed.

The holdings about the second and the third arguments in *Hodge* need comment. The second argument was, ultimately, about the nature of the provincial legislatures and its outcome was one of the most important decisions about the nature of Canadian federalism. Because it is now so well established, what the Privy Council said may seem to be no more than an elegant statement of the obvious, but in the late 1870s and early 1880s the topic was passionately debated and one of the battlegrounds of the contest about provincial rights. Even entire books were devoted to the question whether the provincial legislatures were parliaments, like the British Parliament, or merely bodies created by the BNA Act, with no more powers than it specifically gave them, more like municipal governments than parliaments, and severed from their own histories and from the majesty of the British Parliament. At stake were the inherent privileges of a parliament, such as a power to punish for contempt, and the power of a glorious name.

The arguments invoked basic constitutional law and the terms of the BNA Act. One of the fundamental principles of the Constitution was the sovereignty of Parliament, and the dominant legal theory held that in each nation there must be one sovereign and only one. How then could both the Dominion and the provinces be sovereign, and how could law-making power be divided within one nation? In part, this question was answered by avoiding it: neither

could be the sovereign of Canada, because Canada was a colony; the British Parliament was the sovereign, and it had enacted the BNA Act. The terms of the BNA Act were far from clear. It used the word "Parliament" for the Dominion and the word "legislatures" for the provinces; was there a difference? It gave the Dominion a power to disallow provincial legislation, and how could provinces be said to be made in the model of the British Parliament if their statutes could be made nullities by the will of the Dominion? As well, arguably, it gave the residue of legislative power to the Dominion, which seemed to mark a difference from the United States and the claims the states had made to sovereignty.

The crux of the resolution in *Hodge* was that the Dominion and the provinces were equal in kind, and each supreme within their spheres. (Note the use of the word "supreme" and not "sovereign," which acknowledged sovereignty of the British Parliament and denoted a relative power; the Dominion and the provinces were, legally, supreme over other institutions within their jurisdiction.) It was a major triumph for Mowat, who had argued for it in the Ontario Court of Appeal. Not only were the Dominion and the provinces supreme within their spheres of jurisdiction, the jurisdictional lines between them could be easily discerned. This mode of argument—that social and political life could be legally classified and categorized—was common to the legal thought of the 19th century.

Next, we turn to the fate of the third argument in *Hodge*. The Privy Council ignored Spragge J's plea in the Ontario Court of Appeal for a liberal interpretation and, a few years later, it made a more express contrary statement in *Bank of Toronto v Lambe*, [1887] UKPC 29, 12 AC 575 (UKJCPC). The issue was whether taxes imposed by Quebec on specified kinds of commercial corporations were direct taxes and therefore valid under s 92(2) (direct taxation within the province). Lord Hobhouse said at 579: "Questions of this class have been left for the decision of the ordinary Courts of Law which must treat the provisions of the Act in question [the BNA Act] by the same methods of construction and exposition which they apply to other statutes." These "methods of construction and exposition"—that is, the prevailing attitudes toward statutory interpretation—are well illustrated by the first paragraph of the leading English text in the late 19th century:

Statute law is the will of the Legislature; and the object of all judicial interpretation of it is to determine what intention is either expressly or by implication conveyed by the language used, ... When the intention is expressed, the task is one simply of verbal construction; but when, as occasionally happens, the statute expresses no intention on a question to which it gives rise, and on which some intention must necessarily be imputed to the Legislature, the interpreter has to determine it by inference grounded on legal principles.

See Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (London: William Maxwell & Son, 1875) at 1.

The "legal principles" to which Maxwell referred were largely derived from the common law and, whatever else they included, they did not permit consideration of the history of a country, the beliefs of its peoples, or its apparent needs.

NOTE ON THE MCCARTHY ACT REFERENCE

Lawyers had a lot of trouble reconciling *Russell* and *Hodge*, and the result in the *McCarthy Act Reference* didn't help. Understanding the *McCarthy Act Reference* requires returning to June 1882, a few weeks before *Russell* was decided and a Dominion election campaign was underway. Macdonald was outraged that Mowat had a stranglehold on patronage and, when asked in Yorkville about Ontario's *Crooks Act* (the Act that was upheld in *Hodge* late in the following year), he said it was

not worth the paper it was written on ... If he carried the country, as he would [do], he would tell Mr. Mowat, that little tyrant, who had attempted to control public opinion by taking hold

of every office, from that of a Division Court bailiff to a tavern-keeper, that he would get a Bill passed at Ottawa returning to the municipalities the power taken away from them by the Licence Act.

Quoted in RCB Risk, "Canadian Courts Under the Influence" (1990) 40 UTLJ 687 at 715.

When *Russell* was decided, Macdonald concluded that it gave the Dominion exclusive power over liquor licensing. The speech from the throne at the opening of Parliament in February 1883 promised that legislation would be introduced "in order to prevent the unrestrained sale of intoxicating liquors, and to regulate the granting of shop, saloon and tavern licenses." When pressed by Edward Blake, who was the leader of the opposition, an eminent lawyer, and a champion of provincial rights, Macdonald spoke confidently about *Russell*:

It is quite clear to every lawyer, and any man who is not a lawyer, who reads that judgment, that the very reasons on which the Privy Council decided ... are the reasons showing that the Provincial legislature had not a right to deal with that subject under the *Crooks* Act, except as a matter of revenue. [Risk, above at 715.]

A month later, when Macdonald asked for a special committee to investigate and to prepare legislation, Blake gave Macdonald a long lecture about reading *Russell* and provincial rights. He pointed out that s 92(8), which had been the major ground for provincial arguments about the police power and local matters, had not been considered in *Russell*, and argued that the history of the distinctive cultures of the colonies and the pre-Confederation legislation should be considered when interpreting the BNA Act. He also claimed that there was a crucial difference between prohibition and regulation, and pointed to recent decisions, especially the Ontario Court of Appeal's decision in *Hodge*.

Blake's lecture had no effect on Macdonald, and in May, Parliament enacted the *McCarthy* Act. Whatever benevolent impulses Macdonald might have felt toward Ontario's municipalities had disappeared. The Act established licensing requirements for hotel, saloon, shop, vessel, and wholesale sales to be administered by the Dominion and the Conservative Party. It was quickly referred to the Supreme Court, which decided in early 1885 that it was *ultra vires*, except for wholesale sales and sales on vessels. On appeal, the Privy Council held that it was *ultra vires* entirely. Like the result in *Hodge*, the result in the *McCarthy* Act Reference was hardly startling—the Dominion could hardly have been permitted to regulate bedding and stables in hotels. Unfortunately, in accordance with the prevailing practice about references, no written reasons were given, leaving many lawyers in a state of confusion, unable to square *Russell* with *Hodge*.

Some decisions of the Canadian courts on related issues compounded the confusion. The most difficult issue, and also the most pressing politically, was the division of powers to prohibit liquor. *Russell* remained a secure authority permitting Dominion prohibition. The provinces had equally secure and exclusive authority to regulate taverns for police purposes. A distinction between prohibition and regulation may now seem to be implicit in these propositions, and it had been expressly made by *Hodge* in terms of purposes, but this kind of analysis was not widely understood and accepted at the time. The most difficult and pressing question was whether the provinces had power to prohibit. Was the power given by *Russell* exclusive? Any prediction would have been precarious, and a confident one would have been foolhardy. *Russell*'s language and the general structure of spheres of exclusive power seemed to some lawyers to say that it was, but the claim of the provinces to govern their own social and moral lives was strong. The Supreme Court had said little—and much of what it had said was vague, at best—and the provincial courts were divided.

Mowat resolved to confront federal power in 1890 by enacting a statute (SO 1890, c 56) that, by s 18, gave municipalities power to impose prohibition in the same terms that had existed at Confederation—which was a power to prohibit only retail sales. In 1893, when the

opposition in Ontario introduced a bill calling for total prohibition, Mowat responded with an amendment that called for a plebiscite on New Year's Day, 1894. The result was a large majority for prohibition, but Mowat then claimed that the jurisdictional uncertainties must be resolved before the government could act. By agreement with the Dominion government, seven questions were referred to the Supreme Court; the first six were abstract questions about the powers to prohibit sales, manufacturing, and import, and the seventh asked whether the 1890 Act was valid.

A majority of the Supreme Court held that the provinces had no power at all to impose prohibition. The judges who denied the power relied on s 91(2), and here Gwynne J made his last stand. He began by describing the understandings at Confederation in detail, quoting extensively from speeches and presenting a vision of a powerful Dominion that might have been written by Sir John A Macdonald, and concluded with a warning that to give control of trade to the local legislatures would deny the intent of the framers and imperil Confederation. An appeal was taken to the Privy Council.

Lord Watson delivered the decision of the Privy Council. As the following excerpt makes clear, not a lot is known about him, although his impact on Canadian constitutional law was formidable:

Born in 1827 in Covington, County of Lanark, Scotland, Watson received his education at the Universities of Edinburgh and Glasgow and was admitted to the bar as advocate in 1851. For the first ten years of his career, he "was practically one of the unemployed" at the Scottish bar, his career "practically a failure." Throughout his adult life Watson was a staunch Tory, and there seems to be little doubt that his rise to the highest ranks of the judiciary was facilitated by his conservative connections. There were few Scottish lawyers in the Conservative Party in 1874, according to the author of Watson's obituary in *The Times*. Thus "it was probably more the accident of his politics than knowledge of his merits which led to his appointment" that year as Solicitor General of Scotland. By then "altogether exceptional at the Scottish bar," reports the *Dictionary of National Biography*, Disraeli was warranted in "rewarding [Watson for] his conservatism." Watson went on to serve as Lord Advocate (the chief law officer of Scotland) and Dean of the Faculty of Advocates (head of the Scottish Bar) while representing the constituency of the Universities of Glasgow and Aberdeen for an undistinguished four years. At the age of fifty-two, Watson was appointed Lord of Appeal in Ordinary, entitling him to a life peerage (as Baron Watson of Thankerton), a seat in the House of Lords, and another on the Judicial Committee of the Privy Council. It was in this last capacity that he earned the title of judicial overseer of the empire. In the words of Richard Burdon (later Viscount) Haldane, Watson "was an imperial judge of the very first order ... one of the greatest lawyers that ever sat upon the British Bench."

By the time of his death in 1899, Watson had distinguished himself not only as a great judge of Scots law but also of the English common law and, for our purposes, of the law of the colonies of the British Empire. According to *The Times*, "it may be doubtful whether in the Victorian era any one has contributed in equal degree to the sum total of British and Imperial jurisprudence." His judicial temperament was described as simple, plain spoken, and inquisitive: "He never wrote a judgement without the greatest consideration, or without consulting every source of information open to him." His one fault (if he had one) was his habit of interrupting counsel too often during argument. Of the particular details of Watson's life, we know little. As was said of him in tribute: "Lives spent in keen intellectual activity are often devoid of outward incident." [Emphasis in original.]

See David Schneiderman, "AV Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century" (1998) 16:3 L & Hist Rev 495 at 510-12.

Ontario (AG) v Canada (AG)

[1896] UKPC 20, [1896] AC 348 [*The Local Prohibition Reference*],
rev'd *In re Prohibitory Liquor Laws*, [24 SCR 170, 1895 CanLII 95](#)

LORD WATSON:

The seventh question raises the issue, whether, in the circumstances which have just been detailed, the provincial legislature had authority to enact s. 18. In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the *Canada Temperance Act* [of 1886]; and, if so, to consider in the second place, whether, after that Act became the law of each province of the Dominion, there yet remained power with the Legislature of Ontario to enact the provisions of s. 18.

The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good government of Canada," within the meaning of the introductory and general enactments of s. 91 of the *British North America Act*; and, in the second place, upon the ground that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These sources of jurisdictions are in themselves distinct, and are to be found in different enactments.

It was apparently contemplated by the framers of the *Imperial Act* of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Insurance Co. of Canada v. Parsons* [4 SCR 215, 1880 CanLII 6] that the paragraph just quoted "applies in its grammatical construction only to s. 92(16)." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance v. Parsons* and [several other cases].

The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included

in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application: and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intention of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

In construing the introductory enactments of s. 91, ... which concern the peace, order, and good government of Canada, it must be kept in view that s. 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws ... in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

The judgment of this Board in *Russell v. The Queen* (1882), 7 AC 829 (UKJCPC) has relieved their Lordships from the difficult duty of considering whether the *Canada Temperance Act* of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the *Canada Temperance Act* of 1878; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted ... of violating the provisions of the Canadian Act [in] New Brunswick, in which

the prohibitory clauses of the Act had been adopted. But the provisions of the Act of 1878 were in all material respects the same with those which are now embodied in the *Canada Temperance Act* of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell v. The Queen* must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the *Canada Temperance Act* of 1886 as being an Act for the "regulation of trade and commerce" within the meaning of s. 91(2). If it were so, the Parliament of Canada would ... be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. ... [I]n *Citizens' Insurance Co. v. Parsons*, ... it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion The object of the *Canada Temperance Act* of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, ... the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. ...

The authority of the Legislature of Ontario to enact s. 18 of [the 1890 Act] was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by s. 92(8) to create municipal institutions ... necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of s. 92(8), which ... simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation, the Legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than s. 92(8).

Their Lordships are likewise of opinion that s. 92(9) does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer and other licences, in order to the raising of a revenue for provincial, local or municipal purposes." It was held by this Board in *Hodge v. The Queen* (1883), 9 AC 117 (UKJCPC) to include the right to impose reasonable conditions upon the licencees which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.

The only enactments of s. 92 which appear to their Lordships to have any relation to ... the suppression of the liquor traffic are ... ss. 92(13) and (16), which assign to their exclusive jurisdiction, (1.) "property and civil rights in the province," and (2.) "generally

all matters of a merely local or private nature in the province." A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within s. 92(16). In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed. ...

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of ss. 92(13) and (16), is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, ss. (16) appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, ... the classes of subjects already enumerated.

In the able and elaborate argument addressed to their Lordships on behalf of the respondents it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively ... within the regulation of trade and commerce. In that case the subject ... would, by virtue of the concluding enactment of s. 91, be excepted from the matters committed to provincial legislatures by s. 92. Upon the assumption that s. 91(2) does not embrace the right to suppress a trade, Mr. Blake maintained that ... the Parliament of Canada has, by enacting the *Canada Temperance Act* of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy [at present]

• • •

The prohibitions of the *Dominion Act* have in some respects an effect which may extend beyond the limits of a province, and they are all of a very stringent character. ...

On the other hand, the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario.

It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time. In the opinion of their Lordships the question of conflict between their provisions which arises in this case [depends] upon a feature which is common to both. Neither statute is imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of a majority of the electors in a district or municipality.

If the prohibitions of the *Canada Temperance Act* had been made imperative throughout the Dominion, their Lordships might have been constrained by previous

authority to hold that the jurisdiction of the Legislature of Ontario ... had been superseded. ... But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not and may never be in force. ...

Their Lordships, for these reasons, ... are of opinion that the Ontario Legislature had jurisdiction to enact s. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the *Canada Temperance Act* of 1886.

[Lord Watson went on to hold that, in the absence of conflicting federal legislation, a province possesses the jurisdiction to prohibit the manufacture of liquor within the province if the manufacture was carried on in such a way as to make its prohibition a merely local matter in the province, but that it lacks the jurisdiction to prohibit the importation of liquor.]

Appeal allowed.

NOTE: THE NATURE OF FEDERALISM

What did lawyers understand about the basic nature of federalism in the late 19th century? We begin with an excerpt from the leading English text, which we use because it was the dominant statement of the constitutional faiths of English and Canadian lawyers during the late 19th century.

A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of "state rights." The end aimed at fixes the essential character of federalism. For the method by which federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States.

From the notion that national unity can be reconciled with state independence by a division of powers under a common constitution between the nation on the one hand and the individual States on the other, flow the three leading characteristics of completely developed federalism—the supremacy of the constitution—the distribution among bodies with limited and co-ordinate authority of the different powers of government—the authority of the Courts to act as interpreters of the constitution.

See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885) at 131, 132, 161-62.

After a lengthy analysis of these three characteristics, Dicey made some general comments, "of more than merely legal interest," about federalism, including this observation about "legalism":

Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature

throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at a given moment the master of the constitution.

Doubtless, Canadians shared the essence of these beliefs. They may, though, have differed in emphasis. Consider the following paragraph:

A federal union then means two perfectly independent co-ordinate powers in the same state. The powers of each are equally sovereign and neither are derived from the other. The state governments are not subordinate to the general government, nor the general government to the state governments. They are co-ordinate governments standing on the same level and deriving their powers from the same sovereign authority. In their respective spheres neither yields to the other. Each is independent in its own work; incomplete and dependent on the other for the complete work of government.

See Dennis Ambrose O'Sullivan, *Government in Canada: The Principles and Institutions of Our Federal and Provincial Constitutions* (Scarborough, Ont: Carswell, 1887) at 7-8.

Arguably, O'Sullivan's beliefs are, in contrast to Dicey's, marked by an emphasis on the autonomy of the provinces and the federal government: they are mutually exclusive spheres of power, separated by sharp boundaries. If this perception is correct, perhaps a large part of the reason is that visions of federalism were a fighting ground in the struggle for power between the provinces and the federal government. O'Sullivan's model is aggressive, and it expresses the eventual triumph of the provinces.

NOTE: THE COMPACT THEORY

Next, we turn to the compact theory. Its foundation was its claim about the way the Dominion had been created: the colonies had made a compact, ratified by the British Parliament, creating the Dominion and conferring powers and property, and, after Confederation, they continued to exist as the new provinces. One of the first sustained expressions of this theory was by Thomas Jean Jacques Loranger, a Quebec judge, in a series of pamphlets that were published as a book early in 1883: *Letters Upon the Interpretation of the Federal Constitution* (Quebec: "Morning Chronicle" Office, 1884). He began by declaring that the French nation in Quebec was threatened by centralizing tendencies in the early judgments of the Supreme Court about the BNA Act:

During the past century of British rule, the French race in Canada has been through many political crises and has fought many political battles. It has, however, come out triumphant, and averted the dangers which threatened it.

The antagonism resulting from different institutions, traditions, languages and religious beliefs—irresistible when people of various origins dwell in the same territory—which influences them sometimes without their knowledge and often against their will, has made the position of this race an exceptional one in the midst of the Anglo-Saxon population of the Confederation.

The rivalry of races is the same as that which existed under former regimes, but is on a larger scale. ...

French-Canadians should, under the new regime as they did under the old, see with jealous care to the maintenance of their national rights, the preservation of their political autonomy, combat and prevent any aggression that may disturb these guarantees.

Loranger then set out the elements of the "federal compact":

1. In constituting themselves into a confederation, the provinces did not intend to renounce, and in fact never did renounce their autonomy. This autonomy with their rights, powers and prerogatives they expressly preserved for all that concerns their internal government; by forming themselves into a federal association, under political and legislative aspects, they formed a central government, only for interprovincial objects, and, far from having created the provincial powers, it is from these provincial powers that has arisen the federal government, to which the provinces have ceded a portion of their rights, property and revenues.

2. At the time of Confederation, all legislative and executive power, legal attributes, public property and revenues that are now the appanagé of the central government and of the provinces, belonged to the latter. The federal compact did not create a single new power. The part now belonging to the federal government was taken from the jurisdiction of the provinces.

In the early 1880s, the provincial rights advocates began to use the compact as support for a wide range of their claims. Although Loranger used it to defend the French Canadians, it was also embraced by politicians and common law lawyers (and many of the central individuals were both). One claim, which during the 20th century has become the best known, was that the BNA Act could not be amended without the consent of each of the parties—the provinces. Other claims, though, loomed larger in the 1880s, all of them directed at interpretation of the BNA Act. For example, the provinces were entitled to government property not clearly allocated to the Dominion and to all legislative powers not specifically granted to the Dominion—the residue of legislative power. As well, their lieutenant governors had the stature and powers they possessed before Confederation.

In Quebec, the compact has continued to be a powerful part of constitutional beliefs, but its hold among common law lawyers began to fade in the late 1880s. Although it has been resurrected several times since, including, as we will see in Chapter 6, The 1930s: The Depression and the New Deal, it has had little direct influence on the law. One major reason is that, so far as it is an account of what happened at Confederation, it was vulnerable to the simple claim that it was fundamentally inaccurate. More interesting is another possible reason, one based on beliefs about interpretation. The compact was derived from the history of making the BNA Act, but the prevailing beliefs about interpretation (demonstrated, for example, by the Privy Council in *Hodge*) were at odds with considering history of this kind.

This incompatibility is demonstrated in the leading constitutional text, AHF Lefroy, *The Law of Legislative Power in Canada* (Toronto: Law Book and Publishing, 1897-1898) at 1. Lefroy's first proposition declared that the BNA Act was the "sole charter" for determining the rights of the Dominion and the provinces. Given the basic understandings of sovereignty, constitutions, and interpretation, this principle was both basic and inescapable, but it was an assertion about both the origins of the nation and the interpretation of its constitution that excluded any consideration of a compact. The second proposition was that the BNA Act, because it was founded on the Quebec resolutions, "must be accepted as a treaty of union between the provinces" but, once enacted, it became a "wholly new point of departure." The contrast between the two branches seemed to acknowledge a compact, but only as an historical event, irrelevant to interpretation. In this light, the compact foundered because it was at odds with the dominant common law thought.

NOTE: THE POWER OF DISALLOWANCE

The power of disallowance did not sit well with the compact theory of federalism or a conception of legislative supremacy within exclusive spheres of jurisdiction. The power, as expressed in ss 56 and 90 of the *Constitution Act, 1867*, entitles the governor general, acting on the advice of the federal Cabinet, to disallow (or veto) any enactment of the provincial

legislatures. A similar power is exercisable as between the British Crown and the Canadian Parliament, but this is not the focus of discussion here. The subordination of provincial power to federal did not fit well with an understanding of Canadian federalism premised on equality of federal and provincial authority.

The following excerpt from William Paul McClure Kennedy illustrates the uses to which the power was put in the years immediately after Confederation:

We can well understand a principle of disallowance where a constitutional question arises, or where dominion or imperial interests are threatened by a provincial Act; but it would be safer if the decision in such cases were left to the courts as in the United States, since in a federation differences on Constitutional law must frequently arise. The resolution of the problem of *intra vires* or *ultra vires* ought not to be left to the minister of justice. This tends to make him too supreme, and to detract from the character of the supreme court of Canada or of the privy council. For many years, however, after 1867 the dominion government considered it was justified in disallowing provincial Acts which appeared unjust or oppressive—through, for example, interference with vested rights without compensation, or through the impairing of contractual obligations. Provincial Acts were disallowed under these principles.

It appears early to have been a working convention of the Canadian constitution that, as the courts would deal with legislation *ultra vires* of the provinces, the power of disallowance was intended to cover cases outside legal review. In other words, the power of disallowance was inserted in the *British North America Act* to cover, in general terms, unjust, confiscatory, or *ex post facto* legislation, against which there are express safeguards in the constitution of the United States. ...

Whatever other motives—if any—which may have been at work during that period, it is clear that there is a certain consistency of purpose in dealing with provincial legislation which appeared to hurt private property, to invalidate contracts, or to be contrary to what were known as “sound principles of legislation.” It lies outside the discussion to search for or to examine motives which political writers have suggested. All that can be said here is that the constitutional power of disallowance was consistently used during these years to protect those spheres of provincial civil life which are protected explicitly or by implication in the constitution of the United States.

See WPM Kennedy, *The Constitution of Canada: An Introduction to Its Development and Law* (London: Oxford University Press, 1922) at 415-21.

By the mid-20th century, the federal power of disallowance fell into disuse. The federal government offered it up for negotiation in the rounds of constitutional reform in 1987 (Meech Lake) and again in 1992 (Charlottetown). The legal text of the Charlottetown Accord proposed that this federal power be repealed. Though the constitutional proposals failed, Canadians likely will see the power return as a subject in whatever future constitutional negotiations may be conducted.

II. THE MANITOBA SCHOOLS QUESTION

The province of Manitoba entered Canada in 1870 on terms intended to guarantee denominational education rights to Roman Catholics. Population growth in the years following made the province overwhelmingly Protestant and English speaking. This enabled the Protestant majority to sweep away all denominational control and impose a non-sectarian public school system (or what were called the old Protestant schools “thinly disguised”). The Roman Catholic minority were forced to choose between sending their children to Protestant schools or bearing the burden of paying for both public and separate schools.

The context that gave rise to this controversy is set out in the following excerpt.

Gordon Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council"

(1985) 63:3 Can Bar Rev 461 at 466-73

Confederation of 1867 stretched only from the Atlantic to Lake Superior, but the vision of a transcontinental nation was clearly enunciated in section 146 of the Constitution Act, 1867 in its provision for the admission of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-western Territory into the union. The dream of a dominion stretching from sea to sea was threatened by the westward expansion of the United States and its purchase of Alaska from Russia in 1867, and Sir John A. Macdonald appreciated that continuing to haggle with the Hudson's Bay Company jeopardized the Canadian transcontinental dream. In 1869, George-Etienne Cartier and William McDougall, dispatched to London, purchased Rupert's Land for one and a half million dollars and gave a guarantee that five per cent of the land in the fertile belt would continue to belong to the Hudson's Bay Company.

The Canadian government failed to assure the local inhabitants that their rights would be respected. When surveyors sent to the Red River appeared to disregard completely the riverstrip holding of the Metis, Riel and a party of armed horsemen broke up the survey party. Riel then organized the Metis, prevented Lieutenant-Governor-designate William McDougall from entering, seized Fort Garry and put down an attempted overthrow by Dr. John Schultz, the leader of the Canadians in the Red River. On December 29, 1869, Riel assumed the presidency of the provisional government. In February 1870 another bungled effort was made to unseat Riel, and Thomas Scott was captured. Scott was tried before a court-martial presided over by Ambrose Lepine, adjutant general in the provisional government, and a jury of six Metis; he was found guilty, and on March 4, 1870 was taken outside the walls of Fort Garry and shot by a firing squad. The execution of this Orangeman fuelled anti-Catholic feeling in Ontario.

Macdonald was appalled by the events because they revealed Canadian impotence to both Americans and Metis. The formal transfer of Rupert's Land to Canada was to have occurred on December 1, 1869; Macdonald now had the date postponed. As he was reluctant to seek permission to send troops through the United States, he had no alternative but to negotiate with Riel and await the spring. Donald A. Smith, the Hudson's Bay Commissioner in Montreal, travelled to the Red River in the winter of 1869-70. Smith persuaded Riel to state the demands of his provisional government and to choose delegates to send to Ottawa. Many of the Metis demands were agreed to by Macdonald and Cartier and were incorporated in the Manitoba Act. On July 15, 1870, the transfer of the whole northwest to Canada occurred and simultaneously Manitoba became a new province. On that day the new Lieutenant-Governor, Adams G. Archibald, left Port Arthur, accompanied by a force of 1,200 British and Canadian soldiers under Colonel Garnet Wolseley, who navigated the old voyageur route to Fort Garry. Canada's introduction to the West was thus marred by its association with military force.

A census taken in 1871 revealed that there were 5,720 French-speaking Half-breeds or Metis, 4,080 English-speaking Half-breeds or "country-born" and only 1,600 White settlers. Two provisions of the Manitoba Act reflect the approximately equal balance between French-speaking Roman Catholics and English-peaking Protestants. Section 22 of the Manitoba Act provided that the legislature might

exclusively enact laws relating to education, subject to three provisions, of which the first was:

Nothing in any Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union.

Section 23 provided that either English or French could be used in the legislature or in any courts, and Acts of the legislature were to be printed and published in both languages. The religious compromise, in the form of the denominational educational guarantee upon which Canada was founded, was thus projected westward. It should, however, be emphasized that Manitoba was to be a province like Quebec, not one like Ontario, Nova Scotia and New Brunswick. The language guarantee of section 23 of the Manitoba Act was virtually identical to that contained in section 133 of the Constitution Act, 1867. Section 133 accorded equal status to English and French in Parliament and the federal courts, but then provided that such equal status would prevail only in Quebec and not in the other original provinces. ...

The linguistic and religious guarantees of the Manitoba Act were appropriate for a province which was almost equally balanced between Francophones and Anglophones and between Roman Catholics and Protestants. The subsequent demographic changes in Manitoba in the 1870s and 1880s were enormous. The population increased almost fourteen fold in twenty years. There had been a large influx of Protestant and English-speaking settlers, particularly from Ontario. The Manitoba of 1890 was therefore strikingly different in composition from the Manitoba of 1870. The census of 1891 revealed that Manitoba had a population of 152,500, of which only 20,571 or thirteen per cent were Roman Catholics, and only 9,949 or seven per cent were French Canadians. ...

In 1890, the Department of Education Act was passed by the Manitoba Legislature. Section 18 provided that the existing Board of Education and Superintendents of Education were to cease to hold office and were to "deliver over to the Provincial Secretary all records, books, papers, documents and property of every kind belonging to said Boards." The Catholic section of the Board ceased to exist and its property was compulsorily acquired without compensation. The Public Schools Act then provided for free non-sectarian education to be paid for by an assessment of all ratepayers, Protestant and Catholic, in each municipality. The Manitoba legislature at the same session also passed the Official Language Act, which, in spite of section 23 of the Manitoba Act, 1890, made English the sole official language. ...

In *Barrett v the City of Winnipeg*, [19 SCR 374, 1891 CanLII 61](#), Barrett challenged the levy issued by the City of Winnipeg on the assessed value of his property in order to support the new public school system. Barrett argued that this prejudicially affected denominational school rights of Roman Catholics by requiring them to contribute twice—to free public schools, to which they could not in good conscience send children; and to Roman Catholic Schools. In the lower courts, the judges of the Trial Division and Manitoba Court of Queen's Bench split along denominational lines. On appeal, the Supreme Court of Canada reversed these decisions and eschewed the appearance of sectarian allegiance among the judges. The Court held the *Public Schools Act*, [1868] 31 & 32 Vict c 118 *ultra vires*. Chief Justice Ritchie wrote:

Does it not prejudicially, that is to say injuriously ... affect them when they are taxed to support schools of the benefit of which, by their religious belief and the rules and principles of their church, they cannot conscientiously avail themselves, and at the same time by

compelling them to find means to support schools to which they can conscientiously send their children, or in the event of their not being able to find sufficient means to do both to be compelled to allow their children to go without either religious or secular instruction? In other words, I think the Catholics were directly prejudicially affected by such legislation, but whether directly or indirectly the local legislature was powerless to affect them prejudicially in the matter of denominational schools which they certainly did by practically depriving them of their denominational schools and compelling them to support schools the benefit of which Protestants alone can enjoy.

On appeal to the Judicial Committee of the Privy Council, the case was joined to that of Logan, who mischievously sought similar relief on behalf of Anglicans in Winnipeg as was accorded to Roman Catholics. In *City of Winnipeg v Barrett; City of Winnipeg v Logan*, 10 CRAC 193, [1892] AC 445 (UKJCPC), the board reversed the decision of the Supreme Court. According to Lord Macnaghten at 457-58:

Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case), to send their children to public schools where the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

After the Privy Council's decision, the federal Cabinet chose to refer six questions to the Supreme Court of Canada. The questions, in sum, asked whether the Roman Catholic minority could appeal to the federal Cabinet because a right or privilege in relation to education had been affected by the 1890 Act. In *In Re Statutes of Manitoba relating to Education*, 22 SCR 577, 1894 CanLII 80, the Supreme Court of Canada, following the lead of the Privy Council in *Barrett*, split three to two, ruling against the Roman Catholic minority. Chief Justice Strong, writing for the majority, held that the governor-general in council (the federal Cabinet) had no remedial authority it could exercise in this case. It could not be suggested that the province of Manitoba did not have the right to repeal rights and privileges conferred under statute (at 654-56):

[T]here is, it seems to me, much force in the consideration, that whilst it was reasonable that the organic law should preserve vested rights existing at the union ... , yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted. No doubt this right may be controlled by a written constitution A notable instance of this is, as my brother King has pointed out, afforded by the constitution of the United States, according to the construction which the Supreme Court in the well known "Dartmouth College case" put upon the provision [against] impairing the obligation of contracts. It was there held ... that a legislature which had created a private corporation could not repeal its own enactment granting the franchise, [since] the grant of the franchise of a corporation was a contract. This has in practice been got over by inserting

in such acts an express reservation of the right of the legislature to repeal its own act. But, as it is a *prima facie* presumption that every legislative enactment is subject to repeal ... , every statute may be said to contain an implied provision that it may be revoked ... , unless the right of repeal is taken away by ... the overriding constitution which has created the legislature itself. ... [Here Chief Justice Stong endorsed] a canon of constitutional construction that such an inherent right to repeal its own acts cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution itself, by express words, takes away the right. I am of opinion that in construing the Manitoba Act we ought to proceed upon this principle and hold the legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless we find some restriction of its rights in this respect in express terms in the constitutional act.

In a startling reversal in tone from the *Logan* and *Barrett* decisions, the Privy Council in *Brophy v AG of Manitoba*, 11 CRAC 56, [1895] AC 202 (UKJCPC), found that the rights and privileges of Roman Catholics existing before 1890 had been affected. According to Lord Herschell (at 226-27):

Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes ... fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools

In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.

Before the federal government could enact remedial legislation under s 22(3), the federal election of 1896 intervened. The Liberal leader, Wilfrid Laurier, had maintained that a strategy of "conciliation" rather than one of confrontation with the province was the only approach that could restore any measure of rights to the minority. Voluntary concessions, he maintained, would better secure the minority's interests than interfere with provincial rights. In his famous speech on second reading of the remedial bill in the House of Commons, Laurier declared that if it were to become law, "while it would afford no protection whatever to the suffering minority in Manitoba, it would be a most violent wrench of the principles upon which our constitution is based." This remedy of interfering in local legislation, Laurier observed, "has never been applied and probably never can be applied without friction, disturbance and discontent." In the ensuing election campaign, the church threw its support behind the Conservatives, led by Sir Charles Tupper. Laurier, nevertheless, carried the election, even in the Catholic province of Quebec.

Once in office, Laurier reached his negotiated settlement with the province of Manitoba. Religious teaching could be carried on at the end of the school day; at least one Roman Catholic teacher would be employed in urban and rural schools, where the average attendance exceeded a certain number; and where ten pupils spoke the French language "or any language other than English, as their native language, the teaching of such pupils shall be

conducted in French, or such other language, and English upon a bilingual system." According to Laurier's biographer, Oscar Douglas Skelton, in essence,

the agreement left the system of public schools intact, but secured for the minority distinct religious teaching, and, where numbers warranted, teachers of their own faith and the maintenance of the French tongue. The language clause was framed in general terms by the provincial authorities in order to make it apply to the German Mennonites as well as to the French Catholics.

See Oscar Douglas Skelton, *Life and Letters of Sir Wilfrid Laurier*, vol 2 (Toronto: Oxford University Press, 1921) at 17.

III. FEDERALISM AND INDIGENOUS PEOPLES AND LANDS: THE ST CATHARINES MILLING CASE

This chapter began with the statement that, during the period from Confederation to about 1900, Canada experienced a dramatic expansion to the east, west, and north. What did Indigenous peoples experience during this period? Part of that story will be told in Part Four, Indigenous Peoples. This section deals with the ways in which Indigenous peoples and lands were viewed from the perspective of Canadian courts in the final decades of the 19th century.

Sébastien Grammond provides a reminder of some of the relevant context in terms of Indigenous rights and treaties, with particular emphasis on land.

Sébastien Grammond, "Treaties as Constitutional Agreements"

in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), 305 at 308-10 (footnotes omitted)

Private purchases of land from the Indigenous peoples have taken place from the earliest stages of British presence in North America. For a number of reasons, colonial authorities sought to forbid this practice and to centralize in their hands the dealings with the Indigenous peoples. Those actions gave rise to the idea that the Indigenous peoples owned the land until such lands were purchased in the name of the Crown. That fundamental rule was enshrined in the Royal Proclamation of 1763 that was issued by the British King upon the conquest of New France. Although it is better known for the initial political organization of the new British colonies and the purported repeal of French law in Quebec, the crucial character of its Indigenous provisions, which have never been repealed, has earned the Proclamation the nickname of "Indian Bill of Rights." In the summer of 1764, William Johnson, the Superintendent of Indian Affairs, called a meeting of several Indigenous nations at Niagara, where he presented the Proclamation. Some authors have thus argued that the Proclamation itself became a treaty.

The preamble to the Proclamation stated that lands "not having been ceded to, or purchased by Us, are reserved to" the Indigenous peoples. In its operative part, the Proclamation also stated that all purchases of Indigenous land would be made in the name of the Crown only, at a public assembly of the Indigenous peoples concerned. There was found the mandate to conclude land treaties in those parts of North America remaining under British rule.

Nevertheless the Proclamation also signalled the Crown's assertion of sovereignty over Indigenous lands, whether or not ceded by treaty. The King speaks of "Our Dominions and Territories" and considers that the Indigenous peoples are living "under Our Protection." In the British minds, the treaties envisioned by the Proclamation were not international treaties. They were instruments of domestic law, or perhaps colonial law, always subject to the overriding power of the Imperial Parliament. Indeed, throughout the nineteenth century, colonial authorities pursued a policy of treaty-making while taking an increasingly reductionist view of the legal status and capacity of the Indigenous peoples.

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The use of treaties to acquire land switched to high gear after Confederation. To prepare the settlement of the newly-acquired Prairies, the federal government made treaties, over a period of about 50 years, with the Indigenous people of what is now Northeastern British Columbia, Alberta, Saskatchewan, Manitoba, and Northern Ontario, as well as parts of the Northwest Territories and the Yukon. These treaties were assigned numbers, from 1 to 11, and became known collectively as the "numbered treaties."

The acquisition of lands via treaties raised federalism-related issues. Did the acquired lands become the property of the federal Crown, or did they form part of provincial Crown lands? Section 91(24) indicated that Parliament could legislate regarding "Indians, and Lands reserved for Indians"; however, s 109 of the *Constitution Act, 1867* provided that "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces ... shall belong to the several Provinces ... in which the same are situate, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

The answer to the question regarding the property of the lands acquired via treaties was connected to the answer to a further question: what sort of property interest did Indigenous people have in the land prior to dealing with it by way of treaty? That question in turn exposed further important questions, such as whether the property interest was based in an Indigenous or a Euro-Canadian understanding, and whether Indigenous people could be said to have had their own legal system and system of governance? If the answer to the last question was affirmative, how would the recognition of Indigenous legal systems and governance influence the subject matter of this part, Federalism?

We will see that some of the answers to the questions identified above have elicited different answers since the enactment of the *Constitution Act, 1982* (notably s 35), and others have yet to be answered. We will see in this chapter that the initial answers to these important questions by the Supreme Court of Canada and the Judicial Committee of the Privy Council were hardly respectful of Indigenous rights, interests, laws and governance.

The case of *St Catharines Milling and Lumber Co v R*, [1888] UKPC 70, 14 App Cas 46 involved an action by Her Majesty the Queen in right of Ontario on the information of the Attorney General of Ontario against the St Catharines Milling and Lumber Company to prevent the latter from cutting and carrying away timber on lands in Ontario. The lands in question (south of Wabigoon Lake in the District of Algoma) formed part of lands that were the subject of Treaty 3 of 1873. The Attorney General of Ontario claimed that the lands in question were public lands of the province of Ontario, and that the defendants were trespassers and wrongdoers in cutting the timber. The defendants claimed that they had a licence from the federal government, that government having acquired full title to the lands in question.

The province was successful at trial and before the Ontario Court of Appeal. The defendants appealed to the Supreme Court of Canada. A sample of extracts from counsels' arguments and the various judgments in the case provide a sense of the range of attitudes at the time regarding the division of powers, Indigenous peoples and lands, and Indigenous governance. Note that

no Indigenous party appeared before the Court at any level in this case. The full story of the case, including a range of flawed assumptions, has been set out by Kent McNeil, *Flawed Precedent: The St Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019).

The flawed factual assumptions were those made at the trial of the action by Chancellor Boyd in *R v St Catharines Milling & Lumber Co* (1885), 10 OR 196 (Ch). Boyd was of the view that the British Crown had acquired those lands from the French king as a consequence of the 1763 Treaty of Paris: "The legal and constitutional effect of the conquest of Quebec and the cession of Canada was to vest the soil and ownership of the public land in the Crown" (*St Catharines Milling*, above at 204). If, by the law of nations at that time, a European Crown gained sovereignty by conquering lands and people, this would not necessarily confer title. Indeed, at common law, the conquest of others did not eviscerate local title or local laws (*Campbell v Hall*, [1774] Lofft 655, 98 ER 848). Moreover, there was no evidence regarding French law led at trial to support this contention (McNeil, above at 110). Even if correct in international law (that is, as between two European nations, Britain and France), Boyd's decision is premised upon a racist and flawed understanding of "Indians" as uncivilized, disorganized, and without their own laws and governance. It is, in short, premised upon Eurocentric stereotyping. Chancellor Boyd relied on racialized tropes in describing Europeans encountering "heathens and barbarians" (*St Catharines Milling*, above at 206) with no "proprietary title to the soil" (*St Catharines Milling*, above at 226). He repeatedly disparaged Indigenous North Americans as "wild," "primitive," "rude," and the Saulteaux as an unusually "degraded Indian type" (*St Catharines Milling*, above at 227). Nor was there any reference to Saulteaux land law or custom. According to McNeil, in Boyd's eyes, "because Indian people's way of life was inferior, its destruction was of no consequence" (above at 61).

Having been conquered (Chancellor Boyd continued), Indians "have no claim except upon the bounty and benevolence of the Crown" (*St Catharines Milling*, above at 230). Once reserves are established, Indians "become invested with a legally recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement" (*St Catharines Milling*, above at 230). There were, otherwise, no rights worthy of recognition other than those conferred by the Crown. Boyd's Chancery Court judgment was upheld at the Ontario Court of Appeal, while the Supreme Court of Canada split 3–2 in favour of provincial title.

St Catharines Milling and Lumber Co v R

13 SCR 577, 1887 CanLII 3

W CASSELLS and MILLS (for the respondent):

To maintain their position the appellants must assume that the Indians have a regular form of government, whereas nothing is more clear than that they have no government and no organization, and cannot be regarded as a nation capable of holding lands.

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It is also contended that the crown had never recognized the aboriginal inhabitants of a country who were without any settled government as the proprietors of the soil. This was not only the rule uniformly acted upon by the Sovereigns of England, but it was a part of the common law of Europe.

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SIR WJ RITCHIE CJ:

I am of opinion that all ungranted lands in the province of Ontario belong to the crown as part of the public domain, subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished, and when such right of

occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase . . .

• • •

I am therefore of opinion, that when the Dominion Government, in 1873 extinguished the Indian claim or title, its effect was, so far as the question now before us is concerned, simply to relieve the legal ownership of the land belonging to the Province from the burden, incumbrance, or however it might be designated, of the Indian title. It therefore follows that the claim of the Dominion to authorize the cutting of timber on these lands cannot be supported . . .

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STRONG J (dissenting):

In order to ascertain whether it was the intention of Parliament by the use of these words "lands reserved for the Indians" to describe comprehensively all lands in which the Indians retained any interest, and so as to include unsurrendered lands generally, or whether it was intended to use the term in its restricted sense . . . as indicating only lands which had been expressly granted and appropriated by the crown to the use of Indians, or excepted or reserved by them for their own use out of some large tract surrendered by them to the crown, we must refer to historical accounts of the policy . . . followed by the crown in dealings with the Indians in respect of their lands.

... It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.

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It . . . appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, though the *dominium directum* is considered to be in the United States.

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TASCHEREAU J:

While the different nations of Europe respected the rights (I would say the claims) of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves . . .

That such was the case with the French Government in Canada, during its occupancy thereof, is an incontrovertible fact. The King was vested with the ownership of all the ungranted lands in the colony as part of the crown domain, and a royal grant conveyed the full estate and entitled the grantee to possession.

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It was further argued . . . that the principles which have always guided the crown since the cession in its dealing with the Indians amount to a recognition of their title to a beneficiary interest in the soil. There is, in my opinion, no foundation for this contention. For obvious political reasons, and motives of humanity and

benevolence, it has, no doubt been the general policy of the crown, as it had been at the times of the French authorities, to respect the claims of the Indians. But this, though it unquestionably gives them a title to the favorable consideration of the Government, does not give them any title in law, any title that a court of justice can recognize as against the crown. If the numerous quotations on the subject furnished to us by the appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognizing a legal Indian title as against the crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.

The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some writers cited by the appellants, influenced by sentiment and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories.

St Catharines Milling and Lumber Company v The Queen

[1888] UKPC 70, 14 App Cas 46

LORD WATSON:

The territory in dispute has been in Indian occupation from the date of the Proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867) by the Government of the Dominion. ... It was suggested, in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never been "ceded to or purchased by" the Crown, the entire property of the land remained with them. The inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign. ... There was a great deal of learned discussion at the bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion on that point. It appears to them sufficient for the purposes of this case, that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

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The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the province in the same," within the meaning of Sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In the course of the argument, the claim of the Dominion to the ceded territory was rested upon the provisions of Sect. 91 (24) It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, Counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of showing that the

expression "Indian reserves" was used in legislative language to designate certain lands which the Indians had, after the Royal Proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the Proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in Sect. 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms of conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Their Lordships are, however, unable to assent to the argument for the Dominion founded on Sect. 91 (24). There can be no *a priori* probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

Lord Watson's judgment for the Judicial Committee of the Privy Council affirmed Chancellor Boyd's initial decision without Boyd's overt racism. Lord Watson announced that, despite the "great deal of learned discussion at the Bar with respect to the precise quality of the Indian right," the Board did "not consider it necessary to express any opinion on the point." Is it fair to conclude that his judgment is bereft of that underlying racism?

Would Lord Watson have decided the case in favour of the province in any event, irrespective of Chancellor Boyd's reasons, given Watson's preference, as expressed in *Local Prohibition*, for limiting the federal power over the provinces?

Recall that in *Local Prohibition*, Lord Watson made no mention of the double aspect rule that was initially articulated in *Hodge*. Nevertheless, could Lord Watson have found in *St Catharines Milling* that there were federal and provincial aspects to the subject matter that would have authorized each level of government to act? Or would those two aspects, conferring timber rights to log on surrendered land, have been identical? How would this be different from federal and provincial laws prohibiting retail liquor sales? As you move through Chapter 8, Interpreting the Division of Powers, you might want to revisit this chapter and consider the following question: if there was a double aspect, what would be the implications of federal paramountcy for provincial authority?

The law, as stated by Lord Watson, has significantly evolved as a consequence of changing judicial attitudes and the entrenchment of Indigenous rights in s 35 of the *Constitution Act, 1982*. As you move through Chapter 14, Indigenous Peoples and the Constitution, consider whether *St Catharines Milling* remains relevant. Does the ruling articulate assumptions the Supreme Court of Canada continues to rely upon to rationalize doctrines addressing Indigenous legal interests? Even if the law has changed in the intervening years, have the assumptions that support it remained in the background of contemporary doctrinal approaches to Indigenous rights and legal systems?

CHAPTER FIVE

THE EARLY TWENTIETH CENTURY: BEGINNINGS OF ECONOMIC REGULATION

This chapter continues the story of federalism into the early 20th century. In 1898, the Yukon Territory was carved out of the western corner of the Northwest Territories and, in 1905, Alberta and Saskatchewan were created out of the Northwest Territories' southern expanse. During this period, regulation of the economy expanded, and this is the subject of most of the cases in this chapter. The dominant personality is Lord Richard Burdon Haldane. Because it is unclear whether his decisions in the 1920s were his own contribution or a faithful elaboration of the earlier doctrine, especially the decisions of Lord Watson, an excerpt from his assessment of Lord Watson, written in 1899, is an appropriate beginning.

Lord Richard Burdon Haldane, "Lord Watson"
(1899) 11 Jurid Rev 278 at 279-81

He was an Imperial judge of the very first order. The function of such a judge, sitting in the supreme tribunal of the Empire, is to do more than decide what abstract and familiar legal conceptions should be applied to particular cases. His function is to be a statesman as well as a jurist, to fill in the gaps which Parliament has deliberately left in the skeleton constitutions and laws that it has provided for the British Colonies. The Imperial legislature has taken the view that these constitutions and laws must, if they are to be acceptable, be in a large measure unwritten, elastic, and capable of being silently developed and even altered as the Colony develops and alters. This imposes a task of immense importance and difficulty upon the Privy Council judges, and it was this task which Lord Watson had to face when some fifteen years ago he found himself face to face with what threatened to be a critical period in the history of Canada. Lord Carnarvon's *Confederation Act of 1867*, which had given separate legislatures and executives to the Provinces, had by no means completely defined the relations of these legislatures and their Lieutenant-Governors to the Parliament and Governor-General of the Dominion. Two views were being contended for. The one was that, excepting in such cases as were specially provided for, a general principle ought to be recognised which would tend to make the Government of Ottawa paramount, and the Governments of the Provinces subordinate. The other was that of federalism through and through, in executive as well as legislative concerns, whenever the contrary had not been expressly said by the Imperial Parliament. The Provincial Governments naturally pressed this latter view very strongly. The Supreme Court of Canada, however, which had been established under the *Confederation Act*, and was originally intended by all parties to be the practically final Court

of Appeal for Canada, took the other view. Great unrest was the result, followed by a series of appeals to the Privy Council, ... I happened to be engaged in a number of these cases, and had to give assistance as I could to the various Prime Ministers of the Provinces who came over to argue in person. Lord Watson made the business of laying down the new law that was necessary his own. He completely altered the tendency of the decisions of the Supreme Court, and established in the first place the sovereignty (subject to the power to interfere of the Imperial Parliament alone) of the legislatures of Ontario, Quebec and the other Provinces. He then worked out as a principle the direct relation, in point of exercise of the prerogative, of the Lieutenant-Governors to the Crown. In a series of masterly judgments he expounded and established the real constitution of Canada. The liquor laws, the Indian reserve lands, the title to regalia, including the precious metals, were brought before a Judicial Committee, in which he took the leading part, for consideration as to which of the rival claims to legislate ought to prevail. Nowhere is his memory likely to be more gratefully preserved than in those distant Canadian Provinces whose rights of self-government he placed on a basis that was both intelligible and firm.

The major cases in this section were decided in the 1920s, but a short look at two earlier ones gives some perspective for assessing the degree of continuity. The first, *City of Montreal v Montreal Street Railway Company*, [1912 CanLII 352](#), [\[1912\] AC 333 \(UKJCPC\)](#) involved a challenge to a section of the *Dominion Railway Act*, 3 Edw VII ch 58 that regulated continuing traffic on all provincial railways that crossed Dominion railways. In the Privy Council, Lord Atkinson expressed concern about provincial autonomy at 686-87:

[I]f the Parliament of Canada had power to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, namely the regulation of trade and commerce.

The second case, *Canada (AG) v Alberta (AG)*, [1916 CanLII 424](#), [\[1916\] 1 AC 588 \(UKJCPC\)](#) [*The Insurance Reference*], aff'g *Insurance Companies (Re)*, [48 SCR 260](#), [1913 CanLII 646](#), considered the *Dominion Insurance Act*, which sought to regulate large insurance companies carrying on business across the country. Section 4 prohibited any person or corporation from undertaking the business of insurance without a licence, although this prohibition did not include a corporation incorporated by a province and carrying on business wholly within the province that created it.

In the Supreme Court, a majority of four to two held the Act *ultra vires*. In the Privy Council, Lord Haldane agreed. He said that the Act "deprives private individuals of their liberty to carry on the business of insurance" (at 595). As regards the federal authority to make laws for the peace, order, and good government of Canada, Haldane considered *Russell v The Queen* (1882), 7 App Cas 829, 51 LJPC 77 (UKJCPC) as having illustrated the principle, "now well established, but [which] nonetheless ought to be applied with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction." He considered *Russell* and *Hodge v The Queen* (1883), 53 LJPC 1, 9 AC 117 (UKJCPC), and said at 596:

Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.

Undoubtedly, Lord Haldane admitted at 596, "the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority."

In the context of his discussion of the federal peace, order, and good government power, Lord Haldane held that a potential new aspect arises when a matter has attained "great dimensions," but called for "great caution" before finding that a matter has this kind of double aspect. Was Lord Haldane reading *Hodge* too narrowly? Was Lord FitzGerald in that case articulating a double-aspect doctrine only in the context of peace, order, and good government, or was he contemplating its application to federal enumerations more generally? Recall from Chapter 4, *The Late Nineteenth Century: The Courts Set an Initial Course*, that Lord FitzGerald referred to both *Russell v The Queen* (1882), 7 AC 829 (UKJCPC) and *Citizens' and The Queen Insurance Cos v Parsons*, [4 SCR 215, 1880 CanLII 6](#) as illustrating this rule.

The background of the next case, *Re the Board of Commerce Act, 1919 and the Combines and Fair Prices Act of 1919*, [60 SCR 456, 1920 CanLII 471](#), aff'd *Canada (AG) v Alberta (AG)*, [1921 CanLII 399, \[1922\] 1 AC 191 \(UKJCPC\)](#) [Reference re the Board of Commerce Act 1919], is described in the excerpt immediately below.

Bernard J Hibbits, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce"

(1989) 21:1 Ottawa L Rev 65 at 67-72

The Great War [The First World War] had been like no other conflict in history. The struggle had been one not merely of armies, but of entire nations harnessed to the single goal of victory. Governments had been forced to make unprecedented military and economic commitments to sustain their strategies and, indeed, themselves. When the guns finally fell silent it was discovered that along with millions of men, women and children had perished an entire world.

Canada had been spared the ravages of the fighting, but it nonetheless emerged in 1918 profoundly changed. Among the more obvious and important consequences of the war had been a phenomenal expansion of government and a concomitant increase in the extent of governmental intervention in the daily economic life of the citizenry. This is not to suggest that prior to 1914 the Canadian state or economy could have been adequately described in terms of laissez-faire; on the contrary, Canada had been remarkable for the tendency of governments throughout its history to direct the course of economic and national development from above and to control or indeed displace private enterprise in the public interest. Traditional Canadian conceptions of the state had nonetheless proven inadequate to meet the challenges posed by a total war in the twentieth century. Within a few months of the outbreak of hostilities the Borden Government had moved to mobilize the capacity of the nation in a more efficient manner.

... McGill's Stephen Leacock voiced the thoughts of many when he wrote in 1917:

The war has brought with it a new conception of society ... It has shown us in concrete form, in the shape of the war machine itself, a vast economic organization drawn to a scale never before imagined. The co-ordination of resources rendered necessary by the war, the united efforts made in production, manufacture and transport, suggest boundless possibilities for a time of peace. ...

By this point it was already apparent that it would be peace, not the war, that would ultimately pose the greater danger to Canadian prosperity and economic well-being. The scale of the existing conflict presaged the extent of the disruption that would follow an armistice. Hundreds of thousands of men would return from the Front looking for work. Entire industries which had grown up during the conflict and which had fueled the economic growth of the period—munitions being an obvious example—would atrophy or collapse almost overnight. Consumer demand patterns would change as the expectations and desires of the populace returned to what they had been in peacetime. Canadian trade abroad stood to suffer to the extent that foreign buyers would no longer need to depend as heavily on Canadian supplies of both raw materials and manufactured goods; at the same time it was feared that Canadian concerns would be exposed to competition from foreign—including, ironically, German—cartels.

In this context organization and co-operation became business bywords. Only through efficient combinations of plant and capital and/or co-ordination of marketing strategies did the country's commercial leaders believe that Canada's prosperity could be preserved.

... [M]any businessmen desired the creation of a forum in which they could work out their own disputes in an expeditious and effective manner. ... [T]he court system was perceived to be inadequate—litigation (assuming that commercial grievances represented valid causes of action in the first place) was expensive and, as noted above, businessmen were not convinced that judges had the commercial sensitivity required in the circumstances. In this context, business looked to the state to provide it with an institution which could, by its decisions, not only mute public criticism of its co-ordinative efforts, but could also facilitate post-war commerce by resolving the differences that created friction and disruption within the business community itself. In addition, many small businessmen hoped that such a tribunal would protect them from discrimination and other so-called unfair practices engaged in by the monopolistic "big interests" against which their own trade associations could be but a partial defence.

Such problems became more pressing as businessmen and consumers alike found themselves swept along by a rapidly rising cost of living. Wholesale and retail prices had skyrocketed during the war.

... In the face of this inflation, embittered members of the public accused businessmen of having conspired to suppress competition that would have kept prices down, and of having made undue profits in the process. In an atmosphere of increasing urgency exacerbated by widespread labour unrest (in particular the Winnipeg General Strike), the Government decided in May 1919 to appoint a special Parliamentary committee to look into the problem and report as soon as possible. This committee, chaired by Conservative MP George Nicholson, sat through the month of June, hearing witnesses from government, business, labour and consumer groups. Reporting on July 5, it suggested that the allegations of profiteering were generally without foundation: "[i]ndividual cases of high profits have been discovered, but these are probably no more numerous or excessive than during ordinary times of peace." Prices were high, but reasons for the wartime increases were to be found less in unfair or exploitative business practices than in consumers' wasteful buying and the general industrial expansion due to munitions making. Recognizing the need to act or at least be seen to act, a majority of the Committee nonetheless suggested that the Government establish a Board of Commerce which would continue and extend the investigative work of the Committee. ... Casting about for policy alternatives and becoming increasingly desperate in the last days of the Parliamentary session, the Government embraced the Committee recommendation and introduced implementing legislation

even before the Committee's final report had been officially released. Not coincidentally, one suspects, the proposals appeared to offer a means by which the Government could satisfy the expressed needs of consumers and businessmen alike. The former would get a commission which in appropriate circumstances could act to limit profits and to a certain extent fix prices so as to stabilize and perhaps even reduce the cost of living; the latter would get their businessman's court which could legitimize business associations and co-ordinative practices while providing a forum for dispute settlement. Two Bills were in fact brought into the House: the first, the *Board of Commerce Bill*, setting up the Board of Commerce more or less along the lines proposed, and the second, the *Combines and Fair Prices Bill*, essentially setting out its powers.

Canada (AG) v Alberta (AG)

1921 CanLII 399, [1922] 1 AC 191 (UKJCPC) [Reference Re the Board Commerce Act 1919], aff'g The Board of Commerce Act (Re), 60 SCR 456, 1920 CanLII 471

[The *Board of Commerce Act*, 1919, 9 & 10 Geo 5, Dom, c 37 and the *Combines and Fair Prices Act*, 1919, 9 & 10 Geo 5, Dom, c 45 were enacted in July 1919. The general objective was to restrict two sorts of perceived abuses: first, combines, monopolies, and mergers; and, second, taking unfair profits, or hoarding "necessaries of life," including food and clothing, for the purpose of unfairly increasing prices. The Board had extensive powers to investigate and to make orders, including orders to cease formation or operation of combines and orders to repay unfair profits. A violation of an order of the Board was an indictable offence, for which the penalty was a fine not exceeding \$1,000 for each day of the offence or imprisonment for a term not exceeding two years.

The Board began to work with great enthusiasm, making investigations and orders about prices, but almost immediately it encountered resistance. An order about profit margins for retail sales of clothing led to protests by irate merchants, and the Board reacted by arranging a reference to the Supreme Court to determine whether it had constitutional authority to make orders of this kind. Some preliminary procedural wrangling followed, caused largely by the Court's dissatisfaction with the abstract form of the questions in the reference. Eventually the questions were reformulated, and the Court was asked whether the Board had power to make a specific order setting profit margins for clothing prices in Ottawa. This depended on the validity of the *Combines and Fair Prices Act*, which gave the Board its powers.

The Supreme Court divided equally, three to three. (At the time, the Court was composed of only six members.) Anglin J, writing for himself and Fitzpatrick and Mignault JJ, would have upheld the statute, relying primarily on s 91(2):

Effective control and regulation of prices so as to meet and overcome in any one province what is generally recognized to be an evil—"profiteering"—an evil so prevalent and so insidious that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion—may thus necessitate investigation, inquiry and control in other Provinces. It may be necessary to deal with the prices and the profits of the growers or other producers of raw material, the manufacturers, the middlemen and the retailers. No one Provincial Legislature could legislate so as to cope effectively with such a matter and concurrent legislation of all the Provinces interested

is fraught with so many difficulties in its enactment, and in its administration and enforcement that to deal with the situation at all adequately by that means is, in my opinion, quite impracticable [*The Board of Commerce Act (Re)* at 362].

He did, though, say that the statute could also be upheld under the peace, order, and good government of Canada (POGG). Although it dealt with property and civil rights, it did so "in an aspect" (at 362) that was not local or private. As well, he would have upheld the provisions about hoarding necessities under s 91(27) (the criminal law power).

Opposed to Anglin were Idington, Duff, and Brodeur JJ. Idington J began his discussion of s 91(2) by speaking of "the old forlorn hope, so many times tried, unsuccessfully" (at 377). Regulation of prices in a "tailor shop, or the corner grocery" (at 377) came within s 92(13) and, if the statute were valid (at *The Board of Commerce Act (Re)* at 377-8):

Is there any sumptuary law or socialistic conception of organised society which could not be made to fall within the power of Parliament by the same process of reasoning . . . Our Confederation Act was not intended to be a mere sham, but an instrument of government intended to assign to the Provincial Legislatures some absolute rights, and of these none were supposed to be more precious than those over property and civil rights.

Turning to POGG, he spoke of "the remarkable legislation now in question" (*The Board of Commerce Act (Re)* at 379), and said it could not include a power to affect "property and civil rights . . . save in the extreme necessity begotten of war conditions, or in manifold ways that do not touch provincial rights" (*The Board of Commerce Act (Re)* at 379). Duff J began by considering s 91(2), and separated the Board's powers about hoarding and unfair profits. The powers about hoarding were too broad because they extended to hoarding by anyone, not only traders: "For example, it applies to accumulations by the house holder of articles of food produced by the householder himself, the small farmer's pork and butter, as well as to his cordwood" (*The Board of Commerce Act (Re)* at 386). The powers about unfair profits did not fail in the same way, but they did not come within the general principles specified by the cases (*The Board of Commerce Act (Re)* at 387-8):

I have indicated the principle which in my opinion is deducible from *Parsons'* case . . . namely that sec. 91, sub-sec. 2 does not authorise an enactment by the Dominion Parliament regulating in each of the Provinces the terms of the contracts of a particular business or trade, for the reason (put very broadly) that such legislation involves an interposition in . . . the sphere of "Property and Civil Rights and local undertakings" . . . I cannot discover any principle consistent with these conclusions, upon which an enactment delegating to a commission the authority to regulate the terms of particular contracts . . . according to the views of the Board as to what may be fair . . . , can be sustained as an exercise of that power; and if such legislation could not be supported when the subject dealt with is a single commodity, or the trade is a single commodity, or a single group of commodities, how can jurisdiction be acquired so to legislate by extending the scope of the legislation and bringing a large number of specified trades or commodities within its sweep?

Duff J then considered POGG, and said (*The Board of Commerce Act (Re)* at 392):

[W]here a subject matter is from a provincial point of view comprehended within the class of subjects falling under "property and civil rights," properly construed . . . it is incompetent to the Dominion in exercise of the authority given by the introductory

clause to legislate upon that matter either alone or together with subjects over which the Dominion has undoubted jurisdiction as falling neither within sec. 92 nor within the enumerated heads of sec. 91; and legislation which in effect has this operation cannot be legitimised by framing it in comprehensive terms embracing matters over which the Dominion has jurisdiction as well as matters in which the jurisdiction is committed exclusively to the Provinces.

Nor do I think it matters in the least that the legislation is enacted with the view of providing a remedy uniformly applicable to the whole of Canada in relation to a situation of general importance to the Dominion. The ultimate social, economic or political aims of the legislator cannot I think determine the category into which the matters dealt with fall in order to determine the question whether the jurisdiction to enact it is given by sec. 91 or sec. 92. The immediate operation and effect of the legislation, or the effect the legislation is calculated immediately to produce must alone, I think, be considered.

Both Idington and Duff JJ also rejected the arguments based on s 91(27). The Dominion appealed to the Privy Council.]

VISCOUNT HALDANE:

The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in war time [i.e., an emergency]. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada. No doubt the initial words of sec. 91 of the B.N.A. Act, confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in sec. 92, untrammelled by the enumeration of special heads in sec. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in sec. 92, and is not covered by them. The decision in *Russell v. The Queen* (1882) ... appears to recognise this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within sec. 92. Nor do the words in sec. 91, the Regulation of Trade and Commerce, if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the Provincial powers under sec. 92. In the case of Dominion companies their Lordships in deciding the case of *John Deere Plow Co. v. Wharton* [1914 CanLII 603, [1915] AC 330 (UKJCPC)], expressed the opinion that the language of sec. 91(2) could have the effect

of aiding Dominion powers conferred by the general language of sec. 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces. This result was the outcome of a series of well-known decisions of earlier dates, which are now so familiar that they need not be cited.

For analogous reasons the words of head 27 of sec. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the Criminal Law, except the constitution of courts of Criminal Jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion Criminal law which require a title to so interfere as basis of their application. ...

As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be ultra vires for the reasons now discussed. It implies a claim of title, in the cases of non-traders as well as of traders, to make orders prohibiting the accumulation of certain articles required for everyday life, and the withholding of such articles from sale at prices to be defined by the Board, whenever they exceed the amount of the material which appears to the Board to be required for domestic purposes or for the ordinary purposes of business. The Board is also given jurisdiction to regulate profits and dealings which may give rise to profit. The power sought to be given to the Board applies to articles produced for his own use by the householder himself, as well as to articles accumulated, not for the market but for the purposes of their own processes of manufacture by manufacturers. The Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application. This would cover such instances as those of coal mines and of local Provincial undertakings for meeting Provincial requirements of social life.

Legislation setting up a Board of Commerce with such powers appears to their Lordships to be beyond the powers conferred by sec. 91. They find confirmation of this view in sec. 41 of the Board of Commerce Act, which enables the Dominion Executive to review and alter the decisions of the Board. It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled [such] that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either sec. 92 or sec. 91 itself. Such a case, if it were to arise would have to be considered closely before [concluding] that it was one which could not be treated as falling under any of the heads enumerated. Still it is a conceivable case; and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the B.N.A. Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in

another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognised in earlier decisions, ... has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important [the policy] may seem to the Parliament of Canada ... , their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable ... without the co-operation of the Provincial Legislatures. It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the argument at the Bar for the Attorney-General for Canada. But even this consideration affords no justification for interpreting the words of sec. 91(2), in a fashion which would, as was said in the argument on the other side, make them confer capacity to regulate particular trades and businesses.

For the reasons now given their Lordships are of opinion that the first of the questions brought before them must be answered in the negative. As a consequence the second question does not arise. ...

Appeal dismissed.

A revised measure regulating anti-competitive conduct was upheld in *Proprietary Articles Trade Association v Canada (AG)*, [1931 CanLII 385, \[1931\] AC 310 \(UKJCPC\)](#), reproduced in Chapter 6, The 1930s: The Depression and the New Deal.

Fort Frances Pulp and Paper Co v Manitoba Free Press Co [1923 CanLII 429, \[1923\] AC 695 \(UKJCPC\)](#)

[This case dealt with regulation of prices for newsprint. It shared the social and economic background of the *Board of Commerce* case but involved different legislation. In 1914, the Dominion enacted the *War Measures Act*, 5 Geo 5, c 2, which gave the government power to do whatever it considered "necessary or advisable for the security, defense, peace, order and welfare of Canada." This power was limited to the existence of "real or apprehended war, invasion, insurrection" and a proclamation by the government was to be conclusive evidence that these conditions existed. Under the *War Measures Act*, the government regulated prices of newsprint in a series of different administrative arrangements. Most important was the creation, in 1917, of the paper controller, who made the initial decisions, and the Paper Control Tribunal, which heard appeals. On December 24, 1919, the controller made an order about prices up to December 31 and ordered the Fort Frances Company to repay whatever it had received from the Manitoba Free Press in excess of these prices. The Tribunal confirmed this order on July 8, 1920. When Fort Frances refused to pay, the Manitoba Free Press brought an action in Ontario. A trial judgment allowing the claim was affirmed by the Ontario Court of Appeal and the defendant appealed directly to the Privy Council.]

VISCOUNT HALDANE:

It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question. The recent decision of the Judicial Committee in the *Board of Commerce Case* [[1921] CanLII 399, [1922] 1 AC 191 (UKJCPC)] as well as earlier decisions, shew that as the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, it could not have done what the two statutes under consideration purport to do had the situation been normal. But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of the Dominion cannot act under other powers which may well be implied in the constitution. The reasons given in the *Board of Commerce Case* recognize exceptional cases where such a power may be implied.

In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires sec. 91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

The overriding powers enumerated in sec. 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the Provinces. It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within sec. 91, because in their fullness they extend beyond what sec. 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralised power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such. This principle of a power so implied has received effect also in countries with a written and apparently rigid constitution such as the United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component States. The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the B.N.A. Act, where the residuary powers are given to the Dominion Central Government, and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom.

Their Lordships, therefore, entertain no doubt that [while], as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that

arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in sec. 92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units. Where an exact line of demarcation will lie in such cases it may not be easy to lay down *a priori*, nor is it necessary. For in the solution of the problem regard must be had to the broadened field covered, in case of exceptional necessity, by the language of sec. 91, in which the interests of the Dominion generally are protected. As to these interests the Dominion Government, which in its Parliament represents the people as a whole, must be deemed to be left with considerable freedom to judge.

The other point which arises is whether such exceptional necessity as must be taken to have existed when the war broke out, and almost of necessity for some period subsequent to its outbreak, continued through the whole of the time within which the questions in the present case arose.

When war has broken out it may be requisite to make special provision to ensure the maintenance of law and order in a country, even when it is in no immediate danger of invasion. Public opinion may become excitable, and one of the causes of this may conceivably be want of uninterrupted information in newspapers. Steps may have to be taken to ensure supplies of these and to avoid shortage, and the effect of the economic and other disturbance occasioned originally by the war may thus continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter. No authority other than the central government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton v. Kentucky Distilleries* (1919), 251 U.S. Rep. 146.

When then, in the present instance, can it be said that the necessity altogether ceased for maintaining the exceptional measure of control over the newspaper print industry introduced while the war was at its height? At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires*? It is enough to say that there is no clear and unmistakable evidence [of this] at the dates on which the action in question was taken by the Paper Control Tribunal. No doubt late in 1919 statements were made to the effect that the war itself was at an end. For example, in the Order in Council made at Ottawa on December 20, 1919, it is stated that it must

"be realised that although no proclamation has been issued declaring that the war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently existence of war can no longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security of Canada."

The Order in Council then goes on to say that in consequence of the armistice of November, 1918, the Expeditionary Force had since been withdrawn and demobilised, and the country generally is devoting its energies to re-establishment in the ordinary avocations of peace. In these circumstances, it states, the Minister of Justice considers that the time has arrived when the emergency Government legislation should cease to operate. (This was in December, 1919.) The order then goes on to declare repealed all orders and regulations of the Governor in Council which depend for their sanction upon sec. 6 of the War Measures Act, 1914, and repeals them as from January 1, 1920. But from this repeal it expressly excepts, among other orders and regulations specified, those relating to paper control, which are to remain in force until the end of another session of Parliament.

It will be observed that this Order in Council deals only with the results following from the cessation of actual war conditions. It excepts from repeal certain measures concerned with consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over.

Their Lordships find themselves unable to say that the Dominion Government had no good reason for thus temporarily continuing the paper control after actual war had ceased, but while the effects of war conditions might still be operative.

Appeal dismissed.

NOTE

The Board of Commerce was also entangled in the regulation of the price of newsprint, although later and in a different way. Early in 1920, as part of the dismantling of wartime controls, the Dominion assigned the Board of Commerce the functions of the paper controller, and it inherited a quarrel with Price Brothers, one of the large pulp and paper firms. Shortly afterward, the Board declared newsprint to be a necessity and set a maximum price that was well below the market price in the United States. Price Brothers refused to comply, and the Board sought to enforce its order. This quarrel led to another case, *In re Price Bros and The Board of Commerce of Canada*, [60 SCR 265, 1920 CanLII 89](#), in which two issues of interpretation were raised. The first involved the *War Measures Act*, and here the question was whether it authorized the appointment of the paper controller even though armistice had been declared three months before the appointment. The second of these two issues involved the phrase "necessary of life" in the *Combines and Fair Prices Act*: was newsprint a "necessary"? A majority of the Supreme Court decided both issues against the Board, and no appeal was taken.

See Bernard J Hibbitts, "A Bridle for Leviathan: The Supreme Court and the Board of Commerce" (1989) 21:1 Ottawa L Rev 65, where Hibbitts argues that the case is a watershed in the attitudes of Canadian judges toward economic regulation. His argument (at 97-102) may be useful in considering explanations of the cases throughout the 1920s and 1930s:

The outright split in the Reference and the variations in approach which had been evident in *Price Brothers* reflected philosophical and conceptual differences among members of the Supreme Court going far beyond the level of disagreements as to the *vires* of particular legislation or the jurisdiction of a particular board. Beneath the veneer afforded by the circumstances of the cases, the Court was divided on such fundamental issues as the appropriate functions of the state, the rights of the individual, the nature of Canadian federalism, the role of the courts and the task of law. The divisions, granted, were not always hard and fast and sometimes individuals appeared inconsistent. The Board of Commerce decisions nonetheless made it clear that the Judges of the Court were not altogether of one mind. Regarded in a broader context, the decisions further suggested that far from being a static

institution, the Court in this period was in the process—albeit by now in the last stages—of a transformation which was having an important impact on its behaviour, and in particular on its relationship with government.

Ultimately, the differences among the members of the Court were differences about values—in particular, the respective worths of Man (the individual) and the state (the community). Idington, Duff and Brodeur JJ, for instance, were very much animated by faith in the capacity of individuals to advance and benefit themselves and society and by a concomitant concern for their rights. In the *Board of Commerce Reference*, these things had revealed themselves directly as an aversion to compulsion of the individual by the state and a willingness to confine the power and discretion of state instrumentalities so as to limit the potential extent of that compulsion. Similar considerations had encouraged the same men to deny federal authority over such undertakings in favour of provincial jurisdiction. ...

Justices Anglin, Davies and Mignault had been rather less concerned with such rights and provincial autonomy. Their judgments contained no paeans to the state, but they had nonetheless been prepared to allow the legislature and its instrumentalities a greater degree of “interference” in the lives and business of the citizenry. In sum, they seemed less convinced of the individual’s social omnipotence and omnicompetence, more concerned with the efficient solution of important social problems and more prepared to defer to authority purporting to be engaged in such solution. ...

It may be argued that the inconsistencies in approach manifest among members of the Supreme Court in the *Board of Commerce* cases reflected a confrontation within the Court between two competing visions of law; one newly dominant, the other in decline. The dominant vision—that shared by Idington, Duff and Brodeur JJ—had been imported to Canada from late nineteenth century England, and was the more modern of the two. The other view of law—arguably apparent in the judgments of Anglin, Davies and Mignault JJ, but even in them somewhat qualified by aspects of the dominant vision—was more traditional, being principally a philosophic holdover from the colonial past.

Toronto Electric Commissioners v Snider

1925 CanLII 331, [1925] AC 396 (UKJCPC), rev’g Toronto Electric Commission v Snider, 1924 CanLII 429, 55 OLR 454 (CA)

[Here the Privy Council considered the validity of the *Industrial Disputes Investigation Act*, enacted by the Dominion in 1907. It applied to mining, transportation, and communications undertakings, as well as public service utilities, and it was limited to those with more than ten employees. It enabled an employee or an employer in a dispute about the conditions of work to apply to the Minister of Labour for the appointment of a Board of Conciliation and Investigation. If a board was appointed, a strike or lockout was prohibited, and the function of this board was to inquire into the dispute and to attempt to effect a settlement. If a settlement was reached, it had the effect of an order of a court; if no settlement was reached, the board was to report to the Minister, who was to make the report public. In 1914, Ontario enacted a similar statute.

A board was appointed to inquire into a dispute between the Toronto Electric commissioners and some of its employees, and the commissioners sought an injunction, alleging that the Act was *ultra vires*. The Ontario Court of Appeal, reversing the trial court, dismissed the claim. Ferguson JA, with whom Mulock CJO and Magee and Smith JJA concurred, wrote the judgment for the majority. He avoided relying on POGG, because he felt that its limits were not clearly settled. The Act, though, was valid under s 91(2) and s 91(27). About s 91(2), Ferguson JA said (*Snider* [1924] at 785-86):

It cannot be disputed that to deprive the City of Toronto of electric power on which it depends for light, heat and power is to disturb and hinder the national trade and commerce and to endanger public peace, order and safety.

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Industrial disputes are not now regarded as matters concerning only a disputing employer and his employees. It is common knowledge that such disputes are matters of public interest and concern, and frequently of national and international importance.

Hodgins JA dissented. For POGG, he saw two distinct grounds, emergency and "matters of 'general Canadian interest and importance,'" (*Snider* [1924] at 764) an expression borrowed from Lord Watson. The Act was not a response to an emergency. Instead, it dealt with

the normal working of industrial relations, which often require time and patience and some restraint, to afford protection against dislocation or disturbance in the usual conduct of business as between employer and employees. It [was] essentially a sedative measure, and not in any way designed to meet a serious emergency [*Snider* [1924] at 764].

He held that the other branch of POGG could not support the Act, because it "plainly invades the specified domain of provincial legislation" (*Snider* [1924] at 769), even though the subject of labour relations was one that should, "in the interest of the whole community ... be dealt with by some national measure" (*Snider* [1924] at 769). In conclusion, he said that s 91(27) did not support the Act, because it was "substantially in relation to property and civil rights" (*Snider* [1924] at 778). The commissioners appealed to the Privy Council.]

LORD HALDANE:

[A description of the legislation and the dispute is omitted. Lord Haldane's description was inaccurate in one respect—it asserted that the legislation applied to "industrial disputes between any employer in Canada and any one or more of his employees" (*Snider* [1924] at 766). In fact, the legislation was limited to certain industries and applied only to employers with more than ten employees.]

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Their Lordships are of opinion that, on authority as well as on principle, they are to-day precluded from accepting the arguments that the Dominion Act in controversy can be justified as being an exercise of the Dominion power under s. 91 in relation to criminal law. What the Industrial Disputes Investigation Act ... aimed at accomplishing was to enable the Dominion Government to appoint anywhere in Canada a Board of Conciliation and Investigation to which the dispute between an employer and his employees might be referred. The Board was to have power to enforce the attendance of witnesses and to compel the production of documents. It could under the Act enter premises, interrogate the persons there, and inspect the work. It rendered it unlawful for an employer to lock-out or for a workman to strike, on account of the dispute, prior to or during the reference, and imposed an obligation on employees and employers to give 30 days' notice of any intended change affecting wages or hours. ... It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not [lessen] the statute['s] ... interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime. Moreover, the employer retains under the general common law a right to lock-out, only slightly

interfered with by the penalty. In this connection their Lordships are therefore of opinion that the validity of the Act cannot be sustained.

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Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention.

[A discussion of cases, especially *Parsons*, is omitted.]

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It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.

A more difficult question arises with reference to the initial words of s. 91, which enable the Parliament of Canada to make laws for the peace, order and good government of Canada in matters falling outside the Provincial powers specifically conferred by s. 92. ...

[Another discussion of cases, especially *Russell*, is omitted.]

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It appears to their Lordships that it is not now open to them to treat *Russell v. The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp and Power Co. v. Manitoba Free Press* [1923] CanLII 429, [1923] AC 695 (UKJCPC), are highly exceptional. Their Lordships think that the decision in *Russell v. The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce* case [1921] CanLII 399, [1922] 1 AC 191 (UKJCPC), that the evil of profiteering could not have been so invoked, for provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell v. The Queen* as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

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As the result of consideration, their Lordships have come to the conclusion that they ought humbly to advise the Sovereign that the appeal should be allowed, and

that judgment should be entered for the appellants for the declaration and injunction claimed.

Appeal allowed.

The Board's decision to strike down the federal *Industrial Disputes Investigation Act*, RSC 1952, c 152 came as no great surprise to some commentators, even though the Act had been in continuous operation for the previous 19 years. The following excerpt helps to explain why Lord Haldane saw labour relations as more appropriately the subject of provincial regulation:

Labour at first opposed the scheme [in the *Snider* litigation]. It came around to support the Act, submitted counsel for Snider, Mr. Duncan, in oral argument, because labour saw the "justice" in supporting a national scheme that dealt with the subject satisfactorily "from a Labour point of view." The same could not be expected of the provinces acting severally. Federal authority was justified, argued Duncan, not only because social conditions had changed so dramatically that regulation of industrial relations was a national priority, but also because of the fear that collective action by labour could "be very quickly turned into an attack on the State"—always an imminent [*sic*] emergency.

Lord Haldane could find no authority for the Act in the federal trade and commerce power because it was not invoked in aid of another power conferred independently of section 91(2); nor could he find support under the federal criminal law power. As for pog, Haldane resisted the conclusion that the Act arose out of some "extraordinary peril to the national life of Canada, as a whole." As in the case of the evil of "profiteering," which was the target of federal legislation in *Board of Commerce*, provincial powers "if exercised, were adequate" to the task of regulating labour relations.

Not only did the structure and interpretation of the 1867 Act compel the conclusion that the provinces had this authority, but Haldane made clear during oral argument that he preferred that authority rest with the provinces, for reasons having to do with the ethical superiority of local government: "In all those labour disputes the stopping of a strike depends a good deal on whether the Minister can get alongside the men, and whether he knows them, and can talk as familiar friends; you have a better chance of that if you are all local men than if you are spread over a huge Dominion." Haldane went so far as to describe each province as "a country by itself," as an "independent State, ... cut into expressly by the enumerations of section 91." ... Perhaps the better interpretation of Haldane's understanding of Canadian constitutional law is this: citizenship in a federal polity is advanced by favouring autonomous local government over centralized state authority, save for those rare instances when the polity itself is under threat.

See David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century" (1998) 48:4 UTLJ 521 at 558-59.

NOTE: LORD HALDANE AND THE TRADE AND COMMERCE POWER

The *Parsons* case excerpted in Chapter 4 had suggested a narrow reading of the scope of the federal trade and commerce power. In the series of decisions discussed in this chapter, Lord Haldane further reduced this power to one available only "in aid of" another federal enumeration. The federal trade and commerce power alone had no independent authority; it could only be used to tip the balance in favour of the federal government under some other independent enumeration. Yet in *Parsons*, Sir Montague Smith admitted that the federal power under s 91(2) extended to international and interprovincial trade. Could it have been

that Lord Haldane intended to deny even this authority to the federal government? Professor Alexander Smith suggests that it was a "Procrustean adjustment" to proscribe the power relating to the "general regulation of trade" to a subsidiary role. "If it was intended to apply to all components of the commerce clause, including international and interprovincial trade," Smith wrote, "then it is remarkable indeed": see Alexander Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at 115. In the following case, Justice Anglin expresses a similar concern. Justice Duff, for the majority, seems to acknowledge that the federal government continues to have authority to regulate foreign trade, but holds that it does not have authority to intermingle regulation of foreign trade with trade taking place entirely within provincial boundaries.

The King v Eastern Terminal Elevator Co

[1925] SCR 434, 1925 CanLII 82

[Early in the 20th century, exports of grain grown on the prairies became a major element of Canada's economy. Typically, the grain was delivered by farmers to local elevators and, from them, transported by rail to elevators in Winnipeg. From Winnipeg, it went, again by rail, to elevators in Port Arthur or Fort William (now Thunder Bay) and then to markets in Canada and abroad. The entire industry was governed by the *Canada Grain Act*, 1912, 9-10 Geo 5, c 40, which created the Board of Grain Commissioners and gave it extensive regulatory powers.

One of the purposes of the Act was to facilitate commercial transactions, especially international transactions, by requiring all prairie grain shipped through elevators to be cleaned, weighed, and graded, and by providing certificates of weights and grades on which buyers could rely. The railway cars were inspected at Winnipeg to determine the kind of grain, its grade and weight, and the percentage of "dockage"—extraneous grain and foreign matter. When the grain arrived in Port Arthur or Fort William, the elevators issued certificates of weight and grade, which were used in commercial transactions; and warehouse receipts, which were traded on the Winnipeg Grain Exchange.

This case involved a quarrel between farmers and terminal grain elevators in Port Arthur and Fort William. The quarrel was about the arrangements established by the Act for compensating the terminal elevators for storing and cleaning the grain. These arrangements were complex. If the dockage was over three percent of the weight of the grain delivered, it was returned to the shipper (with a small deduction for waste), and the shipper paid a fee for storage and cleaning. If it was under three percent, it was a "surplus," and was retained by the elevator in lieu of a separate fee. The elevators screened this surplus and sold the marketable grain it contained.

In 1919, in response to complaints that the terminal elevators were making unfair profits from the surpluses, s 95(7) was added. It provided that each elevator could retain only a limited amount of the surplus—one-quarter percent of the total grain it received. The remainder was to be sold, and the proceeds paid to the Board and used for administrative costs.

The Board brought this action against the Eastern Terminal Company, one of the terminal elevators, after it refused to pay, and the company claimed that s 95(7) was *ultra vires*. The trial judge, Maclean J, agreed. Even though the Act as a whole might be valid because "the export of Canadian grain was a matter of national concern" and "a primary industry of great magnitude" (at 455), s 95(7) was not necessarily incidental. Considering the legislative history, especially the concern for unfair profits, the limitation to terminal elevators, and the fact that the Board had a power

to impose fees to pay its expenses, it was "an attempt to regulate profits" (at 455), and not an imposition of a tax. The Board appealed.]

ANGLIN CJ (dissenting):

Assuming that the Canada Grain Act as a whole is *intra vires* of Parliament, s.s. 7 of s. 95 seems to me to be defensible as an incidental enactment designed to promote the attainment of the purposes of the Act. It not only provides for the obtaining of revenue from persons and corporations instrumental and beneficially interested in the carrying out of the scheme which it sanctions, and to be applied towards the cost of working it, but it furnishes, perhaps, the best possible security that one of the main operations for which the Act provides, namely, the cleaning of the grain so that it will actually conform to the grade and quality called for by the Government certificate based on its prior inspection, will be honestly and efficiently carried out

The object of Parliament in enacting the Canada Grain Act was, in my opinion, to provide for the economical expeditious and profitable export and marketing abroad of what is to-day the most valuable product of Canada—the most important subject of its trade and commerce—its greatest source of wealth. The scheme of the Act is the constitution and regulation of machinery to effectuate that purpose. It provides, as only the Dominion Parliament can, for the control and handling of the grain from the moment it leaves the hands of the grower—practically always in one of the Western Provinces—until its shipment in Ontario or one of the eastern provinces for the foreign market accompanied by a government certificate of its grade and quality, upon the acceptance of which in that market the Canadian shipper can depend. No single province could legislate to cover this field. Concurrent legislation by all the provinces interested, if practicable (which I doubt), would be ineffectual to accomplish the purpose. Dominion legislation is required. Apart from the fact that a provincial certificate would not carry the weight and authority attaching to a certificate issued under Dominion sanction, the necessary control over transit and handling in different provinces and ultimate shipment could not be exercised under provincial legislation.

I regard the subject matter of the Canada Grain Act, therefore, as lying outside the scope of the powers entrusted to the legislatures by the sixteen heads of provincial legislative jurisdiction contained in s. 92.

[Anglin CJ discussed the Privy Council decisions and, when he came to Lord Haldane's description of *Russell* in *Snider*, he said: "I should indeed be surprised if a body so well informed as their Lordships had countenanced such an aspersion on the fair fame of Canada, even though some hard driven advocate had ventured to insinuate it in argument" (at 438). He continued the discussion of the cases and came to Lord Haldane's account of trade and commerce, again in *Snider*, and said:]

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With the utmost respect, I fail to appreciate the reasoning on which this view is based. If neither the power conferred by the general language of s. 91, nor the power ... to regulate trade and commerce ... warrants Dominion legislation which trenches on the provincial field, ... I find rather elusive and difficult to understand the foundation for the view that legislation authorized only by the [general clause] may be so helped out by the [trade and commerce clause] that invasion of the provincial domain may thus be justified. But the decisive authority of the judgments which have so determined cannot now be questioned in this court. I defer to it.

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But for their Lordships' emphatic and reiterated allocation of "the regulation of trade and commerce" to this subordinate and wholly auxiliary function, my

inclination would have been to accord to it some independent operation, [and] to treat it as appropriating exclusively to the Dominion Parliament an enumerated subject of legislative jurisdiction with consequences similar to ... the other twenty-eight [in] s. 91. It is incontrovertible and readily apprehended that the subject matter of head No. 2 must be restricted as was indicated in *Parsons' Case* [and] frequently recognized in later decisions of the Judicial Committee. But that it should be denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction—that it must be excluded from the operation of the concluding paragraph of s. 91, except for the subsidiary and auxiliary purposes indicated in recent decisions—these are propositions to which I find it difficult to accede. ...

But apart from any assistance afforded by head No. 2 of 91, I would uphold the Canada Grain Act as a statute of which the subject matter lies outside all of ... s. 92, in which case, said Lord Haldane in the *Insurance Reference* [1916 CanLII 424, [1916] 1 AC 588 (UKJCPC)], "the Dominion Parliament can legislate effectively as regards a province." ...

In my view not only is the grain trade of Canada a matter of national concern and of such dimensions as to affect the body politic of the Dominion, but the provisions of the Canada Grain Act, with some possible exceptions, deal with matters which, as envisaged by that legislation, do not come within that class of matters of a local or private nature ... assigned exclusively to the legislatures of the provinces.

As to most of them there is, therefore, no encroachment on the provincial domain. ...

So regarded the Canada Grain Act may, I think, be supported without having recourse to the existence of abnormal conditions involving some extraordinary peril to the national life of Canada, recently indicated as a justification ... when legislating under the general power conferred by s. 91. But if ... it should therefore be deemed necessary to meet this test of their validity, I know of nothing more likely to create a national emergency in Canada than a judicial determination that the Dominion Parliament lacks the power to legislate for the regulation of the export grain trade of the country. It cannot be that Parliament must defer legislative action until a national emergency with attendant disaster has developed. To protect the national interest it assuredly may anticipate and ward off such an evil. There is an emergency connected with the movement of the grain crop at the end of each season incontrovertibly greater than any which can be supposed to have existed in 1878 with regard to the liquor traffic

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DUFF J:

... The Act is an attempt to regulate, directly and through the instrumentality of Grain Commissioners, the occupations mentioned. It is also an attempt to regulate generally elevators as warehouses for grain, and the business of operating them; and it seems, *ex facie*, to come within the decision of the Judicial Committee, *Attorney General for Canada v. Attorney General for Alberta*, [1916] 1 AG 588 (UKJCPC), condemning the Insurance Act of 1910 as *ultra vires*.

Mr. Symington, in a very able argument, attempted to support the Act on the ground that the trade in grain is largely an external trade (between seventy and eighty per cent, apparently, of the grain produced in the country is exported); and that the provisions of the Act are, on the whole, an attempt to regulate a branch of external trade, the provisions dealing with local matters being, as a rule, subsidiary and reasonably ancillary to the main purpose of the Act.

It is undeniable that one principal object of this Act is to protect the external trade in grain ... and the beneficent effect and the value of the system provided by the legislation as a whole is not at all disputed by anybody. I do not think it is fairly disputable, either, that the Dominion possesses legislative powers, in respect of

transport (by its authority over Dominion railways, over lines of ships connecting this country with foreign countries, over navigation and shipping); in respect of weight and measures; in respect of trade and commerce, interpreted as that phrase has been interpreted; which would enable it effectively, by properly framed legislation, to regulate this branch of external trade for the purpose of protecting it ... It does not follow that it is within the power of Parliament to accomplish this object by assuming, as this legislation does, the regulation in the provinces of particular occupations, as such, by a licensing system and otherwise, and of local works and undertakings, as such, however important and beneficial the ultimate purpose of the legislation may be. There are, no doubt, many provisions of this statute which, as they stand, can be sustained; with them we are not concerned at this moment. The particular provision which is sought to be enforced is one of a series of provisions which are designed to regulate elevators and the occupations of those who make it their business to operate elevators. The particular provision, if it stood alone, might, perhaps, be sustained as a tax, but it cannot be separated from its context; it is only one part of a scheme for the regulation of elevators. There is one way in which the Dominion may acquire authority to regulate a local work such as an elevator; and that is, by a declaration properly framed under section 92(10) of the B.N.A. Act ...

There are two lurking fallacies in the argument advanced on behalf of the Crown; first, that, because in large part the grain trade is an export trade, you can regulate it locally in order to give effect to your policy in relation to the regulation of that part of it which is export. Obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is seventy per cent of the whole, it must be equally operative when that percentage is only thirty; and such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country ... and regulation of trade, according to ... this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried on. Precisely the same thing was attempted in the Insurance Act of 1910, unsuccessfully. The other fallacy is (the two are, perhaps, different forms of the same error) that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the *Board of Commerce Case* [1921 CanLII 399, [1922] 1 AC 191 (UKJCPC)] and, indeed, is the view which was unsuccessfully put forward in the *Montreal Street Railway Case* [1912 CanLII 352, [1912] AC 333 (UKJCPC)], where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

In one respect there is a close analogy between this case and the *Montreal Street Railway Case*. The expedient which their Lordships there pointed out as the appropriate one ... is precisely that by which the Dominion could invest itself with the authority [here]; that is to say, by resorting, as already suggested, to the power conferred by section 92(10) to assume, through the procedure there laid down, jurisdiction in respect of "local works."

Fortunately, however, to repeat what has been said above, the control possessed by the Dominion over the subject matters mentioned, and especially over transport (both land transport and water transport) and over external trade, would really appear to be amply sufficient to enable the Dominion, by appropriately framed legislation, effectively to secure the essential objects of this statute.

[Mignault J held the Act invalid, for reasons similar to those of Duff J. Rinfret J concurred with Duff J and Idington J agreed with the trial judge, Maclean J.]

Appeal dismissed.

After *The King v Eastern Terminal Elevator Co*, the Dominion adopted the technique suggested by Duff J and acquired regulatory authority by declaring grain elevators to be works for the general advantage of Canada, pursuant to s 92(10)(c) of the *British North America Act* (BNA Act).

Before 1925, scholars expressed little concern about the general course of the decisions by the Privy Council. For example, the leading Canadian constitutional scholar in the later 19th century, AHF Lefroy, was, generally, utterly respectful and, in 1913, when he did dare to criticize one of its decisions, he said that he had never before "seen the smallest loophole for criticism or for doubt as to the correctness of any one of them before this last judgment": see Augustus Henry Frazer Lefroy, "The Alberta and Great Waterways Railway Case" (1913) 29 Law Q Rev 285 at 288. Shortly after *Snider*, misgivings began to appear, together with a new attitude toward legal thought and scholarship. The following article was the first substantial mark of these changes. We will see later in this part that the rule against quoting from the proceedings of Parliament, referred to by Smith in this extract, has since been relaxed.

HA Smith, "The Residue of Power in Canada"

(1926) 4 Can Bar Rev 432 at 432-39 (footnotes omitted)

[T]he difficulties of interpretation begin when words are not unambiguous, and it is at this point that our practice has drawn an arbitrary distinction between statutes and all other legal documents. In interpreting an obscure clause in a contract the court will take into consideration the whole of the previous correspondence between the parties and any words or conduct which may throw light upon their intentions. So again, if the words of a will are capable of two or more meanings, evidence is freely admitted to show what was passing in the testator's mind when he wrote those words. In all these cases our law is in accordance with common sense and with the ordinary practice of historical and literary criticism in other branches of learning.

If the application of this rule were extended to the interpretation of statutes it would follow that obscure clauses could be elucidated by studying the debates in Parliament and the considered public utterances of statesmen responsible for the introduction of the new law. ...

Unfortunately an arbitrary rule of English practice has cut off from the judge the light which is available for the historian, and it is now settled law that counsel are not permitted to quote from the proceedings of Parliament in order to explain the meaning of a statute. The same rule operates to exclude the speeches of statesmen outside Parliament, and probably extends to other forms of *contemporanea expositio*. In other words the courts are forbidden to adopt historical methods in solving a historical problem.

The immediate purpose of this rather lengthy introduction is to explain how an arbitrary and unreasonable rule of interpretation has produced the very serious result of giving Canada a constitution substantially different from that which her founders intended that she should have. A study of the available historical evidence gives us

a clear and definite idea of what the fathers of Canadian confederation sought to achieve. By excluding this historical evidence and considering the *British North America Act* without any regard to its historical setting the courts have recently imposed upon us a constitution which is different, not only in detail but also in principle, from that designed at Charlottetown and Quebec.

The latest and leading authority upon the meaning of the "peace, order and good government" clause in the Canadian constitution is now the case of *Toronto Electric Commissioners v. Snider*, where the validity of the "*Lemieux Act*" dealing with compulsory industrial arbitration was in question. The judgment delivered by Lord Haldane in this case is now too well-known to need detailed analysis here. Its importance lies in the fact that it definitely relegated the words "peace, order and good government" to the position of a reserve power to be used only in cases of war or similar national emergencies. The real residuary power of legislation in normal times is now held to be contained in the words "property and civil rights," with regard to which the legislative power of the provinces is exclusive. The specific powers enunciated in section 91 are to be treated as exceptions to the general jurisdiction of the provinces to legislate upon property and civil rights. ...

I do not think that it is going too far to say that this result is the precise opposite of that which our fathers hoped and endeavoured to attain. ...

Upon reading the [Confederation] debates as a whole two points strike the attention. In the first place, no speaker, whether an advocate or an opponent of confederation, seems to have doubted that the Dominion was endowed with a general power to pass all legislation that it might deem to be for the general interest of Canada. Broadly speaking, the distinction between section 91 and section 92 was the distinction between those things that were of general and those that were of merely local importance. The true balance of the constitution is to be found in the opposition between the words "laws for the peace, order, and good government of Canada," in section 91 and the concluding words of section 92—"Generally, all matters of a merely local or private nature in the Province." The detailed enumerations were really intended to be explanatory of these two main principles, subject to the proviso that nothing specifically mentioned in section 91 should be deemed to be of a local or private nature. ...

The second point that will strike the student of these debates is that nobody even thought of the modern idea that the words "peace, order, and good government" were intended to provide a kind of reserve power to be used only in the event of war, pestilence, or similar national calamities. So far as I am aware, this doctrine begins with the judgment in *Re the Board of Commerce Act*. The encroachment upon the sound and lucid doctrine of *Russell v. The Queen* began much earlier, but it did not at first amount to a denial of the main principle of Confederation.

[Here, Smith quoted the famous passage from the *Local Prohibition Reference* about "national concern."]

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In these words we have a clear recognition of the true test of jurisdiction, as laid down by the statesmen of 1867.

Canadian historians, political scientists, and lawyers have spilled a lot of ink trying to explain the decisions of the Privy Council, especially the judgments of Lords Watson and Haldane. Two of the best-known efforts follow.

James R Mallory, Social Credit and the Federal Power in Canada

(Toronto: University of Toronto Press, 1976) at 48-49, 55-56
(footnotes omitted)

What is the explanation of [the *Board of Commerce* case] and the trend of interpretation which it represents? Lord Haldane's reasoning, although elaborate, is not always easy to follow. An important element in the arguments appears to be the repeated view that the Act in question represented something altogether abnormal, and outside the range and scope of the functions of government as properly conceived. There are two aspects of the judgment which support this explanation.

The first arises from the nature of the agency itself, as is evident from the above quotation. The board, which is an agency enjoying rather wide discretionary powers and considerable independence of Parliament, is a very common device in Canada, particularly for dealing with problems of administration where the matter is technical in character, or where political pressure in the execution of policy is unlikely to serve any useful purpose. The independent administrative agency has been unpopular in England because it has tended to usurp functions of both Parliament and the judiciary. At no time was it in greater disrepute in legal circles than in the period which followed the dismantling of much of the war-created machinery of government in the early twenties. The fact that the decisions of the Board of Commerce were subject to review and alteration by the executive, rather than by Parliament, created in the English mind the illusion of concentrated state power of an emergency character. Thus the independent board, controlled only by the executive, appeared in the light of contemporary anxiety to transcend the words of sections 91 and 92 altogether.

The second explanation of Lord Haldane's judgment reinforces the first. Throughout the judgment there is the clear assumption that the eradication of hoarding and undue combination was scarcely an activity which should commend itself to the sense of propriety of a national parliament. Such matters, indeed, might be causes of local annoyance, and perhaps occasionally might be dealt with by local governments, but to pretend in ordinary times that hoarding and market-rigging were the proper subject for the attention of a national government suggested that they must be a cloak for some unwarranted extension of the proper sphere of the state.

Lord Haldane's decision in the *Snider* case is of the same order. There he took the almost incredible step of finding that a statute, which had been in force for nineteen years without serious question, was *ultra vires* the Parliament of Canada. In fact, his judgments follow a consistent pattern of nineteenth-century liberalism. This is, admittedly, not easy to explain since his philosophical outlook was scarcely Benthamite and his political sympathies were openly with the British Labour party. But the judgments, with their painstaking inability to be sympathetic to the intention of the legislature and their disastrous effect on novel functions and novel methods of government, remain. ...

Increasingly, constitutional case-law had become a reflection of conflict over the major issues of economic and social policy. If they are looked at in this way, one-half of the important leading cases in Canadian constitutional law involved an attempt by the state to interfere with the free disposal by individuals of their property. The results of this constant litigious pressure against limitation of the freedom of action of the individual are imposing. In one-half of the cases the plea of *ultra vires* was successful in defeating the intention of the legislature. It is impossible to avoid the conclusion that the resulting spheres of authority of the Dominion and the provinces are the incidental outcome of a clash between individualism and collectivism.

Thus, only on the surface has this struggle been a conflict between two conceptions of federalism. Basically it has been a dialectic of two sets of ideas. These ideas in turn, as we have seen, have been set in conflict by two forces. One force has been the current of world opinion over the last half century. The other has been the change in the nature of the Canadian economy. The assumptions of *laissez-faire* and individual self-help fitted the facts of frontier life. With greater diversification, a growth of scale in enterprise, an increase in urbanization, and an increase in economic interdependence which was accompanied by a growth of group consciousness, collective wants became more important and individual freedom of action so limited as to destroy the validity of the old individualistic assumptions.

The extension of the franchise, the granting of provincial stature to the prairies, and the opening up of new areas and new kinds of economic activity gave a measure of political power to groups which did not benefit directly from the old national policy. The clash in interest and in ideas took place through the party system in elections and in the legislatures, and resulted in legislation which was a concession to the newly emerged interests. The struggle was continued in the courts where the interests which felt themselves inconvenienced by these restrictions on their freedom of action were able to enlist the aid of a judicial theory of interpretation and legislative propriety which found ways of nullifying the effect of undesirable legislation. [Emphasis in original.]

Alan C Cairns, "The Judicial Committee and Its Critics"

(1971) 4 Can J Political Science 301 (footnotes omitted)

[After quoting from Lord Haldane's praise of Lord Watson, Cairns argued that "there can be no doubt that Watson and Haldane consciously fostered the provinces in Canadian federalism, and by so doing helped to transform the highly centralist structure originally created in 1867" (at 313). Later, in making a defence or justification of the Privy Council, he said:

The most elementary justification of the Privy Council rests on the broad sociological ground that the provincial bias which pervaded so many of its decisions was in fundamental harmony with the regional pluralism of Canada. ... From the vantage point of a century of constitutional evolution the centralist emphasis of the Confederation appears increasingly unrealistic.]

[After Confederation the] provinces, which had initially been endowed with functions of lesser significance, found that their control of natural resources gave them important sources of wealth and power, and extensive managerial responsibilities. By the decade of the twenties, highways, hydro-electric power, a host of welfare functions, and mushrooming educational responsibilities gave them tasks and burdens far beyond those anticipated in 1867. By this time the centralizing effect of the building of the railways and the settlement of the west was ended by the virtual completion of these great national purposes.

As the newer provinces west of the great lakes entered the union, or were created by federal legislation, they quickly developed their own identities and distinct public purposes. Their populations grew. Their economies expanded. Their separate histories lengthened. Their governmental functions proliferated, and their administrative and political competence developed. They quickly acquired feelings of individuality and a sense of power which contributed to the attenuation of federal dominance in the political system.

Only in special, unique, and temporary circumstances—typically of an emergency nature—has the federal system been oriented in a centralist direction. The focus of so many Canadian academic nationalists on the central government reflected their primary concern with winning autonomy from the United Kingdom. An additional and less visible process was also taking place. Canadian political evolution has been characterized not only by nation-building, but by province-building. Further, it is too readily overlooked that with the passing of time Canada became more federal. In 1867 there were only four provinces in a geographically much more compact area than the nine provinces which had emerged by 1905, and the ten by 1949. If a province is regarded as an institutionalized particularism the historical development of Canada has been characterized by expansion which has made the country more heterogeneous than hitherto.

In response to this increasingly federal society the various centralizing features of the *BNA Act* fell into disuse, not because their meaning was distorted by the courts, but because they were incompatible with developments in the country as a whole. In numerous areas, decentralizing developments occurred entirely on Canadian initiative, with no intervention by the Judicial Committee. The powers of reservation and disallowance were not eroded by the stupidity or malevolence of British judges but by concrete Canadian political facts. The failure to employ section 94 of the *BNA Act* to render uniform the laws relating to property and civil rights in the common law provinces was not due to the prejudice of Lords Watson and Haldane, but to the utopian nature of the assumptions which inspired it, and the consequent failure of Canadians to exploit its centralizing possibilities.

The preceding analysis of Canadian federalism makes it evident that the provincial bias of the Privy Council was generally harmonious with Canadian developments. A more detailed investigation provides added support for this thesis.

At the time when Privy Council decisions commenced to undermine the centralism of Macdonald there was a strong growth of regional feeling. During the long premiership of Oliver Mowat, 1872-96, Ontario was involved in almost constant struggle with Ottawa. The status of the lieutenant governor, the boundary dispute with Manitoba and the central government, and bitter controversies over the federal use of the power of disallowance constituted recurrent points of friction between Ottawa and Ontario. Friction was intensified by the fact that with the exception of the brief Liberal interlude from 1873 to 1878 the governing parties at the two levels were of opposed partisan complexion, and by the fact that Mowat and Macdonald were personally hostile to each other. The interprovincial conference of 1887, at which Mowat played a prominent part, indicated the general reassertion of provincialism. The "strength and diversity of provincial interests shown by the conference," in the words of the *Rowell-Sirois Report*, "indicated that, under the conditions of the late nineteenth century, the working constitution of the Dominion must provide for a large sphere of provincial freedom." Nationalism had become a strong political force in Quebec in reaction to the hanging of Riel and the failure of the newly opened west to develop along bicultural and bilingual lines. Nova Scotia was agitated by a secession movement. The maritime provinces generally were hostile to the tariff aspects of the National Policy. Manitoba was struggling against federal railway policies. British Columbia was only slowly being drawn into the national party system after the belated completion of the CPR in 1885. It was entering a long period of struggle with the Dominion over Oriental immigration. In addition, the late eighties and early nineties constituted one of the lowest points of national self-confidence in Canadian history. It was a period in which the very survival of Canada was questioned. By the late 1890s, when economic conditions had markedly improved, a new Liberal government, with provincial sympathies, was in office. The year of the much

criticized *Local Prohibition* decision was the same year in which Laurier assumed power and commenced to wield federal authority with much looser reins than had his Conservative predecessors. "The only means of maintaining Confederation," he had declared in 1889, "is to recognize that, within its sphere assigned to it by the constitution, each province is as independent of control by the federal Parliament as the latter is from control by the provincial legislatures."

The Privy Council clearly responded to these trends in a series of landmark decisions in the eighties and nineties.

Cairns's sociological explanation accords well with Pierre Elliott Trudeau's observations (at the time Cairns was writing, Trudeau was a law professor at the Université de Montréal) that the Privy Council rulings had the effect of forestalling the separation of Quebec from Canada: "[I]t should perhaps be considered that if the law lords had not leaned in that [provincial] direction, Quebec separatism might not be a threat today; it might be an accomplished fact": see Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968) at 198. The literature offers many other explanations, including the Privy Council's concern about the preservation of the British Empire; its reluctance to make a vague phrase such as POGG a major power; its attitudes toward home rule for Ireland (which was one of the searing domestic political issues in England) and its desire to preserve its own power; Lord Haldane's affection for Hegelian philosophy (he was an amateur philosopher of some substance); and the possibility that the Privy Council interpreted the BNA Act correctly, after all.

Another candidate is the power of ideas about federalism in lawyers' and judges' minds. Recall the passage from Dicey in Chapter 4 in "Note: The Nature of Federalism." According to Dicey, federalism gives rise to a spirit of legalism in which "no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but by-laws." (AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1979) at 175) Might this model have contributed to the reasoning and results of the courts in the late 19th century? Another version of federalism may have been at work in the Haldane era. It is described in the following excerpt.

David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century"

(1998) 48:4 UTLJ 521 at 529-38, 543-46

"Federalistic feeling" was described as "curiously widespread" in Britain in the early part of the twentieth century. ... [The theory of political pluralism] merged these economic and political streams, attacking the all-absorptive state and promoting the inherent worthiness of group associations. ... [Political scientist Harold Laski was one of the leading figures of the British political pluralist movement.] Laski believed that citizens derived meaning and identity from the plurality of groups with which they were associated. The individual was portrayed as a complex of multiple loyalties and belongings with many forms of association competing for his or her allegiance. He described the individual as "a point towards which a thousand associations converge." Whether we will it or not, he wrote, we are all a "bundle of hyphens." ...

If the state had no privileged existence over group life, it could not legitimately attempt to absorb or control the diverse allegiances of its citizens. Each of these associations—"the club, trade-union, church, society, town, country, university"—has

a "group-life, a group-will, to enrich the imagination." English law treated organized groups largely as incapable of having an existence independent of the state—group life was contingent upon, rather than independent of, state recognition. ...

The modern state was in need of more, not less, decentralization. To consider Ottawa or Washington as reserves of nascent power capable of resolving conflict by simple generalizable solutions was to risk local stagnation. Centralized government, wrote Laski, "cannot grasp ... the genius of place: ... To multiply the centres of authority is to multiply the channels of discussion and so promote the diffusion of healthy and independent opinion." In contrast, the vices of centralized government for Laski were numerous:

It is so baffled by the very vastness of its business as necessarily to be narrow and despotic and over-formal in character. It tends to substitute for a real effort to grapple with special problems an attempt to apply wide generalisations that are in fact irrelevant. It involves the decay of local energy by taking real power from its hands. It puts real responsibility in a situation where, from its very flavour of generality, an unreal experiment is postulated. It prevents the saving grace of experiment. It invites the congestion of business.

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For the pluralists, then, self-government was exercised preferably at local levels where the implications of social policy choices could be felt and better understood. The object of the pluralist state was to partition power along these lines so that the diversity of group life could be given expression. Functional devolution along territorial and non-territorial lines not only facilitated the expression of individual moral development through participation in associational life, it also created a "corporate sense of responsibility" or "training in self-government." Like Hegel (and Mill), Laski believed that local self-government was "educative in perhaps a higher degree, at least contingently, than any other part of government." This training in self-government would lead, ultimately, to connections being made between associational life and "the general background of social life." ...

In a highly decentralized society, what role remained for the national state? On this, Laski moved from a position of radical polyarchy in 1915 to one of centralized authority for the performance of key public functions in 1925. For just as associations had social functions to fulfil, so did the state. "The state exists as the most adequate means we have yet invented for the promotion of an end we deem good," admitted Laski. ...

[Lord Haldane befriended Laski and wrote, in his review of Laski's 1922 book *The Foundation of Sovereignty and Other Essays*, that Laski] had "achieved a remarkable success" with this book. Regarding the personality of associations, Laski had "no difficulty in showing that the reluctance of our jurisprudence to treat an association as a person that can be made responsible in law has given rise to many obscurities and difficulties." Haldane contrasted the monistic with the pluralistic view of the state and concluded that the doctrine of political pluralism "is an ethical ideal" greatly superior to the monistic state. It is those "institutions which have genuine popular power expressed in them that become organs of ethical ideals and of true citizenship, and so the superiority of the pluralistic State becomes evident," wrote Haldane. Decentralization, therefore, was "essential." Haldane also could agree with Laski's desire to remodel government from time to time, not only in the direction of devolution, but also in the other direction: "In wartime, a highly centralized control may be essential. In peacetime it may be politically and ethically very undesirable." ...

The true nature of state sovereignty, then, was not revealed in the arguments of either the monists or the pluralists. The "real source of sovereignty," according to

Haldane, was "general opinion," which lay behind the institutional apparatus of state and society. Acknowledging merit in the monist case, Haldane argued that the minds that constitute the general will cohere into a "unitary and monistic" form represented by the state, though this is not the exclusive vehicle of public opinion. Its "forms of expression may be diverse," Haldane conceded to the pluralists. The true source of sovereignty, though, was constituted neither wholly in the state nor in group life; rather, it could be found in "public opinion," which he equated with the general will. ...

The distribution of sovereignty to organizational groups did not exclude the general will "which may manifest itself as supreme, and may arm Govt. with extended authority on occasion." The general will, as an expression of homogeneous opinion, could emerge to supersede the heterogeneity of sovereignty in such extreme circumstances. Ernest Barker, in his modified defence of the pluralists, agreed: "If it comes to a pinch, we shall forget that we are anything but citizens."

CHAPTER SIX

THE 1930S: THE DEPRESSION AND THE NEW DEAL

Early in the 1930s, the Privy Council decided three cases that seemed to signal a shift in both results and manner of reasoning. Recall that in the *Persons* case, decided in 1928 and reproduced in Chapter 2, Judicial Review and Constitutional Interpretation, Lord Sankey spoke of a “living tree” and the need for a “large and liberal interpretation,” even though he also took pains to point out that the issue there was not the division of powers.

Proprietary Articles Trade Association v Canada (AG)

[1931 CanLII 385, \[1931\] AC 310 \(UKJCPC\)](#), aff’g *Reference re Validity of the Combines Investigation Act and of s 498 of the Criminal Code*,
[\[1929\] SCR 409, 1929 CanLII 90](#)

[A reference was initiated to determine whether the *Combines Investigation Act*, RSC 1927, c 26 and s 498 of the *Criminal Code*, RSC 1985, c C-46 were valid. Section 498 of the Code prohibited participation in an agreement to restrain competition. The *Combines Investigation Act* made it a criminal offence to participate in a combine and defined a “combine” as an agreement or merger that limited competition or increased prices to the detriment of the public. It also created a commission to administer the Act, with powers to investigate, and it gave the government power to reduce tariffs that protected a combine. The Proprietary Articles Trade Association was permitted to participate in the reference, presumably because the commission had found that it had participated in a combine.

Both the Supreme Court and the Privy Council held that both statutes were valid. In the Supreme Court, Duff J, writing for himself and Rinfret and Smith JJ, discussed the Dominion’s criminal law power. He began by quoting from the judgment of the Privy Council in *AG (Ont) v Hamilton Street Railway*, 1903 CanLII 121, [1903] AC 524, where Lord Halsbury said that s 91(27) gave the Dominion power over “the criminal law in its widest sense” (*Reference re Validity* at 411). Duff J quickly added the reservation that some limitation was needed to respect the “constitutional autonomy of the provinces” (*Reference re Validity* at 412). Then, turning to s 498, he said that the law “aims at suppressing certain practices calculated, in the view of Parliament, to limit competition and produce the evil of high prices. [The prohibited conduct is] dealt with from that point of view and that point of view only” (*Reference re Validity* at 415). In response to an argument that s 91(27) extended only to offences that were offences at Confederation or offences that were criminal “in their very nature” (and here the reference was obviously to Lord Haldane’s judgment in the *The Board of Commerce Act (Re)*, 60 SCR 456, 1920 CanLII 471), he said (*Reference re Validity* at 415):

It is difficult to understand upon what justification the Dominion Parliament can be denied the power under s. 91 to declare any act to be a crime which, in its opinion, is

such a violation of generally accepted standards of conduct as to deserve chastisement as a crime. The views of the community as to what deserves punishment change from generation to generation. Practices calculated to imperil health and safety, or to prejudice the moral standards of the community may become, in the course of a few years, so widely prevalent as to create a general demand for the abatement and prevention of them by State action in the sphere of the Criminal Law. Other acts, once within the scope of the Criminal Law, may, in the course of time, come to be regarded as outside the proper domain of State interference. It is difficult to understand on what principle the court is to review the decisions of Parliament in seeking to adapt the Criminal Law to successive phases of public opinion in such matters.

The primary parts of the *Combines Investigation Act* were valid on the same ground. Newcombe J, writing for himself and Mignault and Lamont JJ, reasoned in much the same way.]

LORD ATKIN:

"Criminal law" means "the criminal law in its widest sense": (*A.-G. Ont. v. Hamilton Street Railway* (1903), 7 Can. C.C. 326). It certainly is not confined to what was criminal by the law of England or of any Province of 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act [depends on a single standard]: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes . . . Their Lordships agree . . . that the passage [alluded to] in the judgment of the Board in the *Board of Commerce* case [1921 CanLII 399, [1922] 1 AC 191 (UKJCPC)] at 198-199 was not intended as a definition.

In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment. . . .

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The view that their Lordships have expressed makes it unnecessary to discuss . . . the power to legislate under s. 91(2), for "The Regulation of Trade and Commerce." Their Lordships merely propose to disassociate themselves from the [alleged contention in the *Board of Commerce* case] that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject matter. . . .

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Their Lordships are of opinion that the Supreme Court of Canada were right in answering both questions in the negative, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Canada (AG) v Ontario (AG)

1931 CanLII 466, [1932] AC 54 (UKJCPC) [Aeronautics Reference], rev'g
Reference Re Legislative Powers as to Regulation and Control of
Aeronautics in Canada, [1930] SCR 663, 1930 CanLII 79

[After the First World War, a convention about aeronautics was made by the peace conference, and ratified by Canada and by the king on behalf of the British Empire. The Canadian Parliament enacted legislation and regulations implementing this convention and regulating aeronautics in a comprehensive way, including licensing of pilots, aircraft, and commercial services and regulations for navigation and safety. A reference was made to the Supreme Court to determine the validity of this legislation. It held, in a series of divided judgments, that the subject of aeronautics was, generally, one for the provinces but that the Dominion had paramount, although not exclusive, authority to implement the convention under s 132.]

LORD SANKEY LC:

Before discussing the several questions individually, it is desirable to make some general observations upon ss. 91 and 92, and 132.

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Under our system, decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.

To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the B.N.A. Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract ... , nor is it legitimate that any judicial construction of ... ss. 91 and 92 should impose a new and different contract upon the federating bodies.

But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers ...

on all questions which were of common concern to all the Provinces as members of a constituent whole.

[A discussion of cases, which concluded with Lord Haldane's judgment in *Fort Frances Pulp and Paper Co v Manitoba Free Press Co*, 1923 CanLII 429, [1923] AC 695 (UKJCPC), excerpted in Chapter 5, The Early Twentieth Century: Beginnings of Economic Regulation, is omitted.]

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It is obvious, therefore, that there may be cases of emergency where the Dominion is empowered to act for the whole. There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

During the course of the argument, learned counsel on either side endeavoured respectively to bring the subject of aeronautics within s. 91 or s. 92. Thus, the appellant referred to s. 91(2) The Regulation of Trade and Commerce; s. 91(5) Postal Services; s. 91(9) Beacons; s. 91(10) Navigation and Shipping. Their Lordships do not think that aeronautics can be brought within the subject Navigation and Shipping, although undoubtedly to a large extent, and in some respects, it might be brought under the Regulation of Trade and Commerce, or the Postal Services. On the other hand, the respondents contended that aeronautics as a class of subject came within s. 92(13) Property and Civil rights in the Provinces or s. 92(16) Generally all Matters of a merely local and private Nature in the Provinces. Their Lordships do not think that aeronautics is a class of subject within Property and Civil rights in the Provinces, although here again, ingenious arguments may show that some small part of it might be so included.

In their Lordships' view, transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance. ... [H]owever, from the very definite words of the section, ... it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. ... [Therefore] any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. ...

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... [W]e think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91(2), for the regulation of Trade and Commerce, and under s. 91(5) for the Postal Services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose.

To sum up, having regard (a) to the terms of s. 132; (b) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (c) to the fact that further legislative powers in relation to aerial navigation reside in

the Parliament of Canada by virtue of s. 91(2), (5), and (7), it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the B.N.A. Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to such small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada [the introductory clause of s 91 known as "POGG"]. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

For these reasons their Lordships have come to the conclusion that it was competent for the Parliament of Canada to pass the Act and authorize the Regulations in question, and that Qq 1, 3 and 4, which alone they are asked to answer, should be answered in the affirmative.

Appeal allowed.

Regulation & Control of Radio Communication in Canada, Re

1932 CanLII 354, [1932] AC 304 (UKJCPC) [Radio Reference], aff'g
Reference re Regulation and Control of Radio Communication,
[1931] SCR 541, 1931 CanLII 83

[In the late 1920s, the Dominion government entered into a series of international agreements about radio, the major one created in 1927 in Washington. After enacting legislation to implement these agreements, the government made a reference asking, generally, whether it had the power to regulate radio. In the Supreme Court, the conventions and s 132 were barely mentioned and a majority of three to two held that the Dominion had power under POGG.]

VISCOUNT DUNEDIN:

The learned Chief Justice and Rinfret J., expressed their regret that at the time of delivering judgment they had not had the advantage of knowing what was the conclusion reached by this Board on the [Aeronautics Reference, 1931 CanLII 466, [1932] AC 54 (UKJCPC)]. ... [W]e know now that the judgment of this Board (A-G Can. V. A.G. Ont., delivered on October 22, 1931; [1932] 1 D.L.R. 58, 39 C.R.C. 108) settled that the regulation of aviation was a matter for the Dominion. It would certainly only have confirmed the [Supreme Court] majority in their opinions. And as to the minority, ... it is doubtful whether that fact would have altered their opinion. ...

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... [I]t is said with truth that, while as regards aviation there was a treaty, the Convention here is not a treaty between the Empire as such and foreign countries, for Great Britain ... only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the Convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side. ...

This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada *vis-à-vis* to the mother country, Great Britain, which is found in these later days expressed in the Statute of Westminster

(1921 (Can.) p. v.). It is not therefore to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being therefore not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the Peace Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing. ... The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention; and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

At the same time, while this view is destructive of the view urged by the Province as to how the observance of the International Convention should be secured, it does not they say dispose of the whole of the question. They say it does not touch the consideration of interprovincial broadcasting. Now, much the same might have been said as to aeronautics. It is quite possible to fly without going outside the Province, yet that was not thought to disturb the general view, and once you come to the conclusion that the convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the *Aviation* case which might be literally transcribed to this. The idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject. The same might at least very easily be said on this subject, but even supposing that it were possible to draw a rigid line between interprovincial and Dominion broadcasting, there is something more to be said.

It will be found that the argument for the Provinces really depends on a complete difference being established between the operations of the transmitting and the receiving instruments. ...

[A discussion of s 92(10)(a) is omitted.]

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The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, ... that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.

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As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss ... whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "Property and Civil Rights," or within "matters of a merely local or private nature."

Upon the whole matter therefore their Lordships have no hesitation in holding that the judgment of the majority of the Supreme Court was right, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. ...

Appeal dismissed.

The Great Depression devastated Canada, and the rest of the capitalist world, between the late 1920s and the late 1930s. Some measure of its impact can be suggested by numbers: in 1933, the worst year of the Depression, 33 percent of non-agricultural workers were unemployed and, taking 1929 as a base, national output had fallen 30 percent, personal incomes had fallen almost 50 percent, and prices had fallen 18 percent—and far further in export markets. On the prairies, drought and crop failure compounded the economic decline; crop yield fell from 23.5 bushels of wheat per acre in 1928 to 6.4 bushels in 1937, and farm income fell from \$450 million to \$100 million in 1931. In the cities, thousands sought “dole” after prospects for work disappeared. For the governments, the cost of providing assistance fell most heavily on the municipalities and provinces, which were the least able to bear it, and by 1934, in the metropolitan Toronto area, every municipality except Forest Hill and Swansea was bankrupt.

When the Depression began, the Liberals and William Lyon Mackenzie King were in power in Ottawa. In 1930, the Conservatives, led by Richard Bedford Bennett, swept to power, aided somewhat by King’s pronouncement in Parliament that he would not give any Conservative provincial government “a five-cent piece” for relief. Bennett, like King, offered little more than traditional measures: manipulation of the tariff, a balanced budget, and hard work. The *Unemployment Relief Act*, SC 1930, c 1, enacted first in 1930, provided a modest amount for public works and for direct relief—the dole—but in 1932, the aid for public works was terminated in an effort to balance the budget. Bennett had little comprehension, let alone sympathy, for the radical proposals for increased public spending made by JM Keynes in the *Atlantic Monthly* in 1932. In 1932, as well, the Department of National Defence began a program of work camps for single men and, by 1935, there were 200 of these camps through which 170,000 men had passed.

In 1934, Bennett’s government enacted the *Farmers’ Creditors Arrangements Act*, SC 1934, c 53 to protect farmers from their creditors, and the *Natural Products Marketing Act*, SC 1934, c 57 to regulate the marketing of agricultural products. (As well, legislation created the *Canadian Radio Broadcasting Commission Act*, SC 1932, c 51 and the Bank of Canada, but neither were at stake in the constitutional conflict that followed.)

The Depression continued, apparently unabated. The Conservatives were threatened with losses in provincial general elections and federal by-elections and a divisive and theatrical inquiry into commercial abuses—the “Price Spreads” inquiry. Late in 1934, Bennett, who had been a powerful and autocratic leader, seemed to be faltering, but in January 1935 he reappeared and, with little warning to his Cabinet, let alone consultation, he dramatically promised a “new deal” in a series of radio broadcasts. (The phrase “new deal” was taken from President Roosevelt’s “fireside chats” in the United States; Bennett did not use the phrase, but it has become the common label.) Bennett likely did not have a comprehensive and concrete program in mind when he spoke, although he promised regulation of hours of work, wages, and working conditions; social insurance against sickness, industrial accidents, and unemployment; expansion of the regulation of agricultural products; and an agricultural credit program.

Shortly afterward, six statutes were enacted, all of which fell far short of Bennett’s promises. The *Limitation of Hours Work Act*, SC 1935, c 63; the *Weekly Rest in Industrial Undertakings Act*, SC 1935, c 4; and the *Minimum Wages Act*, SC 1935, c 44 were all explicitly based on International Labour Organization conventions and enacted to fulfill treaty obligations. They established, respectively, maximum hours of work, a weekly day of rest, and administrative arrangements for specifying a minimum wage, although the scope of each was sharply limited. The *Employment and Social Insurance Act*, SC 1935, c 38 established unemployment insurance for industrial workers; an amendment to the *Criminal Code*, SC 1935, c 56 prohibited specified commercial practices; and the *Dominion Trade and Industry Commission Act*, SC 1935, c 59 established a commission to regulate competition and a federal trademark—the Canada Standard.

As the following excerpt suggests, neither the Bennett nor the subsequent King government substantially improved the conditions of working and unemployed individuals.

Richard Simeon & Ian Robinson, State, Society, and the Development of Canadian Federalism

(Toronto: University of Toronto Press, 1990) at 78-80 (references omitted)

Aside from substantial increases in federal transfers, "charity" to which the provinces had no legal claim and which could not be expected to last beyond the economic emergency, the Bennett government did remarkably little in the early depression years. Increased subsidies were made to the railways and the coal industry, and a variety of price support schemes were undertaken for wheat producers, but Bennett launched no dramatic policy initiatives like those in Roosevelt's America.

Prime Minister Bennett's reticence cannot plausibly be traced to a keen sense of provincial rights, or of the sociological realities underlying the legal doctrine. When, in 1935, he finally decided that a major departure from conventional economic policies was necessary, he did not bother to consult his own cabinet ministers, much less the provincial governments. Nor was Prime Minister Bennett one for worrying about the details of the constitutional division of powers. He seems to have been confident that constitutional grounds for his "New Deal" legislation could be found within the BNA Act.

The principal reason for the relative lack of federal initiative in the early years of the Depression seems to have been that Bennett believed the crisis could be remedied by the policies he campaigned for in 1930: the restoration of access to foreign markets for Canadian goods through Imperial preferences and the use of Canadian tariffs. Nor did provincial governments press forcefully for the federal government to undertake more radical programs in these early years. They were focussing on the immediate task of meeting their burgeoning relief commitments and their principal interest in the federal government was increased tax room, larger grants, or both. This focus on fiscal arrangements meant that in the first phase of the Depression there was relatively little intergovernmental discussion of fundamental reform to the federal constitution. As in 1927, so in 1931, the Dominion-Provincial Conference discussed the amending formula only because the issue had to be dealt with as part of the Statute of Westminster.

By 1935 the situation had greatly changed. Prime Minister Bennett's radio speeches of that spring had proclaimed the necessity of major changes in national economic and social institutions. These changes, his legislative program implied, had to be brought about primarily by the federal government. This entailed a clear challenge to the existing federal order. Bennett's defeat in the 1935 federal election left King with the dilemma of what to do with the Bennett New Deal. Unlike Bennett, King was highly sensitive to provincial objections (especially from Quebec and Ontario) that the legislation constituted a major encroachment on provincial jurisdiction. One of King's first acts upon being restored to power was to refer all of Bennett's proposed legislation to the Supreme Court of Canada.

King then sought to determine whether a consensus on constitutional reform could be found at the Dominion-Provincial Conference of December 1935. He was open to proposals to extend federal authority to regulate wages, working conditions and combines in restraint of trade, but advocated no specific amendments. King preferred to concentrate on the preliminary problem of securing agreement to an amendment formula.

A committee of the conference was assigned the task of exploring the latter issue. Premier Taschereau, who had opposed any discussion of an amendment formula in 1927, now proved receptive to the idea in the twilight hours of his regime. Still, the participants were a long way from agreement on a concrete formula at the end of the conference and it was agreed that federal and provincial officials should immediately begin to meet with a view to developing such a formula.

The conference of 1935 was remarkably conciliatory considering the economic stress facing both orders of government, and there was considerable optimism that an amending formula would soon be found. By February 1936 federal Minister of Justice Ernest Lapointe and the provincial Attorneys-General had, with the exception of New Brunswick, reached agreement on a formula: unanimous consent of all legislatures would be required for amendments touching on such crucial areas of the constitution as the educational rights of religious minorities. For other areas, such as social policy, the consent of parliament and two thirds of the legislatures, representing at least 55 percent of the Canadian population, would be sufficient. It was a major advance, but New Brunswick could not be induced to agree to it. King refused to act without unanimous consent, and the recommendations were shelved. Soon federal-provincial conflict began to escalate. The moment for constitutional reform based on unanimous provincial consent had passed.

The King government did take some initiatives. It negotiated a formal trade agreement with the United States within weeks of taking office. The Bank of Canada, which Bennett had established in 1934 as a "banker's bank," was nationalized, but the federal control thus acquired was not used to go beyond the easy money policy already established under its first Governor, Graham Towers. A National Employment Commission was created with the aim of coordinating the administration of relief expenditures and recommending measures to create employment opportunities. But when the Commission took up the views of Keynes in 1937 and urged the federal government to run a major budget deficit, King balked.

During the 1930s, the three major Canadian constitutional scholars were Vincent Macdonald, dean of the Faculty of Law at Dalhousie University; William Paul McClure Kennedy, chair of the Honour School of Law at the University of Toronto; and Frank R Scott, a member of the Faculty of Law at McGill University and, as well, a major Canadian poet, a founder of the Co-operative Commonwealth Federation (CCF), and a crusader for civil liberties. These scholars shared beliefs about Canada, its Constitution, and legal reasoning. In their view, Canada had become an independent nation, its economy and social structure had changed fundamentally, and only a strong Dominion government could respond adequately to the Depression. They were passionately critical of the decisions of the Privy Council, and they feared that the *British North America Act* (BNA Act) was becoming more and more inadequate, despite the hopes suggested by the cases in the early 1930s.

Their beliefs about interpretation of the BNA Act were an expression of new approaches to legal reasoning and scholarship, which had arisen around the turn of the 20th century in the United States, under the banners of "sociological jurisprudence" and "realism." The function of the courts was to determine the intent, or purpose, of the legislature, but the words of a text, especially a constitutional text, often did not express this intent and, therefore, sometimes history and current social needs were necessary sources for determining meaning. These scholars read the BNA Act as making the federal government dominant and giving it power to legislate about matters of general importance. The Act gave the provinces specific powers to legislate about local matters; the remaining powers went to the Dominion. The POGG clause was the sole grant of power in s 91, and the enumerations were examples. Beginning in the late 1920s, the three scholars berated the Privy Council for betraying this

design, for its "literal" approach (its belief that interpretation should be limited to the words alone), and for its failure to respect both the text and evidence of the understandings of Confederation. The article by HA Smith, "The Residue of Power in Canada" (1926) 4 Can Bar Rev 432, excerpted near the end of Chapter 5, is representative of much of their writing in the early 1930s. Some excerpts from articles by Kennedy and Macdonald, written a few years later as their despair mounted, follow.

WPM Kennedy, "Our Constitution in the Melting Pot"

(1934) SA L Times 156 at 158-59.

Before the depression, the federal government, with the "generous" permission and approval of the provinces, had already undertaken to assist in old age pensions. The subject-matter is purely and solely provincial; but "What's the constitution," said the provinces, "when will the Dominion pay?" The example and procedure were unfortunate perhaps; but, as the issues may show, perhaps creative. Then came the crash. Unemployment—a purely provincial subject-matter—increased by leaps and bounds. There was no work; firm after firm went down; economic life was atrophied. Unemployment insurance—a purely provincial subject-matter—though suggested time after time by the "traitors," etc., was now too late. Then the whole problem of industrial control came to the front in a manner never before experienced—fair competition, hours of labour, rates of wages, minimum wages for *men*, marketing organizations, the capitalisation of companies, mass-production—all provincial subject-matters, but now erected, before the impelling forces of a world agony, into questions of vital national importance. Once again the Dominion stepped beyond its field to spend millions upon millions on unemployment—a provincial subject-matter. Nor was this the end. Province after province, especially in the west, faced bankruptcy, a repudiation of its obligations. Once again the Dominion stepped in with vast funds to prevent the crash. The Prime Minister, however, began to scent dangers, such as financial aid to the provinces without financial control of the federal money given to their aid. A Dominion provincial conference suggested constitutional changes. ... The provinces stood firm on their "rights," but next day they came hat in hand to almost demand the continuance of the federal relief. ...

It will no longer be possible to look on the *British North America Act* as a sacred instrument. The persistent forces of national tragedy—poverty, hunger, employment, possible bankruptcies, contracting trade, lower wages, miserable market prices, narrowed credit, lowering value of money—have all combined to rob "1867" of the glamour of romance. We do not dispute the creative work of that year any more than we dispute the creative work of Noah; but we see it at long last in its proper and just setting. ... We are now face to face with this issue: Shall we continue as a loose league of "sovereign" provinces, which the unfortunate judgments of the Privy Council had almost made us, surviving *legally* in order to break *culturally* and *economically*. Or shall we boldly face the problem that a nation of vast potential wealth and possibilities and of many remarkable achievements shall not be sacrificed at a constitutional altar erected in a far-off pioneer past, itself creatively barren by judicial obscurantism?

Vincent C Macdonald, "Judicial Interpretation of the Canadian Constitution"

(1936) 1:2 UTLJ 260 at 282-84

The constitution of to-day, as it exists in enactment and construction, it is generally agreed, is ill-adapted in many important respects to our new status within the empire, to our present social and economic organization and needs, and to prevailing political theories which indicate the propriety or necessity of a greater degree of national control over, and governmental intervention in, matters of social welfare and business activity. New political facts, such as our greater autonomy in intra-empire matters, new legal facts, such as our increased legislative capacity under the Statute of Westminster, 1931, emergent conditions arising out of the present economic depression, and a new philosophy of government—all these make up a background vastly different from that against which the act was projected in 1867, or that which conditioned the decisions of the past.

Much has been written and spoken elsewhere of the inability of the Canadian constitution to meet the social, economic, and political needs of to-day and of the necessity for its revision. However, it is not necessary to traverse this familiar ground, for the point at the moment is that great problems affecting the social and economic life of the country demand legislative capacity and solution. The second great fact at the moment is that effective solution of these contemporary problems is, in part, handicapped, and, in part, rendered impossible by (a) the terms of the act of 1867, and (b) previous decisions thereon, which, together, withhold jurisdiction where it is necessary that jurisdiction should be, divide jurisdiction where unity of jurisdiction is essential, and, in other cases, paralyse action because of doubt as to jurisdiction where certainty of jurisdiction is vital. Thus, it is not inaccurate to say that the constitutionality of many of the statutes which constituted the effort of the Dominion administration of the day (1934-5) to put through a great programme of social and economic reform is shrouded in doubt

And so, born of the knowledge that new and unusual conditions demanded, in some matters, a unity of action, and, in others, a certainty of jurisdiction denied by the terms of the act or by its judicial interpretation, there came into being among the Canadian people the strong conviction, ... that the constitution must be revised. ...

Whether amended or not, the Canadian constitution will continue to be a written instrument requiring interpretation by a supreme judicial authority. When the task of revising the constitution is approached, the question as to the identity of the body which will be charged with its interpretation in the years to come must bulk large. Up to now this has been the judicial committee of the privy council, and, inevitably, the question must arise as to whether it shall continue to be entrusted with the ultimate power of interpretation.

The New Deal did not save Bennett, and, as described by Simeon and Robinson, excerpted above, King and the Liberals came to power in the general election of 1935. King quickly referred all six statutes to the Supreme Court, together with the *Farmers' Creditors Arrangements Act* and the *Natural Products Marketing Act*. Six members of the Supreme Court heard arguments in the reference on Bennett's New Deal legislation early in 1936 and gave their decision on June 17. The results were complicated—the Court unanimously upheld two of the statutes, the *Farmers' Creditors Arrangements Act* and the *Criminal Code* amendments. They were also unanimous in declaring both the *Dominion Trade and Industry Commission Act* and the *Natural Products Marketing Act ultra vires*, and they declared the *Employment*

and Social Insurance Act *ultra vires* by a margin of four to two. Last, they divided three to three on the three International Labour Organization statutes—the *Limitation of Hours Work Act*, the *Weekly Rest in Industrial Undertakings Act*, and the *Minimum Wages Act*. On appeal, the Privy Council declared all the statutes *ultra vires*, except the *Farmers' Creditors Arrangements Act*, the amendments to the *Criminal Code*, and the Canada Standard provisions of the *Dominion Trade and Industry Commission Act*.

Canada (AG) v Ontario (AG)

1937 CanLII 362, [1937] AC 326 (UKJCPC) [Labour Conventions], on appeal from References re the Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, And The Limitation of Hours of Work Act,
[1936] SCR 461, 1936 CanLII 24

[This was a reference about the validity of the *Limitation of Hours Work Act*, which set 8 hours a day and 48 hours a week as maximum hours of work; the *Weekly Rest in Industrial Undertakings Act*, which required a rest period of at least 24 consecutive hours for industrial workers; and the *Minimum Wages Act*, which gave the governor in council power to establish minimum wages. In 1919, Canada signed the Treaty of Peace as a member of the British Empire to secure humane conditions for workers. In 1930, the International Labour Organization of the League of Nations adopted conventions about hours of work, minimum wages, and days of rest. In March and April 1935, the federal government ratified these conventions and, in June, enacted these three statutes expressly to implement its treaty obligations.

In argument before the Supreme Court, Canada relied primarily on s 132 (the treaty power). The provinces, fearing a threat to their autonomy, all opposed use of this power to permit the Dominion to legislate about subjects that would normally be within s 92. Only Ontario stressed the possibility that, in the depression, POGG could support the legislation, but its invitation went largely unanswered by the Dominion.

The six-member court split equally and, in all the judgments, the treaty power was the dominant issue. Duff CJ, writing for himself and Davis and Kerwin JJ, would have upheld the statutes. He began by demonstrating that the rapid development of Canada's independence gave the Dominion power to enter into international obligations. Then, relying greatly on the *Radio* and *Aeronautics* references, he held that the treaty came within s 132, which gave the Dominion exclusive power to implement its terms even though the subject matter might otherwise come within s 92. As well, he asserted that POGG gave the Dominion the same power to implement treaties that did not come within s 132. The other three court members, Rinfret, Crocket, and Cannon JJ, held that, because the conventions had been adopted by Canada on its own behalf, they did not come within s 132 and, distinguishing the *Radio* and *Aeronautics* references, they held that POGG did not give the Dominion power. Rinfret J agreed about s 132, but then shifted to a different ground and held that provincial consent was necessary for the validity of a treaty if its subject came under s 92. All three were sensitive to the threat to provincial autonomy represented by an exclusive Dominion power to make and implement treaties—for example, Cannon J said (*References re the Weekly Rest* at 521):

The framers of our constitution, and the Privy Council by their recent judgments in the *Radio* and *Aeronautics* cases never intended to plant in its bosom the seeds of its own destruction. If such interference with provincial rights by way of international agreements is admitted as *intra vires* of the central government, we may as well say

that we have in Canada a confederation in name, but a legislative union in fact. Uniformity is not in the spirit of our constitution. We have not a single community in this country. We have nine commonwealths, several different communities. This is the fact embodied in the law. It may be wise or unwise, according to the preferences and predilection of every one, but this is the basis of our constitution. Diversity is the basis of our constitution. The federative system was adopted in order to give to the Provinces their autonomy and to secure, specially in Quebec, the rights to their own customs as crystallized in their civil law.]

LORD ATKIN:

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not ... by virtue of the treaty alone, have the force of law. If the national executive ... decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. ... [T]he creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and so leave the state in default. In a unitary state whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the state by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But ... in a federal state where legislative authority is limited by a constitutional document, or is divided up between different Legislatures ... , the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent Legislature or Legislatures.

• • •

The first ground upon which counsel for the Dominion sought to base the validity of the legislation was s. 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations ... do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case [1932 CanLII 354, [1932] AC 304 (UKJCPC)], and their Lordships do not think that the proposition admits of any doubt. ... While it is true, as was pointed out in the *Radio* case, that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the unanticipated event.

A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise "under" that treaty because of the stipulations in Part XIII. It is impossible to accept this view. No

obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion, of their own volition acceded to the conventions For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on s. 132, and their Lordships are in full agreement with them.

If, therefore, s. 132 is out of the way, the validity of the legislation can only depend upon ss. 91 and 92. Now it had to be admitted that normally this legislation came within ... Property and Civil rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How then can the legislation be within the legislative powers given by s. 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in s. 91: and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have [ruled in favour of federal jurisdiction under s 91] had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the *Aeronautics* case [1931 CanLII 466, [1932] AC 54 (UKJCPC)] and the *Radio* case ... constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions.

The *Aeronautics* case ... concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132, therefore, clearly applied

The judgment in the *Radio* case ... appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92 or even within the enumerated classes in s. 91. ... Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the B.N.A. Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is it of less importance for the other Provinces ... to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separate the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in

the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed *ab origine*. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

[The] validity of the legislation under the general words of s. 91 was sought to be established ... also as being concerned with matters of such general importance as to have attained "such dimensions as to affect the body politic," and to have "ceased to be merely local or provincial," and to have "become matter of national concern." It is interesting to notice how often the words used by Lord Watson in *A-G Ont v. A-G Can. (Local Prohibition Case)*, [1896] A.C. 348, have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act ... and dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice, naturally from his point of view, excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this they agree with and adopt what was there said. ... It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances," "exceptional conditions," "standard of necessity" (*Board of Commerce case*, [1921 CanLII 399, [1922] 1 AC 191 (UKJCPC)]) "some extraordinary peril to the national life of Canada," "highly exceptional," "epidemic of pestilence" (*Snider's case*, [1925 CanLII 331, [1925] AC 396 (UKJCPC)]), to show how far the present case is from the conditions which may override the normal distribution of powers in ss. 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions ... [Canada] incurs obligations they must, so far as legislation be concerned, when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure. The Supreme Court ... was equally divided and therefore the formal judgment could only state the opinions of the three Judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the Act in each case is *ultra vires* of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

Appeal allowed.

**Reference re legislative jurisdiction of Parliament
of Canada to enact the Employment and
Social Insurance Act (1935, c 48)**

[1936] SCR 427, 1936 CanLII 30 [Unemployment Insurance Reference],
aff'd Canada (AG) v Ontario (AG), 1937 CanLII 363, [1937] AC 355 (UKJCPC)
[The Employment and Social Insurance Reference]

[From a fund created by the joint contributions of workers and employers, the federal *Employment and Social Insurance Act* provided for compulsory insurance against unemployment for workers. The subject of unemployment insurance had also been included in the International Labour Organization conventions, but, although these conventions were described in the preamble, Prime Minister Bennett chose not to make the Act an explicit implementation of the international obligation, perhaps because he did not want to present opponents with the temptation to remind Canadians that relief assistance was closely associated with unemployment insurance in the Conventions.

The Supreme Court, by a majority of four to two, held the Act invalid. The majority, Rinfret, Cannon, Crocket, and Kerwin JJ, shared substantially the same grounds—the Act dealt with property and civil rights, because it dealt with insurance, which Rinfret said had always been a provincial matter, and because it regulated contracts and employment. It was therefore in its "pith and substance" (at 687), within s 92 and it was not a response to an emergency that might be justified by POGG. Duff CJ, with whom Davis J concurred, dissented, essentially because he characterized the Act differently—it was in essence a taxation measure, justified under s 91(3). Part of his reasoning was the proposition that there was no constitutional restriction against the Dominion spending public money for the benefit of individuals.]

LORD ATKIN:

A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of and for some time previous to the passing of the Act. On this point it ... is sufficient to say that the present Act does not purport to deal with any special emergency. It finds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to differ from this view.

It only remains to deal with the argument ... that the legislation can be supported under the enumerated heads, 1 and 3 of s. 91 of the B.N.A. Act, 1867: (1) The public debt and property [and] (3) The raising of money by any mode or system of taxation. Shortly stated the argument is that the obligation imposed upon employers and persons employed is a mode of taxation: that the money so raised becomes public property and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act.

That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether ... the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not

necessary ... to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the state, or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. ... It follows that the whole Act must be pronounced *ultra vires*, and in accordance with the view of the majority of the Supreme Court their Lordships will humbly advise His Majesty that this appeal be dismissed.

Appeal dismissed.

British Columbia (AG) v Canada (AG), Reference re the Natural Products Marketing Act, 1934

1937 CanLII 364, [1937] AC 377 (UKJCPC), aff'g *Reference Re Legislative Jurisdiction of Parliament of Canada to Enact the Natural Products Marketing Act, 1934, and the Natural Products Marketing Act Amendment Act, 1935*, [1936] SCR 398, 1936 CanLII 21

[The purpose of the *Natural Products Marketing Act* was to establish regulation of natural products for the benefit of producers and, especially, to establish effective marketing arrangements and to impose pooling to equalize prices in particular products and areas. The Act was limited to products for which the principal market was outside the province of production and products that were, in some part, exported.

In the Supreme Court, the Act was unanimously declared invalid. Duff CJ, writing for the Court, considered s 91(2) and POGG separately and, for each, he discussed the Privy Council decisions at length, on the assumption that his contribution was to summarize them and announce their consequences. About s 91(2), after discussing *Edwards v Canada (AG)*, 1929 CanLII 438, 1929 UKPC 86 (UKJCPC) [the Persons case], *AG Canada v AG Alberta*, [1916] 1 AC 589 (UKJCPC), [1916] UKPC 12, and *City of Montreal v Montreal Street Railway Company*, 1912 CanLII 352, [1912] AC 333 (UKJCPC), he said (*Reference Re Legislative Jurisdiction* at 410):

It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of inter-provincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

After discussing other cases, including *Hodge v the Queen*, 53 LJPC 1, 9 AC 117 (UKJCPC) and the *Local Prohibition Reference*, [1896] UKPC 20, [1896] AC 348 (UKJCPC), he said (*Reference Re Legislative Jurisdiction* at 412):

The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (*King v Eastern Terminal Elevators* ...).

It should also be observed that these enactments operate by way of the regulation of dealings in particular commodities and classes of commodities. The regulations contemplated are not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in Parson's [sic] case.

Then, after discussing *Board of Commerce and Toronto Electric Commission v Snider*, 1925 CanLII 331, [1925] AC 396 (UKJCPC), rev'g *Toronto Electric Commission v Snider*, 1924 CanLII 429, 55 OLR 454, and distinguishing the Radio and Aeronautics references, he concluded (*Reference Re Legislative Jurisdiction* at 414):

There is one further observation which, perhaps, ought not to be omitted although it may be a mere corollary of what has already been said. Legislation necessarily incidental to the exercise of the undoubted powers of the Dominion in respect of the regulations of trade and commerce is competent although such legislation may trench upon subjects reserved to the provinces by section 92, but it cannot, we think, be seriously contended that sweeping regulation in respect of local trade, such as we find in this enactment, is, in the proper sense, necessarily incidental to the regulation of external trade or interprovincial trade or both combined.

For POGG, he began (*Reference Re Legislative Jurisdiction* at 416):

The initial clause of section 91 has been many times considered. There is no dispute now that the exception which excludes from the ambit of the general power all matters assigned to the exclusive authority of the legislatures must be given its full effect. Nevertheless, it has been laid down that matters normally comprised within the subjects enumerated in section 92 may, in extraordinary circumstances, acquire aspects of such paramount significance as to take them outside the sphere of that section.

Next, after pointing out that his reference was to the *Local Prohibition Reference*, he added (*Reference Re Legislative Jurisdiction* at 417-18, 419-20):

It seems to us right, if these two sentences are to be properly understood, that they should be read with the preceding sentences; and experience seems to shew that there has been a disposition not to attend to the limits implied in the carefully guarded language in which the Board expressed itself.

• • •

As we have said, Lord Watson's language is carefully guarded. He does not say that every matter which attains such dimensions as to effect the body politic of the Dominion falls thereby within the introductory matter of section 91. But he said that "some matters" may attain such dimensions as to affect the body politic of the Dominion and, as we think the sentence ought to be read having regard to the context, in such manner and degree as may "justify the Canadian Parliament in passing laws for their regulation or abolition. ..." So, in the second sentence, he is not dealing with all matters of "national

concern" in the broadest sense of those words, but only those which are matter of national concern "in such sense" as to bring them within the jurisdiction of the Parliament of Canada.

The application of the principle implicit in this passage must always be a delicate and difficult task. ...

A discussion of *Russell* (1882), 7 App Cas 829, 51 LJPC 77 (UKJCPC); *Board of Commerce; Fort Frances*; and *Snider* followed, after which he asserted that the *Radio and Aeronautics* references were not a "new point of departure" (*Reference Re Legislative Jurisdiction* at 425). He concluded, "consistently with these decisions, we do not see how it is possible that the argument now under discussion can receive effect" (*Reference Re Legislative Jurisdiction* at 426).]

LORD ATKIN:

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with interprovincial or export trade. It is therefore plain that the Act purports to affect Property and Civil Rights in the Province . . . It was sought to bring the Act within the class (2) of s. 91—namely, "The Regulation of Trade and Commerce." Emphasis was laid upon those parts of the Act which deal with interprovincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province. In his judgment the Chief Justice says [1936] SCR 412: "... Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority: (*The King v. Eastern Terminal Elevator Co.*, [1925] SCR 434, 1925 CanLII 82.)

Their Lordships agree with this, and find it unnecessary to add anything. There was a further attempt to support the Act upon the general powers to legislate for the Peace, Order and Good Government of Canada. Their Lordships have already dealt with this matter in their previous judgments in this series and need not repeat what is there said. The judgment of the Chief Justice in this case is conclusive against the claim for validity on this ground. . . .

• • •

The Board were given to understand that some of the Provinces attach much importance to the existence of marketing schemes such as might be set up under this legislation; and their attention was called to the existence of provincial legislation setting up provincial schemes for various provincial products. It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other. In the present case their Lordships are unable to support the Dominion legislation as it stands. They will therefore humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

The remaining New Deal cases can be dealt with briefly. We deal first with *British Columbia (AG) v Canada (AG)*, [\[1937\] CanLII 365, \[1937\] AC 368 \(UKJCPC\)](#) [Criminal Code Reference], var'g *Reference Re Legislative Jurisdiction of Parliament of Canada to Enact Section 498A of the Criminal Code*, [\[1936\] SCR 363, 1936 CanLII 45](#). The amendments to the *Criminal Code* prohibited two kinds of conduct: (1) selling goods at prices that discriminated among competitors, and (2) selling goods at prices designed to eliminate competitors. In the Supreme Court, a majority of four held both provisions valid. Duff CJ, writing for himself and Rinfret, Davis, and Kerwin JJ, said (at 365–66):

We see no good reason for denying the authority of Parliament, under subdivision 27 of s. 91 of the B.N.A. Act, to pass these enactments.

• • •

... Whatever doubt may have previously existed, none can remain since the decision of the Judicial Committee in *Proprietary Articles Trade Association. v. Attorney-General for Canada* [[1931 CanLII 385, \[1931\] AC 310 \(UKJCPC\)](#)] that, in enacting laws in relation to matters falling within the subject of the criminal law, as these words are used in section 91, Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be "in their own nature" criminal. The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.

He added that some limits were needed to avoid permitting the Dominion to exclude the provinces entirely, but these limits were not relevant here. The dissenters, Crocket and Cannon JJ, believed that the first prohibition was invalid because it was not, in its nature, a prohibition of criminal conduct. According to Cannon J, what it prohibited was a private wrong and not a "danger to the community" (at 369). The Privy Council affirmed the Supreme Court's decision. Lord Atkin said (at 375):

Their Lordships agree that this case is covered by the decision of the Judicial Committee in the *Proprietary Articles* case The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. ...

Next, we come to the fate of the *Dominion Trade and Industry Commission Act*, which was decided in *Ontario (AG) v Canada (AG)*, [\[1937\] CanLII 366, \[1937\] AC 405 \(UKJCPC\)](#) [Canada Standard Case], var'g *Reference re legislative jurisdiction of Parliament of Canada to enact the Dominion Trade and Industry Commission Act, 1935*, [\[1936\] SCR 379, 1936 CanLII 51](#). The Act included two major parts: (1) it authorized administrative approval for agreements among businesses to restrict undue competition; and (2) it established a national trademark, "Canada Standard," to be used to identify products that complied with standards to be set by the Dominion. The Supreme Court unanimously found both parts invalid and, again, Duff CJ wrote the judgment. For the first part, he relied on his judgment in the *Natural Products Marketing Reference*. For the second, his reasoning was that the standard was not a trademark, but a "civil right of an entirely novel character. ... Generally speaking, ... Parliament possesses no competence to create a civil right of a new kind ..." (at 382–83). The Privy Council agreed about the first part, but not the second. Lord Atkin declared (at 704–5) that it could be upheld under s 91(2):

There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks. But if the Dominion has power to create trade mark rights for individual traders, it is difficult to see why the power should not extend to that which is now a usual feature of national and international commerce—a national mark.

It is perfectly true as is said by the Chief Justice that the method adopted in s. 18 is to create a civil right of a novel character. ... But there seems no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields, if they can be brought fairly within the classes of subjects confided to Parliament by the constitution.

Last of all, we can dispose of the *Farmers' Creditors Arrangements Act* briefly—it established administrative boards with powers to impose compromises or extensions of farmers' obligations to their debtors, and, in *British Columbia (AG) v Canada (AG)*, [1937 CanLII 357, \[1937\] AC 391 \(UKJCPC\)](#) [Farmers' Creditors' Arrangement Reference], aff'g Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935 [[1936\] SCR 384, 1936 CanLII 35](#), both the Supreme Court and the Privy Council upheld it under s 91(21), the Dominion's power to legislate about bankruptcy and insolvency. King saw the "New Deal" cases as an excuse for further federal inactivity, as discussed in the following excerpt.

Richard Simeon & Ian Robinson, State, Society, and the Development of Canadian Federalism

(Toronto: University of Toronto Press, 1990) at 81-83 (references omitted)

The effect of the Privy Council's decisions, in Mallory's opinion, was "practically to paralyse the Dominion as an agency for regulating economic activity ... the Dominion had practically no jurisdiction over labour, prices, production, and marketing except in wartime." King was now able to blame the constitution for federal inaction. Many accepted this explanation and there was much argument among reformers such as Scott concerning the conservative politics of the old men on the Privy Council.

Yet, ... King had other options, including constitutional reform and court-packing. Moreover, if he had supported the Bennett legislation, he could have implemented it, awaiting such private challenges to its constitutional status as might arise. If these measures had improved the national economy, or were believed to have done so, the public outcry against their abolition by a foreign court would have backed his demands for constitutional change. This was the strategy being followed at this time by the Social Credit government in Alberta, with growing popular support despite its constitutional defeats. But King did none of these things; instead, he immediately referred the Bennett legislation to the courts. As Mallory observes: "Under such circumstances, it is unlikely that the Court would be led to believe that the government was strongly attached to the legislation."

Why was King against the federal government playing the sort of extended economic and social role implied by Bennett's legislation? It was not because King was an inflexible fiscal conservative. By 1938, albeit with some misgivings, he had been persuaded to undertake a moderately expansionary budget on the Keynesian grounds advocated by the National Employment Commission and his Minister of Labour, Norman Rogers. Nor can King plausibly be portrayed as a libertarian intent upon maintaining a minimal state. In the same year that King accepted the desirability of running a deficit, he refused to utilize the federal power of disallowance to strike down Duplessis' "Padlock Law."

The best explanation for the King government's relative inactivity during the Depression, and his willingness to expand federal social and economic policy thereafter, is not to be found either in the federal constitution or in King's ideas of economics or

justice. It is that the first priority of King and his Liberals, for both ideological and party self-interest reasons, was national unity. As long as there was no clear English-speaking majority position on the appropriate role of the state, electoral politics left King with room to manoeuvre. In this context, King preferred to avoid the kind of economic and social policy initiatives that Taschereau denounced in 1935. To his conscience and his diary King justified his refusal to disallow or refer the Padlock Law to the courts, in spite of his personal opposition to it, by arguing that "in the last resort, the unity of Canada was the test by which we would meet all these things."

King's inclinations were reinforced by the election of a Quebec government, less than a year after his own re-election in 1935, which was a more militant, if still conservative, defender of provincial rights than its Liberal predecessors. But King's strategy of minimal federal activity, informed by his conviction that the principal threat to national unity lay in French-English conflict, was much less effective under conditions of economic crisis than it had been in the 1920s. For while federal inaction minimized the potential for new federal-provincial conflicts related to language, it provoked increasing criticism from those who saw the nation primarily through the lenses of region and class.

These elements argued that only the federal government possessed the fiscal resources and technical expertise to implement progressive social and economic policies. These policies involved redistribution between individuals and regions which could only be achieved in accordance with national conceptions of collective welfare and fairness. Provincial governments, given their accountability to sub-national political communities, could not be expected to take a national perspective on such issues. Poorer provinces, whatever their progressive aims, were hampered by inadequate resources and limited ability to assert claims on the rich, given the mobility of capital. Accordingly, it was deemed essential that the federal government expand its jurisdiction.

Even before the 1937 decisions by the Privy Council, a growing number of English Canadian intellectuals had begun to attack the federal system as a major impediment to the adoption of progressive policies. Foremost among them had been Norman Rogers, who had first argued that federalism had become a "dead hand" in 1931. Upon entering national politics, Rogers carried his views into King's cabinet. Leading figures within the League for Social Reconstruction and the CCF echoed this conclusion, although there was considerable difference of opinion as to who should be blamed for the constitutional failure. F.R. Scott stressed the culpability of the Privy Council, while Frank Underhill argued that the deeper source of stalemate was class-based opposition to "the substitution of government power in place of private wealth." Still, all agreed that the solution to both economic and constitutional crisis lay in a centralization of federal powers. Harold Laski, reflecting widely-held views among the Social Democratic left, went further, declaring that federalism was obsolete, a luxury which could no longer be afforded because it denied governments effective control over the forces of "giant capitalism."

We now return to the constitutional scholars. When the Privy Council decisions were announced, their criticisms turned to despair. Two such examples are manifestos written by Kennedy and Scott for a symposium in the *Canadian Bar Review*. Following is part of Kennedy's reaction:

We must no longer live in the vain world of delusion that the Judicial Committee will do for the Act what the Supreme Court of the United States has been able to do, in a wide manner, since the days of John Marshall, for perhaps the most rigid formal constitution in the world. ... As we read the recent judgments we must be convinced that the Judicial Committee has no

intention whatever, in any substantial or fundamental matter, of acting as a constituent assembly for Canada. We would have faced this issue long ago had we not too largely believed that constitutional and legal wisdom never really crossed the Atlantic.

For, I submit, we must now face issues. The federal "general power" is gone with the winds. It can be relied on at the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their legal water-tight provincial compartments; the social lines must not obliterate the legal lines of jurisdiction—at least this is the law, and it killeth. ...

The time has come to abandon tinkering with or twisting the *British North America Act*—a curiosity belonging to an older age. At long last we can criticize it, as the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship. We must seek machinery to do in Canada certain things: (i) to repeal the *BNA Act in toto*; (ii) to rewrite completely the constitution; (iii) to provide reasonable and sane and workable constituent machinery; (iv) to abolish all appeals to the Judicial Committee. I submit that every one of these things is necessary; and above all we must get rid of all the past decisions of the Judicial Committee, for they will hang round the necks of the judiciary, if appeals are abolished, in that uncanny stranglehold with which *stare decisis* seems doomed to rob the law of creative vitality.

See WPM Kennedy, "The British North America Act: Past and Future" (1937) 15 Can Bar Rev 393 at 398–99.

Frank R Scott was equally passionate, and his article concluded as follows:

Turning from the legal to the economic consequences of the decisions, it is obvious that they leave this country even more helpless than she was in 1929 to deal with the problems created by a changing economic system. The depression came, revealing gross injustices and inefficiencies in the body economic; the Stevens Committee and the Royal Commission on Price Spreads disclosed evils crying out for remedy; a considerable attempt was made to provide a system of controls and palliatives on a national scale. This attempt has failed because the constitution could not, in the hands of the judiciary at the moment interpreting it, adapt itself to the new requirements. ...

If the whole trend of world developments is wrong and all government interference in economic matters is an obstacle to progress, then Canada will benefit from her constitutional impasse, but should the reverse be true, should the need of the hour be increasingly to bring an intelligent and conscious direction to economic affairs, then Canada has suffered a national set-back of grievous proportions. A federal government that cannot concern itself with questions of wages and hours and unemployment in industry, whose attempts at the regulation of trade and commerce are consistently thwarted, which has no power to join its sister nations in the establishment of world living standards, and which cannot even feel on sure ground when by some political miracle it is supported in a legislative scheme by all the provinces, is a government wholly unable to direct and to control our economic development.

The history of recent cases dealing with the control of trade and commerce in Canada shows a fairly consistent attitude in the courts against control, an attitude which overrides any feeling for or against provincial autonomy. ...

It would seem that even without special mention in the *British North America Act*, the doctrines of *laissez-faire* are in practice receiving ample protection from the courts. ...

One lesson, it is to be hoped, will be learned again from these decisions. The Privy Council is our final court of appeal. Its interpretations of the Canadian constitution vitally affect the political, social and economic destinies of eleven million Canadians. Such a court should be staffed with men fully qualified to understand the spirit which infuses the *British North*

America Act, and the environment in which it must be made to work. Unfortunately it is only too evident that judges of this type rarely sit upon the Judicial Committee. ...

To imagine that we shall ever get consistent and reasonable judgments from such a casually selected and untrained court is merely silly. To continue using it under the circumstances is costly sentimentality. ... No alterations to the *British North America Act* will ever achieve what Canadians want them to achieve if their interpretation is left to a non-Canadian judiciary.

See Frank R Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can Bar Rev 485 at 491-94.

Scott was particularly concerned that there had been complete cooperation between the federal government and the provinces in the implementation of the *Natural Products Marketing Act* (at 489-91):

Another important consequence of these holdings is the doubt they cast upon the possibility of Dominion-Provincial co-operation as an escape from constitutional difficulties. Hitherto it has been thought that whatever problem there might be with regard to legislative jurisdiction, the difficulty could be overcome by joint action by all the legislatures. If the Dominion added all its powers to those already possessed by the provinces, surely, it seemed, anything and everything might be accomplished. On several occasions the Privy Council and the Supreme Court of Canada have suggested that this is a proper method of procedure. In the very decisions under review Duff CJ, discussing the *Natural Products Market Act*, quoted from the judgment in the *Board of Commerce Case* and said that such a scheme of regulation as set up by the Marketing Boards was not practicable "without the co-operation of the provincial legislatures"; while the Privy Council tempered their destruction of the Dominion treat-making power with the helpful reminder that "It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped."

Nevertheless, in the judgment on the *Marketing Act* in the Supreme Court there was no consideration whatever of the fact that every province in Canada had co-operated with the Dominion in setting up Marketing Boards, and had enacted special legislation to provide for this co-operation. Ten legislatures in Canada had acted to attain an end unanimously desired, yet the key-statute was declared *ultra vires* and the whole structure destroyed. The *Dominion Act* by section 12 provided that if any parts of the Act were *ultra vires*, none of the other provisions should be inoperative on that account, but should be considered as separate enactments; and the provincial statutes were intended to supply any legislative power lacking in the Dominion. In the Privy Council Lord Atkin, after repeating the empty formula that "satisfactory results" for both Dominion and Provinces "can only be obtained by co-operation," went on to warn that "the legislation will have to be very carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other. In the present case their Lordships are unable to support the Dominion legislation as it stands. They will therefore humbly advise His Majesty that this appeal should be dismissed."

Thus the courts take the view that even where there is complete co-operation between all Canadian legislatures, each one contributing its share of legislative capacity, still the scheme thus established will be destroyed, if, perchance, one legislature has made a slip in the wording of its contributory statute and has in fact included some subject matter beyond its jurisdiction. Instead of considering that this mistake is rectified by the other supporting statutes, it may be looked upon as fatal. So co-operation between the Dominion and the provinces, as in the case of the marketing legislation, may be of no use whatever in the way of overcoming constitutional difficulties, and leaves the courts as free as before to set aside legislation of which they disapprove. This legalistic straining at technicalities will do little to enhance the prestige of the courts. The *Dominion Marketing Act* was not an isolated statute, but was part of a national scheme and should have been interpreted as such.

Another example of the dismay among Canadian lawyers is a document that has come to be known as the O'Connor Report: see William F O'Connor, *Report Pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel, Relating to the Enactment of the British North America Act, 1867, any Lack of Consonance Between its Terms and Judicial Construction of Them and Cognate Matters* (Ottawa: JO Patenaude, ISO, printer to the King, 1939). In 1938, O'Connor, counsel to the Senate, was directed to examine Confederation, the BNA Act, and the Act's interpretation by the Privy Council. His report, submitted in 1939, is long and does not lend itself easily to being represented by quotations and, therefore, a summary must suffice, even though it cannot capture the tone of anger and frustration that O'Connor sustained throughout almost 150 pages.

O'Connor analyzed ss 91 and 92 and the Privy Council decisions at great length, presenting a comprehensive account of their structure. After quoting extensively from the debates at Confederation, he claimed that the BNA Act made "two grand divisions" of legislative powers: general and local. The first 15 subsections of s 92 granted powers over specified local subjects to the provinces and s 92(16) was a grant of power over residual local subjects. Section 91 assigned the residue of legislative power to the Dominion; its opening words were the sole grant and they gave the Dominion exclusive and paramount power. The effect of the "notwithstanding clause" (beginning "and for greater certainty") was to extend the exclusivity given by the opening words to the enumerations, which were simply examples, and the effect of the deeming clause (beginning, "And any matter") was to exclude from s 92(16) any local element of the enumerated subjects.

O'Connor claimed that this design had been "repealed by judicial legislation," particularly by Lords Watson and Haldane. The Privy Council had been guilty of "demonstrable error" and "serious and persistent deviation." The path of error began in *Citizens' and The Queen Insurance Cos v Parsons*, [4 SCR 215, 1880 CanLII 6](#), in its reading of the closing words of s 91. Russell represented a proper understanding of the structure and a sensible determination of aspects, but the path of error was resumed in *Tennant v Union Bank of Canada*, [1893] JCJ No 1 (QL), [1894] AC 31 (UKJCPC), where Lord Watson said: "[Section] 91 expressly declares that 'notwithstanding anything in this Act,' the legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes, which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority." O'Connor argued that this reading divided the enumerated subjects in s 91 from the opening grant of power and gave them both independent stature and priority.

This misreading was continued in Lord Watson's "extraordinary" decision in *The Local Prohibition Reference*, which struck s 91 "the deadliest blow it has received." The opening grant of power in s 91, its sole grant of power, was limited to "extraordinary circumstances only, and without exclusiveness or paramountcy." This interpretation "paralysed many essential law-making activities of the Dominion" and the result was "an undeniable partial breakdown of the general scheme of Confederation." During the 20th century, Lord Haldane's decisions "exceeded those of Lord Watson in their emasculatory effect upon the Dominion's authority." "If only this fatal error in construction could be undone, nothing much need be done in order to restore the BNA Act to that state of reasonable satisfactoriness in which it was before the fatal error was committed." Lords Watson and Haldane were the villains of Canadian federalism.

O'Connor's intensive, detailed analysis of the structure of ss 91 and 92 was a substantially new kind of undertaking. Prior to his report, the furthest scholars had gone in this direction had been to make claims of the kind that Smith had made in 1926 in the excerpt that appears near the end of Chapter 5: the POGG power had been diminished and supplanted by s 92(13). O'Connor's analysis quickly became authoritative and set the terms for discussion for about 30 years. For example, Kennedy used an elegant summary in an article in 1943: see WPM Kennedy, "The Interpretation of the British North America Act" (1943) 8:2 Cambridge LJ 146, and future Chief Justice of Canada Bora Laskin took the analysis as settled in a comprehensive and

fierce attack on the Privy Council in 1947: Bora Laskin, "Peace, Order and Good Government Re-examined" (1947) 25 Can Bar Rev 1054.

Competing assessments of the Privy Council began to appear in the 1950s, expressing different visions of Canadian federalism and representing different parts of the country. The first came from Quebec. In 1951, Louis-Philippe Pigeon, later to become a member of the Supreme Court, wrote about provincial autonomy: Louis-Philippe Pigeon, "The Meaning of Provincial Autonomy" (1951) 29 Can Bar Rev 1126, beginning with the claim that provincial autonomy had been an important element of the debates and the agreements preceding Confederation, and had been established in the terms of the BNA Act, especially in the opening words of s 91, which excluded the subjects assigned to the provinces from the grant of power to the Dominion. He concluded (at 1133, 1134, 1135):

Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies

... [T]he courts have consistently refused to allow any particular clause of the *BNA Act* to be construed in a way that would enable the federal Parliament to invade the provincial sphere of action outside of emergencies

A great volume of criticism has been heaped upon the Privy Council and the Supreme Court on the ground that their decisions rest on a narrow and technical construction of the *BNA Act*. This contention is ill-founded. The decisions on the whole proceed from a much higher view [T]hey recognize the implicit fluidity of any constitution by allowing for emergencies and by resting distinctions on questions of degree. At the same time they firmly uphold the fundamental principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union. In doing so, they are preserving the essential condition of the Canadian confederation.

Another perspective was given by William Lederman, from Queen's University, who had grown up in the West. In a series of articles beginning in 1965, he argued that at the heart of Canada was a balanced federalism—a balance between unity and diversity and between a strong Dominion and autonomous provinces. The "equilibrium points" of this balanced federalism had been made by courts, especially the Privy Council, and Lord Watson was "the greatest of the Privy Council judges concerned with the Canadian constitution": see William Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can Bar Rev 597, as reprinted in William Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 285 at 291, 294. A villain of the 1930s had become a hero.

Perhaps the most appropriate way to end this discussion of the New Deal cases is the following poem, written by Frank R Scott in 1950.

Frank R Scott, "Some Privy Counsel"

(1950) 28 Can Bar Rev 780

"Emergency, emergency," I cried, "give us emergency,
This shall be the doctrine of our salvation.
Are we not surrounded by emergencies?
The rent of a house, the cost of food, pensions and health, the unemployed,
These are lasting emergencies, tragic for me"
Yet ever the answer was property and civil rights,
And my peace-time troubles were counted as nothing.
"At least you have an unoccupied field," I urged,
"Or something ancillary for a man with four children?
Surely my insecurity and want affect the body politic?"
But back came the echo of property and civil rights.
I was told to wrap my sorrows in water-tight compartments.

"Please, please," I entreated, "look at my problem.
I and my brothers, regardless of race, are afflicted.
Our welfare hangs on remote policies, distant decisions,
Planning of trade, guaranteed prices, high employment—
Can provincial fractions deal with this complex whole?
Surely such questions are now supra-national!"
But the judges fidgeted over their digests
and blew me away with the canons of construction.
"This is intolerable," I shouted, "this is one country;
Two flourishing cultures, but joined in one nation.
I demand peace, order and good government.
This you must admit is the aim of Confederation!"
But firmly and sternly I was pushed to a corner
And covered with the wet blanket of provincial autonomy.
Stifling under the burden I raised my hands to Heaven
And called out with my last and expiring breath
"At least you cannot deny I have a new aspect?
I cite in my aid the fresh approach of Lord Simon!"
But all I could hear was the old sing-song,
this time in Latin, muttering *stare decisis*.

A CONSTITUTIONAL AMENDMENT REGARDING UNEMPLOYMENT INSURANCE

One important result of the Depression and the New Deal was the agreement by all provinces and the federal government to add "Unemployment Insurance" to the list of exclusive federal powers under s 91. We have already seen how the Privy Council struck down a previous federal attempt to provide for compulsory unemployment insurance in *Unemployment Insurance Reference*. In the late 1930s, the King government sought to remove this constitutional obstacle by proposing a constitutional amendment adding unemployment insurance to the list of federal heads of power in s 91 of the *Constitution Act, 1867*.

As noted in the extract from Simeon and Robinson set out earlier in this chapter, attempts to agree on a domestic amending formula had begun in 1927 in the wake of the Balfour Declaration and in anticipation of the enactment of the Statute of Westminster, 1931. In the absence of an agreed formula, the old amendment machinery would have to be used again: that is, an Act of the United Kingdom Parliament at the request of the Canadian Parliament. According to emerging constitutional conventions, where provincial interests were concerned, as was the case here, the consent of the provinces would also be required, though the level of that consent had yet to be determined (and would only be definitively worked out in 1981-82).

As it happened, the 1930s saw a brief revival of the compact theory referred to in Chapter 4, *The Late Nineteenth Century: The Courts Set an Initial Course*. This revival was prompted in large measure by the discussions regarding a new domestic amending formula. Some premiers, led by Ontario's Howard Ferguson, argued that "the Confederation of the provinces was brought about by the action of the provinces ... [and] that this agreement should not be altered without the consent of the parties to it": see Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950) at 204. Premier Taschereau of Quebec seconded Premier Ferguson's view in a letter to then Prime Minister Bennett: [TRANSLATION] "Confederation is a contract that had been signed by the different Canadian provinces after long discussions, on conditions acceptable to all the contracting parties. I ask myself how such a contract could be amended without the agreement of all the parties": see

Robert Rumilly, *L'autonomie provinciale* (Montreal: Fides, 1948) at 171. Such assertions were firmly discredited by constitutional commentators such as Norman Rogers of Queen's University, who attempted by means of systematic scholarly argument to "remove the barbed-wire that has been set in our path by the proponents of the compact theory of Confederation": see Norman McL Rogers, "The Compact Theory of Confederation" (1931) 9:6 Can Bar Rev 395 at 417. Rogers subsequently carried his views into federal politics and the King government.

Meanwhile, the compact theory had found a most forceful spokesman in Maurice Duplessis, successor to Taschereau as Premier of Quebec. Upon coming to power in 1936, Duplessis replaced Howard Ferguson of Ontario as principal proponent of the compact theory, and his party began to apply the idea rigorously in government and opposition. Quebec's view was expressed to the Rowell-Sirois commissioners in Quebec City in 1938 through the chief counsel of the Union Nationale, L'Emery Beaulieu, who said, "[T]he federative pact cannot be amended or modified without the assent of all the parties, that is to say, all of the provinces. It does not belong to the majority of the provinces, even less to the federal government to change it. ... [A]ny modification [without unanimous consent] ... continues to assault on the respect due to contracts": see Conrad Black, *Duplessis* (McClelland & Stewart, 1977) at 80. Duplessis was relegated to the position of Leader of the Opposition from 1939 to 1944, which meant that he was unable to express effectively his disapproval of the unemployment insurance amendment of 1940. His replacement, Premier Adelard Godbout, assented to the amendment, as did all his provincial counterparts.

Prime Minister King subsequently celebrated the political and constitutional achievement while taking pains to distance himself from the compact theory:

We have avoided the raising of a very critical constitutional question, namely, whether or not in amending the British North America Act it is absolutely necessary to secure the consent of all the provinces, or whether the consent of a certain number of provinces would be sufficient. The question may come up, but not in reference to unemployment insurance, at some time later on.

See Canada, House of Commons, Debates (1940) at 1117. King's words were those of a careful politician and clairvoyant, as can be seen in Chapter 26, Amending the Constitution.

The compact theory faded in importance after 1940, both for lack of a spokesperson among the premiers outside Quebec, and because Quebec increasingly focused its arguments not on the need for the unanimous consent of all provinces to constitutional amendments affecting provincial interests, but on the need for Quebec's assent. Quebec was not limited to the compact theory to justify its claim to a constitutional veto. On his return to power, Duplessis would argue that, in addition to being a signatory to the confederal pact, Quebec was also guardian of the French language in Canada. The claim for a distinctive role for the province found its most convincing expression in the Tremblay Report, Quebec's response to the federally inspired Rowell-Sirois Commission. The Tremblay Report stated famously that "Quebec is not a province like the others" for with regard to "French-Canadian culture," the province "assumes alone the responsibilities which the other provinces jointly assume with regard to Anglo-Canadian culture": see Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems* (Quebec: Éditeur officiel, 1956) (Chair: T Tremblay) (cited to D Kwavnick, ed, *The Tremblay Report* (Toronto: McClelland & Stewart, 1973) at 290).

CHAPTER SEVEN

FEDERALISM AND THE MODERN CANADIAN STATE

With this chapter, we move into the world of modern federalism, where we examine the judicial interpretation of some of the major heads of federal and provincial power since the end of appeals to the Privy Council in 1949. Chapter 7 begins with some background materials, which pick up the story from Chapter 6, The 1930s: The Depression and the New Deal, and set the political context for modern federalism disputes. Chapter 8, Interpreting the Division of Powers, discusses the modern principles that govern interpretation of the division of powers. We continue with an examination of the three major federal powers—peace, order, and good government (Chapter 9, Peace, Order, and Good Government); trade and commerce (Chapter 10, Federalism and the Economy); and criminal law (Chapter 11, Criminal Law and Procedure)—and their interaction with provincial powers over property and civil rights powers. Chapter 12, Instruments of Flexibility in the Federal System, shifts the focus away from the courts to examine a number of policy instruments that Canadian governments have used to avoid some rigidities of the formal division of powers in the Constitution and to alter, in practice, the actual distribution of functions and policy responsibilities of each level of government in many areas.

From the early 1970s, the Supreme Court of Canada played an increasingly active role in adjudication of disputes between the federal and provincial governments, although constitutional cases of this type were never a large part of the Court's docket. Katherine Swinton states that the Court decided 158 cases raising distribution of powers issues between 1970 and 1989. The Court was especially active in the period from 1976 through 1983, reaching a "high" of 14 cases in 1976-77: see Katherine E Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 8.

This activity occurred in a period in which federal–provincial relations were often acrimonious as a result of disputes about constitutional reform and natural resource policy as well as disagreements over such matters as the administration of justice and broadcasting. Some of the cases began as references generated by governments; others were the result of corporate or individual challenges to legislative action.

In recent years, the Court's involvement in federalism disputes has decreased, in part because many federal and provincial disputes have arisen in response to fiscal arrangements and harmonization of functions, which are being worked out in political, rather than judicial, arenas.

Before we turn to the cases in the chapters that follow, the excerpt below gives the political context within which modern federalism disputes have been decided.

Kenneth Harold Norrie, Richard Simeon & Mark Krasnick, Federalism and the Economic Union

(Toronto: University of Toronto Press, 1986) at 49-59 (footnotes omitted)

Evolution of the Division of Powers

A reborn Father of Confederation might have great difficulty recognizing his handiwork if he tried to get a grasp on the role that the different orders of government play today. He would, perhaps, be struck most by the expansion in the activities of both orders of government, each now operating across a vastly broader range of economic, social, and cultural life than was imagined in 1867. Many of the responsibilities he had assigned to the provinces were, at the time, primarily carried out by private religious and charitable institutions. Today, now they are the domain of governments, and often the federal government as much as (or even more than) the provincial governments. He would also be struck by how much the bulkheads he had built to separate federal and provincial powers into watertight compartments had been broken down. He would find few areas indeed in which both levels of government were not active; and he would, of course, find governments doing things that he and his colleagues had not even contemplated. All these new activities have, however, been fitted into the capacious, elastic pockets of the original *BNA Act*.

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The most striking development is in the increase in shared, overlapping jurisdiction. A vast range of governmental functions are now concurrent, *de facto* if not *de jure*. This is a result of four distinct processes. First is the projection of federal concerns and interests into areas once reserved primarily for the provinces, largely, but not entirely, through the device of the spending power. The most obvious are the fields of social security and social policy, generally beginning with a few small shared-cost programs in the early years of the century, followed by old-age pensions in 1927, then extended during the depression era and after. They increased to a flood after World War II. The federal government has become primarily responsible for both defining and financing the Canadian welfare state in the name of national standards, national citizenship, and redistribution across regions and individuals. Some programs, such as family allowances, were undertaken directly by the federal government. Others, such as unemployment insurance and pensions, were transferred to it through constitutional amendment. In others, notably health care and education, the chief device has been transfers between levels of government. Federal and provincial programs in social policy now intersect each other at virtually every point.

The federal government has also projected itself into other areas that were previously predominantly provincial, notably economic development, with such joint projects as the Trans-Canada Highway and later with the massive range of programs to promote regional development. To a somewhat lesser extent, the provinces have projected themselves into areas thought to be of predominantly federal concern. For example, if part of the rationale of Confederation was that Ottawa would be the main economic actor, with the provinces reserved mainly to cultural and social matters, today provinces engage in a wide range of economic policies to promote their development, including, on occasion, engaging in explicit provincial fiscal policies or demand management policies. Provinces have also become involved in many international activities. These include provincial representation abroad and a host of trade promotion activities. As international trade policy becomes increasingly focussed on the reduction of non-tariff barriers, provinces are becoming increasingly involved, partly because many of the practices at issue are within provincial jurisdiction, and partly because constitutional interpretation has meant that the

federal power to implement treaties does not extend into provincial jurisdiction. Again, the examples can be multiplied. ...

... [O]verlapping has increased massively in the field of revenue-raising. In the early years of Confederation, the revenue fields cultivated by the federal government and the provinces overlapped little, the provinces relying on direct taxing, and the federal government relying primarily on the tariff, which was not available to the provinces. Today, both levels rely heavily on the same fields, especially the corporate and personal income tax. ...

... [C]oncurrency has been encouraged by the growth of new policy areas that fall outside any of the categories that were set out in the *BNA Act*. Many of these emerging problems could fall equally plausibly into a number of clauses of ss. 91 and 92, virtually inviting each level of government in. In some cases, it was possible for courts to find an existing power into which to fit the new responsibility; in others, the advantage tended to fall to whichever level of government first occupied the field and defined its terms. Such new areas are frequently subjects of intense federal–provincial conflict, a kind of competitive expansionism, which subsides as a rough division of labour is worked out among them. Numerous new fields cut across jurisdictional lines: the environment, consumer protection, manpower training, and many others. As Stevenson [Garth Stevenson, "The Division of Powers in Canada: Evolution and Structure" in R Simeon, ed, *Division of Powers and Public Policy*, vol 61 (Toronto: University of Toronto Press, 1985) 71] notes, between 1959 and 1984, both the Alberta cabinet and the federal cabinet nearly doubled in size, and many of the new portfolios that each added, such as environment and manpower, overlapped directly.

For all these reasons, concurrency, overlapping, and shared responsibilities are fundamental features of Canadian federalism as in all other federations. A second broad development, which is both cause and consequence of increased concurrency, is the breakdown of a clear rationale, or set of criteria, for determining how responsibilities should be allocated. Two such rationales were built into the *BNA Act*. On one hand was a broad distinction between "local" and "national," the former to be provincial and the latter federal. But society and economy are now so interwoven that such a distinction cannot carry us very far. If we can agree that, to use Stevenson's example, defence is a national responsibility and garbage collection a local one, we can find exceptions even here. Defence may be a national concern, but the location of defence facilities or of plants to build equipment are decidedly local. Garbage collection may be local, but its larger effects, such as pollution, may well be interprovincial, national, and even international.

In other less extreme examples, the distinction is impossible to make. Education is the classic example. While in many respects it is, as the Constitution suggests, undeniably local, in other respects it is undeniably national—intimately related to the quality and character of the workforce and to the development of pan-Canadian attitudes and values. The same is true for many federal responsibilities. Transportation again is a classic example. It is certainly national, but in a country as vast and diverse as ours, its local manifestations and impacts are critical. Hence, a case could be made both for federal involvement in education (which has happened in post-secondary education funding, funding of research activities, and support for minority-language education programs) and for provincial involvement in transportation (which has been done through provincial ownership of railways in British Columbia and Ontario, through provincial administration of interprovincial trucking, and through provincial involvement in highways, to name but a few).

Another way to think of the weakness of the national/local distinction is to use the economist's terms of spillovers and externalities. A host of provincial actions can have effects on citizens and governments outside a province's borders. A host of

federal programs—taxing, spending and regulations—can spill over to affect provincial programs and priorities. Similarly, competing views of community can lead to widely varying conceptions of what is appropriately national or provincial. Thus, an expansive view of the supremacy of the national community, and of the federal government as its essential instrument, can lead to a virtually open-ended assertion of the national significance of local-level activities and hence of an essentially unlimited scope for the potential exercise of federal power. Conversely, a strongly held provincialist view justifies an equally unlimited projection of provincial interests into national affairs. Quebec nationalism, of course, erodes the distinction by seeing the nation as Quebec, again justifying an almost unlimited claim to jurisdiction.

A second distinction of government roles found in the *BNA Act* is between economic matters on one hand and sociocultural matters on the other, with the former primarily federal and the latter primarily provincial—though, as we have seen, the federal government was from the start allocated important powers here too. This distinction has also broken down. On one hand, the concern with the national community and with increasing Canada's international autonomy has not only led the federal government to be the architect of the welfare state, as discussed above, but has also led it into many areas of cultural and symbolic importance: multiculturalism, the CBC, the Canada Council, and others. By the same token, provinces have recognized that preservation of a distinct society and culture is impossible without the maintenance of a strong economy, and thus they have become much more interested in economic matters.

No other broad-brush simple rationale appears to offer any better guide to deciding what should legitimately be federal and what should be provincial. The complexity of the modern division of powers mirrors this lack of consensus on the fundamental federal and provincial roles. One can, however, push this argument too far. Chaotic and complex as it may be, the Constitution does provide broad boundaries to the abilities of each level of government to act in an entirely unrestrained way. Supreme Court decisions frequently draw such lines, and they have important effects on subsequent developments. Moreover, some broad agreement on general roles does seem to exist, as [Richard Johnston, *Public Opinion and Public Policy in Canada* (Toronto: University of Toronto Press, 1986)] shows in his Commission monograph. Few would disagree that defence and foreign affairs are overwhelmingly federal responsibilities. Few would deny that while the provinces are indeed important economic actors, the federal government is primarily responsible for broad macroeconomic management: for fiscal policy, monetary policy, and the like. Few would deny an overarching federal responsibility for the major redistributive programs, both for individuals and for regions, nor would they challenge the federal government's responsibility for interregional trade and commerce or for transportation. Indeed, in these areas the call seems to be generally not for increased provincial jurisdiction but for a greater degree of regional sensitivity, whether through consultation with provincial governments or in the internal operations of the national government. A similar listing for provincial government roles might be more controversial, but it would probably include education, social services, and most of the detailed regulation of individual and commercial life encompassed in "property and civil rights."

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What accounts for these changes in the operating division of powers? The proximate causes lie in the changing roles that governments play in advanced industrial societies such as Canada. Especially in the postwar period, federal institutions were required to adapt to new roles for the state and to new relationships between the state and society. The story of the evolution of the division of powers is essentially

the story of how this was done, within the context of the institutions we had inherited and the ways in which the courts had understood them. However, these changes in the role of government were themselves the product of other forces, which also therefore must be understood as “causes” of shifts in the division of powers. These include such broad trends as the increasing and changing importance of international influences in shaping the Canadian society and economy, the increased politicization of society, and the changing expectations and demands of citizens.

Moreover, to say that the division of powers had to respond to changing roles for the state does not necessarily explain how it did so. In particular, it does not explain how these new responsibilities would be allocated among governments, whether they would fall primarily to provincial governments or to the national government, or whether they would be shared. In order to answer this question, we shall return to the larger perspectives of functional federalism, democracy, and community that we outlined in Part I. All three are required to understand the Canadian pattern.

That pattern has been distinctive in some important ways. While increased overlapping and concurrency has been common to all federal states as they respond to the same pressures for the growth of government, in most cases the result has been a considerable degree of centralization. The major new responsibilities fell to the central governments, even though they were often delivered through complex mechanisms of intergovernmental transfers. Canadian commentators (at least virtually all English-speaking ones) on the events of the 1930s, in which federal institutions were seen so clearly and tragically to have failed, argued that decentralized federalism was inherently incapable of undertaking the responsibilities that economic and social developments were forcing on the modern state. The “dead hand” of the Constitution (aided and abetted by the Judicial Committee of the Privy Council) had to be removed. The division of powers had to be reworked to reflect the new responsibilities of government.

Events during and immediately after World War II seemed to indicate that this was precisely what was happening. The Rowell-Sirois Commission reported in 1940, recommending federal jurisdiction over pensions and unemployment insurance and full federal jurisdiction over personal and corporate income taxes. All provinces agreed to a 1940 amendment transferring responsibility for unemployment insurance to the federal government. During the war, the fiscal and bureaucratic capacities of the federal government increased tremendously, and this dominance extended into the years following. Toward the end of the war, the government’s white paper on incomes and employment embraced both freer trade and a responsibility for managing the entire economy, a role that would fall to Ottawa. At the end of the war, the government also released its proposals for postwar federalism, the so-called Green Book proposals, which were discussed with the provinces at a series of Reconstruction Conferences. They, too, envisioned a greatly enhanced role for the federal government, including extension of welfare state policies and control over the income tax system.

The larger, wealthier provinces rejected the Green Book proposals. However, most of the elements of the proposals were achieved over the next two decades in a piecemeal series of federal–provincial agreements: tax rental agreements, grants for health care, culminating in the *Hospital Insurance and Diagnostic Services Act, 1957* and the *Medical Care Act, 1966*; grants for post-secondary education, leading to federal assumption of half the operating costs of all post-secondary institutions in 1967; grants to assist the provinces in social welfare, culminating in the Canada Assistance Plan, 1968; and developments in pensions, including the establishment of the federal old-age security pension in 1951, the Canada and Quebec pension plans in 1964, the guaranteed income supplement, and so on.

Equally remarkable was the persistence and vitality of federalism. In only a few cases were responsibilities formally transferred to the federal level. In most cases, the federal government was to achieve its goals through shared-cost programs, with the provinces retaining a major role in program design and delivery. The fiscal centralization of the immediate postwar period was steadily relaxed. The provincial shares of taxing, spending, and government employment rose at a considerably faster rate than federal spending throughout most of this period. The strength and self-confidence of provincial governments increased, along with their budgets. Thus, predictions that the provinces would wither away, to become little more than municipalities, able merely to weave minor variations on national themes, were proved to be decidedly premature. All this was reflected in the shifting division of powers.

As the state adopted new roles, expectations of federalism pulled in somewhat different directions. Most thinking in the postwar period held that the efficiency and effectiveness of public policy implied the need for increased centralization, or federal authority. There are a number of strands to this argument. The new Keynesian economics stressed the need for the state to manipulate overall levels of taxing and spending in order to smooth out aggregate demand in the economy. Many assumed that this would be more feasible if one single authority was able to determine aggregate levels of taxation, borrowing, and expenditure, rather than if independent actions of 11 governments had to be coordinated. Most provinces were clearly too small to operate their own fiscal policy; any provincial effort was likely to be dissipated in spillovers to other jurisdictions. Without control over their money supply, the provinces' capacity to engage in stabilization policy was further limited. The Canadian commitment to freer international trade in the post-War era also increased the importance of international economic relations in domestic policy-making, a development that was also assumed by many to require wider federal authority. More generally, it was felt that the private economic actors with which governments would have to interact, and which they would have to regulate, were increasingly transcending provincial boundaries. National and international corporations and unions were felt to be beyond the reach of most provincial governments. If the economy itself was becoming organized on a national basis, then the political system should be organized more nationally as well.

Similar reasoning applied to the development of the welfare state. Individual provinces, it was felt, lacked the resources to put the new policies in place, though often they had acted as the pioneers, as Saskatchewan had done with public health care. It was also difficult for the provinces to pursue progressive redistributive policies, since in a society with mobile capital and labour, the wealthy could easily move to areas of low spending and low taxes, and the less well-off could do the reverse. Provincial provision of services such as post-secondary education would probably be less than was desirable for national purposes, since provinces would fear that graduates trained at their expense might move elsewhere on graduation. The more integrated and tight-knit the society, the more inhibiting such interdependencies could be and, as the Saskatchewan health care example shows, the more each level of government would require the assistance of the other to meet its goals. The expansion was therefore complementary as often as competitive.

There thus was a powerful functionally based rationale for a broader federal role; or, if not, for a high degree of federal involvement in provincial policy. By the 1970s, such functional arguments had attenuated somewhat. Perhaps the chief reason was that with the fundamental economic management policies well established, it was possible to turn more attention to the virtues of decentralization in terms of policy experiment, innovation, and the like. By the 1970s there was also growing disquiet about the efficacy and desirability of some of the postwar policies; they were

now less able to command broad support. In particular, the limitations of such policies, especially for some regions, had become more apparent. Keynesian economics had indeed appeared to promote national growth, but it was not clear that it had done much to alleviate underlying regional disparities. Thus, a new set of issues was arising for which, at least for some interests, centralization was not the obvious solution.

If the logic of functionalism was broadly centralizing, the logic of democracy was more complicated. The postwar period was characterized by increased citizen expectations and demands on governments, and by the proliferation of interest groups. Both phenomena were simultaneously cause and consequence of the growth of governments. As [Hugh G Thorburn, *Interest Groups in the Canadian Federal System* (Toronto: University of Toronto Press, 1985) at 59–66] has demonstrated in his study of interest groups, the organization and strategies of such groups was greatly influenced by the federal political structure and by the division of powers. Groups tended to organize around those governments which had the prime responsibility for matters of greatest concern to them. For example, provincial ownership of oil and gas resources led companies in these fields to orient themselves primarily toward the provincial governments. However, federalism also required many groups, such as labour, to orient themselves to both levels, often stretching their resources very thin and rendering it difficult for groups to develop coherent national policies.

At the same time, the groups also helped shape the evolution of federalism. They greatly stimulated the development of jurisdictional overlap and policy interdependence, for neither interest groups nor citizens were likely to consult ss. 91 and 92 before articulating their demands. The call was for action by government generally, and both orders of government were often anxious to respond, especially in the newly emerging areas of public concern.

Finally, community concerns also pulled in both directions. It was widely felt in the postwar period that the searing collective experiences of the depression and the war had greatly strengthened the sense of a Canadian national community. Shared sacrifice and the increased linkages among citizens was [sic] producing a stronger national consciousness, one that was focussed on the federal government, for it had been the prime instrument of the war effort and alone seemed capable of putting in place the new public agenda. The commitment to the welfare state embodied an idea of social rights and national standards which should apply to citizens wherever they lived. A stronger national consciousness legitimized federal policies that were designed to foster it. No longer did it seem justified that we should tolerate large differences in the level and quality of public services simply because of the province of residence. It was widely thought that the processes of economic development in an advanced industrial society were likely to erode the importance of identities rooted in territory and culture, and to strengthen those related to one's status in the economic system, for example as worker, manager, or farmer. This, too, was predicted to undermine the salience of provincial identities and to strengthen those at the national level.

Nevertheless, the support for regional communities had by no means disappeared, especially in Quebec. In their response to the Rowell-Sirois Report (which itself had restrained its recommendations out of a recognition of the value of provincial diversity) and to the federal Green Book proposals, dissenting provinces were able to make strong appeals to values such as provincial autonomy. In the 1950s, Quebec's Tremblay Commission was able to articulate a province-centred view of federalism which attacked the essentials of the thrust for postwar centralization. The strength of such feelings ensured that in the assumption of new roles, the answer would not simply be a wholesale transfers of responsibilities from the provinces to the federal government, however logical this might seem on functional grounds. Instead, many of these

functions would be carried out by the provinces. In other cases, ways would be found to introduce them in a manner consistent with the maintenance of federalism and of provincial responsibility, primarily through the development of the techniques that came to be known as cooperative federalism.

As we shall discuss later at greater length, by the 1970s federal and provincial governments were articulating highly divergent and competing views of the character of the Canadian communities and their relations to the two orders of government. This competitive state-building also promoted increased overlap and *de facto* concurrency, since each of the competing visions tended to be predicated not on a functional division of powers, as suggested by ss. 91 and 92, but on a global view of the dominance of one or other level of community. In the pursuit of such visions, it was legitimate to deploy the full range of public policy—economic, social, and cultural. From this perspective, nothing was easily excluded from the purview of any government; no easy dividing line could be drawn. So in Quebec, for example, by the 1960s the issue was not whether there should be a welfare state but under whose auspices it should be organized. Thus, while in the postwar period the muting of regional consciousness had limited fundamental debate over the division of powers in favour of a search for cooperative mechanisms, by the 1960s the division of powers was at the heart of federal–provincial conflict, as each government explored the limits of its “jurisdictional potential.”

As the preceding comment suggests, changes in the division of powers were not automatic reflections of a changing society and economy. They were developed and articulated by and through the governments in the federal system, each utilizing the resources allocated to it by the Constitution. Thus, we must also understand change in the operating division of powers through the internal dynamics of governments themselves. As they sought to master their own environments, and respond to electoral and other incentives, they were increasingly led to intervene in areas occupied by other governments and to use policy instruments that had previously been largely monopolized by the others. As we have seen, the terms of the *BNA Act* were permissive: a government could almost always find a legitimate constitutional peg on which to hang its desired programs. This was made possible both by the fact that many new areas did not fall neatly into any one category and by the presence of open-ended authority in areas such as the spending or the taxing power. [Emphasis in original.]

NOTE

With increasing levels of activity by federal and provincial governments and the resulting interdependency, executive federalism became an important institution of Canadian political life. The term “executive federalism” describes the relationships between elected and appointed officials representing federal and provincial governments. Through consultation and negotiations in a wide variety of policy areas, these actors have often reshaped the allocation of functions under the Constitution’s distribution of powers, as interpreted by the courts. Further discussion of the intergovernmental relations that characterize modern federalism is found in Garth Stevenson, “Federalism and Intergovernmental Relations” in Michael S Whittington & Glen Williams, eds, *Canadian Politics in the 21st Century*, 7th ed (Toronto: Nelson Thomson Learning, 2008) 85. Intergovernmental agreements are dealt with further in Chapter 12.

CHAPTER EIGHT

INTERPRETING THE DIVISION OF POWERS

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I. INTRODUCTION

This chapter contains an overview of the general principles and doctrines relied on in the judicial interpretation of the division of powers between Parliament and the provincial legislatures. The structure of the chapter follows the three kinds of arguments that can be used to challenge legislation on division of powers grounds.

The first kind of argument involves a challenge to the validity of legislation. The argument in such cases is that the legislation was enacted in relation to a “matter” beyond the enacting level of government’s jurisdiction and thus within the exclusive jurisdiction of the other level of government. Challenges to the validity of legislation can generally be made equally against either federal or provincial legislation and are resolved on the basis of three doctrines that the courts have fashioned over time to help them work their way through the different kinds of legal issues that such challenges can pose: the *pith and substance* doctrine, the *double aspect* doctrine, and the *ancillary powers* doctrine.

The second kind of argument seeks to limit the operability of provincial statutes. Even if a provincial law is valid, provisions in that law will be rendered inoperative if they conflict with provisions forming part of valid federal legislation that also apply to the same facts. This doctrine, known as the *federal paramountcy* rule, works against the operation of provisions in provincial statutes to protect the primacy of federal policies embodied in valid federal legislation. It may help to understand the difference between invalidity and inoperability if you keep in mind that, whereas invalid provisions always remain invalid, when paramount federal legislation is repealed, formerly inoperative provincial provisions become operative once again.

The third kind of argument seeks to limit the applicability of valid legislation. Even if legislation is within the jurisdiction of the enacting level of government, it may have to be limited in its application (or “read down”) so as not to impair matters that lie at what is referred to as the “core” of one of the other level of government’s areas of exclusive jurisdiction. This doctrine,

known as *interjurisdictional immunity*, has been used far more often by the courts to limit the applicability of provincial statutes to protect the exclusivity of federal heads of power than to limit the applicability of federal statutes to protect the exclusivity of provincial heads of power; in fact, instances of the latter are exceedingly rare. The Supreme Court of Canada has affirmed that the logic underlying the doctrine means that it can be used to protect the core areas of jurisdiction of both orders of government. However, the Court has also stated that the interjurisdictional immunity doctrine runs against the dominant tide of modern, flexible Canadian federalism. We will see the various ways in which the Court has downgraded the importance of this doctrine. Where interjurisdictional immunity is relevant, the Court may choose to consider applicability ahead of operability. The rationale for treating applicability ahead of operability in the narrower range of cases where it can still be invoked is that the reading down that is the effective result of treating a provision as inapplicable may eliminate what might otherwise have been conflict leading to inoperability. However, as we shall see, it is now just as, or even more, likely that interjurisdictional immunity issues will not be raised at all—hence the change in the order of presentation in this chapter since the last edition.

Given that it has been 150 years since the bulk of ss 91 and 92 of the *Constitution Act, 1867* came into force, you might assume that the Supreme Court of Canada would be called on relatively rarely nowadays to resolve issues relating to those provisions. You might have thought that, by now, both the meaning of all the significant heads of power would have been determined and the content of the various doctrines that the courts employ to assist in the resolution of such issues would have become both stable and clear. As you will soon come to appreciate, however, disputes can still arise about the proper scope to be given to particular heads of power, and the content of some of the doctrines remains neither stable nor clear. One of your main challenges as you progress through the readings in this chapter will be to keep track of the different ways in which these doctrines have been understood and applied over time. Another will be to gain a sense of why it is that these different ways of understanding and applying these doctrines have developed.

Another reason for the continuing involvement of the courts in this area is the fact that Parliament and the provincial legislatures, either on their own initiative or in response to public pressure, have in recent years been enacting legislation of a kind that the drafters of ss 91 and 92 would never have contemplated—for example, federal legislation that addresses a range of issues arising out of the development of assisted human reproduction techniques and genetic testing; provincial legislation that authorizes the government to claim forfeiture of both the tools and the proceeds of illegal activity; and federal and provincial legislation seeking to protect the environment in multiple ways, ranging from environmental assessment to regulation of greenhouse gases. How such legislation should best be understood to fit within the division of powers framework established many decades ago in a very different world is often far from clear and can pose serious challenges to the courts that are called on to provide the answers.

Yet another reason for the continuing involvement of the courts is the Supreme Court of Canada's tendency in the past few decades to allow both levels of government to legislate in the same areas. Although this has made it more difficult to bring successful challenges to the validity of legislation, it has led to an increase in the number of challenges to both the operability and the applicability of legislation (primarily provincial legislation). As you will see from the readings in Sections IV and V, the Supreme Court is being called on with some frequency these days to resolve both types of challenges.

As important as both the text of ss 91 and 92 and the above-noted doctrines are to the resolution of division of powers disputes, they are not the only tools the courts employ. One of the more striking features of the recent federalism jurisprudence has been the Supreme Court's tendency to invoke a number of broad, overarching principles in support of the approach it takes to division of powers issues. Prominent among these principles is the principle of *flexible or cooperative federalism*. The Supreme Court has invoked that principle in a

number of its recent federalism decisions, particularly those in which it has rendered a judgment that allows for both federal and provincial legislation to exist and operate in the same area. That use of the principle of cooperative federalism to that end is especially evident in several recent decisions in which the Court has declined to apply the doctrine of interjurisdictional immunity (the subject of Section V of this chapter) and the federal paramountcy doctrine (the subject of Section IV). The Court has only recently begun to expand on what it understands "cooperative federalism" to mean. For example, in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, the Court stated the following:

[17] Cooperative federalism is an interpretative aid that is used when "interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, para. 78). Where possible, courts should favour a harmonious reading of statutes enacted by the federal and provincial governments which allows for them to operate concurrently (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 38). This principle is based on the presumption that "Parliament intends its laws to co-exist with provincial laws" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27).

[18] Cooperative federalism is often applied "to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action" (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 3 S.C.R. 693, at paras. 17-19). Broadly speaking, it "accommodates overlapping jurisdiction and encourages intergovernmental cooperation," and therefore discourages courts from interfering with cooperative regulatory schemes so long as they are not incompatible with the boundaries dictated by the *Constitution Act, 1867* (*Reference re Securities Act*, at para. 57, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 63; *Reference re Securities Act*, at paras. 61-62). We stress that cooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Chateauguay (City)*, at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, at para. 19; *Reference re Securities Act*, at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).

[19] This modern view of federalism sees Part VI of the *Constitution Act, 1867* as a set of boundaries within which provinces and the federal government are free to give full effect to "Canadian federalism's constitutional creativity and cooperative flexibility" (*Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292, at para. 15). In short, cooperative federalism allows "different levels of government [to] work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own" (*Comeau*, at para. 87).

For further reading, see J Poirier, "The Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020) 94 SCLR (2d) 85.

The value of such an approach lies in the fact that the cumulative effect of (1) more flexible application of doctrines such as pith and substance, double aspect, and ancillary powers and (2) newly restrained versions of paramountcy and interjurisdictional immunity is that the federal and provincial levels of government will often find themselves regulating the same areas of activity in Canadian society. Rather than attempt to avoid overlapping jurisdiction by means of active judicial policing, federal and provincial actors are left to work out their jurisdictional

disputes themselves and, where appropriate, find ways to resolve those disputes through some form of cooperative action. It is a principle that, at least to this point, has been understood to favour both jurisdictional flexibility and judicial restraint. (An interesting case to examine when considering the principle of cooperative federalism is *Quebec (AG) v Canada (AG)*, 2015 SCC 14, in which the government of Quebec relied in argument on the principle of cooperative federalism not as a reason to allow both levels of government to legislate in the same area but as a reason to prevent one level of government from enacting legislation in an area of shared interest. That case is excerpted in Chapter 11, Criminal Law and Procedure.)

Other general principles in recent jurisprudence include an understanding of federalism as a mechanism for balancing regional diversity with national unity; the importance of interpreting ss 91 and 92 in a "progressive" manner—that is, ensuring that the meaning given to the heads of power reflects the changes that have taken place in Canadian society since 1867; the need for predictability—that is, that both governments and citizens should be able to predict the outcome of federalism disputes with some confidence; the importance of promoting democratic participation and governmental cooperation for the common good; and the principle of *subsidiarity*, which means that, wherever possible, governmental power should be devolved to the local level.

For a good example of the Supreme Court invoking a number of these principles at once, on this occasion as a prelude to its discussion of several of the doctrines we referred to above, consider the following passage from the reasons of Binnie and LeBel JJ, writing for the majority, in *Canadian Western Bank v Alberta*, 2007 SCC 22, excerpted more fully in Section V:

[21] The disposition of this case requires the consideration and application of important constitutional doctrines governing the operation of Canadian federalism. Despite the doubts sometimes expressed about the nature of Canadian federalism, it is beyond question that federalism has been a "fundamental guiding principle" of our constitutional order since the time of Confederation, as our Court emphasized in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 55.

[22] As the Court noted in that decision, federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. (Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.)

[23] To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss. 91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution—this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136—the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very

functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.

[24] As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" . . . We will now turn to the issue of how, in our view, the main constitutional doctrines and the interplay between them should be construed so as to facilitate the achievement of the objectives of Canada's federal structure.

Canadian Western Bank is in many ways a complete course on the division of powers and bears rereading for that reason alone.

Before turning to an examination of the manner in which the courts deal with arguments attacking the validity, operability, and applicability of legislation, the chapter begins with an excerpt from an article by Richard Simeon discussing the fundamental values—community, functional efficiency, and democracy—that shape and animate debates about the federal form of government. The interpretation of the division of powers is an exercise that in some, if not many, cases can be deeply influenced by judicial conceptions of the appropriate weight to be given to the values Simeon discusses. For example, a judge's conception of the relative importance of national and local communities can influence their choice of either a broad or narrow approach to the scope and meaning of competing federal and provincial heads of power. The weight judges attach to a concern about functional efficiency may influence the degree to which they are willing to tolerate overlapping schemes of federal and provincial regulation. An appreciation of the underlying values discussed by Simeon is necessary to grasp the normative dynamics that drive debates about the proper interpretation of the division of powers.

II. VALUES INFORMING THE INTERPRETATION OF THE DIVISION OF POWERS

Richard E Simeon, "Criteria for Choice in Federal Systems"

(1982-83) 8 Queen's LJ 131 at 131-37, 141-43, 148-55 (footnotes omitted)

[F]ederalism is not an end in itself, not something which can be inherently "balanced" or "unbalanced." Federalism (and its many variations in the view taken here) is valued or criticized because it is felt to promote (or constrain) other important values, and is believed to have certain kinds of effects.

Federalism, as a doctrine, is thus often associated with a number of other political values, such as liberty or pluralism; federalism as a set of institutions is felt to enhance the likelihood of approximating these values in practice. Moreover, if this is true, then it should also be true that proposals for change in a federal system like Canada's can be judged by whether they serve or block these wider values, and

perhaps even that if we had clear normative criteria in mind we should be able to deduce proposals for reform from them. ...

In this paper, we will examine the links between federalism and three distinct bodies of theory, each of which provides a different vantage point for assessing a federal system.

Federalism can be evaluated first from the perspective of *community*. Here the question is: what implications do different forms of federalism have for different images of the ideal or preferred community with which people identify and to which they feel loyalty? Linguistic dualism and regional diversity have made this perspective the overwhelming focus of both practitioners and students of Canadian federalism, especially since the 1960s. Second, federalism can be evaluated from the perspective of *democratic theory*: does federalism promote democracy; do different conceptions of democracy generate different images of the good federal system? ...

Third, federalism can be assessed from the vantage point of *functional effectiveness*: does it enhance or frustrate the capacity of government institutions to generate effective policy and respond to citizen needs?

Debates about federalism take place both within and between each perspective. Proponents of each standpoint ask very different questions and have quite different criteria for judgement. Indeed the debate is often confused simply because the combatants talk past each other. But there is also vigorous debate within each of these traditions: between localists and universalists in community terms; between majoritarians and protectors of minority rights in democratic terms; between proponents of economies of scale and of the pathologies of size among the functionalists.

The relative emphasis among the three perspectives tends to vary considerably from country to country and time to time. Thus, if Canadians have been preoccupied with accommodating rival conceptions of community, Americans have—with the major exception of the Civil War period—debated federalism overwhelmingly in terms of its implications for democracy. Australians and Germans have emphasized the functional dimension—though the establishment of the Bonn republic sought the restoration of federalism as one means to diffuse power and thus inhibit the reemergence of totalitarianism. In Canada, while community has been central, English-Canadian academics of the thirties concentrated largely on federalism and effective government, rather than federalism and community. The economic crisis of the present and the (at least temporary) setting aside of the constitutional debate, suggests that attention is turning back to the preoccupations characteristic of the thirties. ...

[P]olitical values are nested in institutional forms. Constitutional doctrines have important educative values. They privilege some concepts of sovereignty, legitimacy, representation and the like over others and thus make them easier to defend or harder to attack. At a more empirical level, they entrench some kinds of interests over others, and structure the incentives within which political actors work. ...

Conceptions of Community

The first set of criteria asks what conception of the political *community* is to be embodied in political arrangements. Federalism is thus assessed largely in terms of its ability to defend and maintain a balance between regional and national political communities. Conflict arises out of competing models of community: between a vision of a single pan-Canadian community, a vision of a union of ten provincial communities and a vision of two distinct national communities, each with full sovereignty. Within the perspective of community, moreover, is the controversy

about whether the communities in Canada are to be defined largely in political terms, or in terms of the relationship of linguistic and ethnic communities. In the present context, the competing images of community can be summarized in terms of a conflict between three drives: country-building, province-building, and two-nation or Quebec nation-building. Federalism itself represents, from this point of view, a dynamic balance between regional and national communities, reflected in the relationship between federal and provincial governments. The tension threatens the federal system itself when residents of different parts of the country hold fundamentally clashing conceptions of the balance; or when residents of one or more regions develop a conception of community in which their identification or links with other regions and the central government become weak.

The criterion of community asks concerning which set of people do we assert a common citizenship, maintain a common loyalty, maintain a common set of obligations one to another, or maximize values such as equity, growth or wealth? Who is entitled to share, as of right, in the resources of the group? What set of people do we regard as "us"? When an Albertan or a New Brunswicker says "we," whom does he include? What is "the appropriate space dimension for the resolution of value conflict?"

In this sense everyone belongs to multiple communities, ranging from family, to city, to province, to country, to humanity in general. And most of the time these identities are not incompatible. ... Indeed federalism is predicated on just this sort of division in the minds of citizens.

Nor, of course, need communities be territorial or geographic—they can equally be communities such as religious groups or classes. Here however, we are concerned primarily with territorially defined communities Moreover, we are concerned with provincially-bounded communities, even though communities defined intra- and supra-provincially exist in many parts of Canada. We focus on nation and province because it is these communities which have been institutionalized, and which have governments with the capacity to define and articulate community interests. ... For this reason, arguments about political community in Canada tend to focus on the relative role and power of federal and provincial authorities. More than most other successful federations, Canadian history has turned on such questions and on shifts in the political strength of each conception. ...

The Functional Perspective

The second set of criteria may be labelled *functional*. Here the focus is not on regions, communities or rival national and provincial states. Rather, federal and provincial governments are seen to be different elements within a single system. Together—either through independent action, or through various forms of cooperation—they are responsible for governing the country and for satisfying the needs of citizens. Powers are allocated, at least in principle, not according to what different communities need to express and protect themselves but rather according to a division of labour criterion: which level can most efficiently and effectively carry out any given responsibility of contemporary government? The system as a whole is evaluated in terms of its ability to respond to the needs of citizens And citizen interests in terms of economic and social goals—as consumers, workers, businessmen, homeowners, etc.—are held to be more important to them than their interests as members of territorially-defined communities. Does the federal system facilitate or frustrate governmental responsiveness, does it promote or block desires for more effective economic planning, control over foreign ownership, environmental protection, a fair welfare system, or any other set of objectives? Does it impose unacceptably high

delays or uncertainties in decision-making, or impose heavy organizational and decision costs?

If the community perspective is the domain of sociologists, the functional perspective is that of the economists and public administrators. If the primary orientation of community theorists is collectivist, the functionalist perspective tends to be individualist. And if advocates of each model of community often take for granted or ignore the policy or efficiency implications of different proposals, functional theorists equally tend to leave unexamined the scope of the community across which values like equity, redistribution, growth or welfare are to be maximized. Most writers in this perspective tend to reject debate in terms of community as illegitimate ... As Pierre Trudeau and his colleagues said in a 1964 manifesto, "An Appeal for Realism in Politics":

To use nationalism (English or French-Canadian) as a yardstick deciding politics and priorities is both sterile and retrograde. Overflowing nationalism distorts one's vision of reality, prevents one from seeing problems in their true perspective, falsifies solutions and constitutes a classic diversionary tactic for politicians caught by the facts. ...

The constitutional problem, then, is to allocate powers and erect machinery that maximizes the capacity of governments collectively to satisfy citizen needs. And the question is whether there exists a body of theory which can provide criteria to suggest how this can be done.

Arguments about the functional ineffectiveness of the federal system abound. Some argue the system is ineffective because it is too *decentralized*. For example, it is suggested that the Canadian common market—and hence the rational allocation of resources—has been substantially eroded by a wide variety of provincial actions. Businessmen argue that they are hampered by differing provincial regulations in such areas as consumer protection. It is often argued that the proportion of taxing and spending power in the hands of the provinces vitiates the federal capacity to manage the economy, or to develop effective national planning. ...

But there are also functionally derived arguments that the system is too *centralized*. They include the view that no remote central government can adequately take into account the interests of all sectors and regions. The federal decision-making apparatus is overloaded and hence ineffective.

Finally, many functionalist arguments focus on the costs of the sharing and overlapping of responsibilities among governments. Such sharing, it is suggested, imposes unacceptably high decision costs ... in the form of delay, uncertainty, and the difficulty of knowing who is responsible or to whom to direct demands. ... The sharing of powers and the process of federal-provincial bargaining, it is argued, freezes out interest groups and contributes to the "overgovernment" of Canadian society. Functionalist critiques thus come from all parts of the ideological spectrum. They can lead either to centralization or to decentralization, and they usually embody an implicit conception of community. ...

• • •

One of the most important lessons of the functional perspective is that not all interests are defined in territorial terms; [other] interests may be neglected in a political regime predicated on the centrality of territory or region. Here, abstract criteria are of little help. What is necessary is assessment of the underlying nature of political, economic and cultural cleavages, and the territorial distribution of interests. ... "Who benefits" from greater centralization or greater decentralization is not a question that can be answered in the abstract; nor are benefits and costs distributed equally across all groups. It is a much more political question

Functionalist theorists have tended to discuss the allocation of powers in terms of watertight compartments; overlapping ... is [generally] held to be inefficient, costly, and perverse. Yet overlapping jurisdictions characterize all federations, and theorists must take into account the political forces which have led to this situation. Most issues have both local and national dimensions, so their assignment to one or other level will inevitably result in inefficiencies. As Dafflon says, "For multi-level problems, single level problem solving structures are unlikely to be optimal." ...

The Democratic Perspective

The third perspective is that of democratic theory. It asks: what are the consequences of alternative federal arrangements for different conceptions of democracy—for participation, responsiveness, liberty and equality? There are several strands to such arguments. The first approach is primarily concerned with protecting citizens from governments The classic defence of federalism as it emerged in the United States suggests that its fundamental purpose is to minimize the possibility of tyranny, especially majority tyranny, by ensuring that power would be fragmented among competing governmental authorities. In this view federalism is a device to place limits on government, in part by ensuring that "ambition" will be checked by ambition, and in part by ensuring that diverse jurisdictions will offer different packages of services from which mobile individuals can choose. This approach tends to argue for considerable decentralization and makes a virtue out of divided jurisdiction and competing governments. A minority tyrannized over by a local majority can seek redress at another level, as blacks faced with discriminatory state policies were able to do by turning to Washington or, to some extent, as French-Canadians were able to do by turning to the provincial government. ...

There are several problems with this approach. It places an excessive faith in the capacity of institutions to prevent tyranny. And if the goal of federalism is more *limited* government overall, many contemporary critics conversely suggest it is associated with *too much* government. Finally, the reverse of protection of minorities is the frustration of majorities. Federalism does not resolve the classic problem of majority versus minority rights.

A second strand of democratic theorizing stresses the advantages of smaller units in terms of governmental responsiveness and citizen participation. In Montesquieu's view:

In a large republic, the common good is subject to a thousand considerations; it is subordinated to various exceptions; it depends on accidents. In a small republic, the public good is more strongly felt, better known and closer to each citizen; abuses are less extensive, and consequently less protected.

Smaller units are likely to be more homogeneous, so a clear majority interest is more likely to emerge. The political weight of an individual citizen is greater if he is one of a small rather than a large number. Political leaders are more sensitive to public opinion with small constituencies. The advantage of a decentralized federal system, then, is that it maximizes opportunities for effective citizen participation.

Again, there are difficulties. In order for communities to be homogeneous, or for individuals to have a real chance of exercising influence, the units probably need to be a great deal smaller than provinces The opportunity to participate in a small unit may also pose a difficult dilemma: one may be able to achieve influence, but that may be negated by the inability of the unit itself to achieve one's goal because it lacks the resources: system responsiveness and system capacity are inversely

related. This is a strong argument for a multi-level system of government, such as federalism.

Thus, "democratic" views of federalism support both a high degree of decentralization and of overlapping between governments. But democratic theory also produces important critiques of federalism. Most prominent recently in Canada is the argument that the Canadian pattern of "executive federalism" in which relations between governments are conducted primarily through the negotiations of political executives limits citizen participation and effectiveness in many ways. Confusion about which level of government is responsible for what makes rational intervention difficult. The mixing of responsibilities reduces accountability and allows governments to pass the buck. The secrecy of the process has similar effects and freezes out interest groups. The dominance of executives strengthens the role of bureaucrats as against politicians, and cabinets as against legislatures and opposition parties. Citizens' interests, it is argued, get lost in governmental competition for status and power. ...

The second critique of federalism is that it frustrates majority rule; indeed, it does so almost by definition. It does so by denying a level of government the jurisdiction or resources to achieve certain ends, or by providing inadequate mechanisms for joint decision-making. This concern, of course, is quite different from those advanced by Madisonian liberals. The difference is well-illustrated by those who oppose an entrenched *Bill of Rights* on the grounds that it infringes on legislative sovereignty. Again, the critical prior question is: which majorities? ... [I]t has often been argued that federalism has frustrated *national* majorities. ...

A related argument, advanced by Porter and others, is that the federal structure, by fragmenting groups and institutionalizing the territorial dimension of politics, has inhibited the emergence of national majorities or of majorities and minorities based on non-regional cleavages, such as class. Both these views argue for more centralization.

But on the other hand, one can argue that federalism has frustrated provincial majorities. ... This is a central argument of the PQ: Quebec cannot achieve its goals in economic, social or cultural policy so long as Ottawa controls so many of the levels of policy-making. More generally, majority rule in Canada as a whole implies inevitably that Central Canada outweighs the East and West, and that English-Canadians predominate over French-Canadians. If regional and ethnic identities are the most salient divisions, and if political issues divide the country on these lines, then the doctrine of majority rule is a major threat to national unity. ...

Thus arguments from majority rule depend crucially on prior conceptions of community. They also depend on the territorial distribution of political cleavages. If most interests are distributed evenly across the whole country, dividing it horizontally rather than vertically, then the argument for aggregation at the national level is strong. If, on the other hand, opinions are sharply divided by region, which implies that a majority in each region is likely to have a different preference, then a strong argument can be made for provincial responsibility. Indeed the "democratic" version of containing spillovers is the idea that political boundaries should be aligned with the distribution of preferences, so that each region is as homogeneous as possible: each unit could then enact its preferences without either imposing them on others or being vetoed by others. This is a fundamental justification of federalism. It is, however, hard to make operational, and does not deal with the problem of the distribution of rewards across units, "conflicts of claim."

NOTES AND QUESTIONS

1. In *Starr v Houlden*, [1990] 1 SCR 1366, 1990 CanLII 112, Lamer J (as he then was) said that one of the relevant considerations in characterizing legislation for division of powers purposes—that is, deciding the “matter” or “pith and substance” of the legislation—is “what Professor Hogg refers to (at p. 323 [Peter W Hogg, *Constitutional Law of Canada*, 2nd ed (Toronto: Carswell, 1985)]) as a ‘concept of federalism’ comprised of the enduring values in the allocation of power between the two levels of government.” The “enduring values” to which Hogg referred are those discussed by Simeon, excerpted above.

2. For examples of cases in which judges have openly acknowledged the influence of a particular value in resolving a federalism issue, see the reasons for judgment of Ritchie J in *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662, 1978 CanLII 6 (excerpted in Chapter 11) (community); Estey J in *Dominion Stores Ltd v R*, [1980] 1 SCR 844, 1979 CanLII 57 (the subject of a note in Chapter 10, Federalism and the Economy) (functional efficiency); and Lamer J (as he then was) in *Starr v Houlden* (democracy). In other cases, judges may not identify a particular value, yet we may be convinced nonetheless that some such value is at work. Try to identify such cases (and values) as you work through the balance of this chapter and subsequent chapters.

3. Note that the decision to select one of Simeon’s three criteria of choice as most appropriate for a particular kind of federalism dispute does not mean that that dispute is going to be resolved in a particular manner—that is, in favour of either the provincial or the federal level of government. It merely tends to define the terms of the debate. For example, if community is selected as the preferred criterion, the debate will probably be about which conception of community—the local/provincial or the national/federal—should take precedence in the context of that kind of dispute. Similarly, if functional efficiency is selected as the preferred criterion, the debate may well be about whether economies of scale (favouring the federal government) or the pathologies of size (favouring the provincial governments) should be given greater weight in the context in question.

4. Is it possible to generalize about the appropriateness of using one criterion rather than another in certain kinds of cases? Could we argue, for example, that community should be preferred when the impugned legislation relates to the social sphere, functional efficiency when the impugned legislation relates to the economic sphere, and democracy when the impugned legislation relates to the political sphere? Is it even possible to categorize legislation in such a manner?

5. For an analysis of the impact that the nature of a particular head of power in ss 91 and 92 can have on the preference shown by a court for one of Simeon’s criteria of choice over another (as well as on the use of the double aspect and necessarily incidental doctrines considered below), see Jean Leclair, “*L’impact de la nature d’une compétence législative sur l’étendue du pouvoir conféré dans le cadre de la Loi constitutionnelle de 1867*” (“The Impact of the Nature of a Legislative Power on the Scope of Power Conferred Under the Constitution Act, 1867”) (1994) 24 RJT 661. See also Jean Leclair, “The Supreme Court’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003) 28 Queen’s LJ 411, for another examination of federalism’s normative dimensions.

6. Indigenous communities are notably absent from Simeon’s account. What is the consequence of including Indigenous communities in an account of federalism, especially where, as we shall see, Indigenous peoples are presently listed as a head of federal power under s 91? How might contemporary debates around s 35 of the *Constitution Act, 1982*, specifically around Indigenous self-government, inform this question? Do Indigenous peoples need constitutionally entrenched powers of self-government, or can Indigenous peoples and communities thrive within the present federal structure?

7. Municipalities are also a head of power (under s 92). Can federalism only serve communities that possess legislative jurisdiction (such as provinces), or can federalism also serve

communities that derive their power from federal (as in the case of territories) or provincial legislation (municipalities)? Cities such as Montreal, Toronto, and Vancouver are economic powerhouses and the place where the vast majority of Canadians live, yet these cities have no formal place in the Canadian constitutional order, their powers being derived from provincial legislation. Should Canadian federalism include powers for cities?

III. VALIDITY: CHARACTERIZATION OF LAWS

The courts have developed a number of doctrines based on the division of powers between Parliament and the provincial legislatures to help them deal with challenges to the validity of legislation. By far the most important, and most frequently used, is the pith and substance doctrine, and we begin our survey with it. The other two main doctrines are the double aspect doctrine and the ancillary powers doctrine (or, as it is sometimes called, the necessarily incidental doctrine).

A. PITH AND SUBSTANCE

The pith and substance doctrine evolved out of the fact that ss 91 and 92 of the *Constitution Act, 1867* grant legislative jurisdiction to Parliament and the provincial legislatures in terms of the power to legislate "in relation to *matters* coming within ... [a prescribed set of] *classes of subjects*." "Classes of subjects" refers to the spheres of jurisdiction over which each level has been assigned control—for example, "the Regulation of Trade and Commerce" (given to Parliament by s 91(2)) and "Property and Civil Rights in the Province" (given to the provincial legislatures by s 92(13)). Although these spheres of jurisdiction play a critically important role in the resolution of questions of validity, the focus of the pith and substance doctrine as an analytical tool is less on them than it is on the phrase "in relation to *matters*" In simple terms, the function of this doctrine is to assist courts in determining what the true "matter" of the impugned legislation should be understood to be. That assistance comes in the form of a direction to judges to attend not to everything that that legislation does, appears to do, or might do but to its *pith and substance*—its dominant characteristic or, in common parlance, what the legislation is really all about. Once they have determined the matter—the pith and substance—of the legislation (a process the courts often refer to as the characterization process), judges can then turn their minds to which of the competing federal and provincial classes of subjects that matter can be said to come within (often referred to as "classification").

We introduce our look at the pith and substance doctrine with excerpts from discussions of the manner in which Canadian courts deal with challenges to the validity of legislation on federalism grounds by two of Canada's leading scholars of Canadian federalism, Katherine Swinton and William Lederman. As you read through these excerpts, you will see that the approaches taken by these two scholars differ in a number of important respects. Perhaps most important, Swinton accepts the dominant role played by the pith and substance doctrine in this area and seeks primarily to explain what it is that courts do when they apply it, whereas Lederman is troubled by several aspects of the pith and substance doctrine as it had come to be applied by the time he wrote and proffers an alternative method of analysis in its place. As you read the excerpt from Lederman's article and the cases that follow, ask yourself whose approach to the pith and substance doctrine you prefer.

Katherine Swinton, **The Supreme Court and Canadian Federalism: The Laskin-Dickson Years**

(Toronto: Carswell, 1990) at 24 (footnotes omitted)

The Anatomy of Constitutional Interpretation

Sections 91 and 92 of the Constitution Act, 1867

To understand the nature of [constitutional] argument ... it is necessary to begin with sections 91 and 92 of the *Constitution Act, 1867*, for any legal argument must be grounded in the constitutional document. Every federal system requires a distribution of legislative powers between the national and regional governments, and sections 91 and 92 perform that function in Canada. Section 91 sets out a list of 30 classes of subjects which are said to fall exclusively within federal legislative competence. The federal classes of subjects cover a wide range, from "sea coast and inland fisheries," ... to the more frequently litigated "regulation of trade and commerce" in section 91(2) and "the criminal law" in section 91(27). The provinces similarly have "exclusive" jurisdiction over classes of subjects, 15 in number, among which the most important is "property and civil rights in the Province" in section 92(13).

There has been longstanding academic controversy over the status of the federal classes of subjects because of the opening words of section 91, referred to as the "peace, order and good government" or p.o.g.g. power. Some commentators have argued that the federal classes are illustrative only, with the federal government's legislative power "general" in scope, unlimited by anything except the list of provincial powers. Others assert that the classes are an independent source of federal power, and the opening words serve only to give the federal government a residuary power to deal with matters not expressly assigned to provincial or federal jurisdiction. Bora Laskin, as a professor, took the first position—that section 91 was a grant of general power to the federal Parliament—while others, such as Professors Lysyk and Lederman, have maintained that the federal classes of subjects are express grants of power which have primary interpretive force. In fact, the courts do give primary effect to the enumerated powers, using the opening words of section 91 only in limited circumstances.

The classes in sections 91 and 92, while numerous, are not exhaustive of the scope of governmental activity. The terms chosen to describe the grants of power were thought to cover the major areas of governmental activity in 1867, but over time, government has inevitably engaged in new areas of regulation, as the changing society and economy presented problems for public policy not contemplated over one hundred years ago. As a result, when a court is presented with a constitutional challenge to legislation, it will decide whether the impugned legislation falls within the provincial or federal sphere through consideration of the enumerated classes and, as well, the power contained in the opening words of section 91, which comes into play when a legislative matter is not covered by the enumerated powers. For example, aeronautics has been held to be a federal matter under the p.o.g.g. power, as it is a matter that was not allocated by the original distribution of powers (for obvious technological reasons).

In deciding the validity of a law, a court engages in a process of classification to determine whether the law comes within a federal or provincial class of powers. Generally, the argument is framed in terms of competing federal and provincial classifications. ...

Choosing Between Competing Classifications

How does the court choose between these competing classifications? The process is far from mechanistic, for it requires considerations both about the impugned legislation and the meaning of the constitution's language. It can, however, be broken down into three steps [citing A Abel, *Laskin's Canadian Constitutional Law*, 4th ed, rev (Scarborough, Ont: Carswell, 1975) at 97] ... : identification of the "matter" of the statute, delineation of the scope of the competing classes, and then a determination of the class into which the challenged statute falls. While Abel criticized the tendency ... to collapse this process by describing the matter of the statute in the terms of the classes, such action is inevitable, for the exercise of determining the "matter" or predominant feature of the statute is affected by the ultimate objective of linking the statute to the classes of subjects in the constitution. Nevertheless, Abel's exercise is useful to illustrate the type of questions which a judge, consciously or subconsciously, works through in characterizing legislation in Canadian constitutional law.

In determining the meaning or matter of legislation (Abel's first step), a court looks to a variety of aids. Obviously, the starting place is the statutory context. ...

In addition to the statutory context, a court may look to the purpose of the legislation, as illustrated by its legislative history or by government reports identifying a problem which triggered the legislation. The effects of the legislation may also be relevant. ...

The ultimate decision as to the meaning or matter of the legislation is not uncontroversial, for some judges give greater weight to effects, others to purpose, in deciding meaning, and there has been little discussion of when they will adopt one approach as opposed to the other. The dominant form of inquiry is into purpose—that is, to the problem underlying the legislation which the legislature is trying to address. Inevitably, the focus on purpose or effects turns, in part, on judicial attitudes of deference to legislatures and concerns about the balance of powers in the federal system. Deference to the legislature's avowed purpose, without attention to the effects of the legislation on the other level of government, permits governments to expand their areas of responsibility.

If one turns to the second stage of Abel's inquiry, the scope of the classes of legislative subjects, one finds that, once again, the judges have discretion. Despite the reference to the "exclusivity" of the classes in sections 91 and 92, there is opportunity for extensive overlapping regulation, because the constitution confers jurisdiction to make laws regarding certain classes of subjects, rather than jurisdiction over facts, persons or activities. Similar laws may fit within both federal and provincial heads of power. For example, the federal Parliament can make misleading advertising a crime under its criminal law power, but the provinces may give a civil remedy for the same conduct or even penalize it under their jurisdiction over property and civil rights in section 92(13) of the constitution. The courts often uphold such legislation using the "double aspect doctrine," whereby they acknowledge that some laws may have both federal and provincial purposes. While the Fathers of Confederation may have wished for exclusivity of legislative powers or "watertight compartments" between federal and provincial governments, it became clear early in the interpretation of the constitution that there must be some overlap or entanglement between federal and provincial regulation, for provincial and federal governments often have good reasons, that can be supported by their distinct heads of legislative power, for dealing with the same activity. Even if the courts of an earlier era might have preferred a classical federal system with watertight compartments, they could never ignore the aspect doctrine and, as governments became increasingly interventionist in the second half of the twentieth century, there was a need for more frequent resort

to this doctrine, as the opportunities for overlap between the regulation of the two levels of government expanded.

The court's discretion in defining the scope of classes is not unlimited, for precedent plays an important role in constitutional adjudication. ...

History, as well, may play a part in the definition of class boundaries, for some judges look to the meaning of words or practices in 1867 to guide them in interpreting the scope of the classes today.

Precedent and history may assist the courts in defining the classes of powers, but they do not fix the boundaries of classes nor show whether a law should come within one class rather than another. Often, the court's ultimate decision about boundaries and the matters within them is guided by federalism concerns—by beliefs about the optimal balance of power between the federal and provincial governments. In Professor Lederman's words [in "Classification of Laws and the British North America Act," excerpted later in this chapter], the courts should reach their decisions by weighing the values of uniformity and diversity and by following "widely prevailing beliefs." Absent such beliefs, he says that judges should do the following:

In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith, and a capacity to discount their own prejudices. No doubt it is also fair to ask that they be men of high attainment, and that they be representative in their thinking of the better standards of their times and their countrymen.

Many would challenge Lederman's premise that there are widely held beliefs on the proper allocation of power in a federal system. Indeed, the constitutional reform debates of the 1960s and 1970s are strong evidence to support the conclusion that there is no one predominant view of the proper allocation of powers in a federal system; rather, there are competing perspectives of the ideal system, with views about the proper distribution of legislative powers shaped by the individual's belief in other values promoted or protected by federalism, such as a stronger national or regional community responsive to the country's needs or loyalties, or increased economic efficiency.

William R Lederman, "Classification of Laws and the British North America Act"

in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 236-43 (footnotes omitted)

In the *BNA Act* [the classification of laws is] found primarily in the well-known sections 91 and 92. These contain respectively enumerations of federal and provincial law-making powers. It is important to realize that these enumerated "subjects" or "matters" are classes of laws, not classes of facts. It is impossible for instance to look at a set of economic facts and say that the activity is trade and commerce within section 91(2) and therefore any law concerning it must be federal law. Rather, one must take a specific law (either actual or proposed) which is relevant to those facts and then ask if that rule is classifiable as a trade or commercial law. The Act very wisely recognizes this necessity in the wording of section 91(2). It does not say just "trade and commerce," it says rather "the regulation of trade and commerce," meaning of course "laws regulating trade and commerce."

The same can be said of all the enumerated classes in both sections 91 and 92. Some of them are obviously classes of laws on their face for they speak of rights, institutions,

relations, or operations which have necessarily to be created or provided for by appropriate laws, e.g. taxation, legal tender, patents of invention and discovery, copyrights, marriage and divorce, criminal law, incorporation, municipal institutions, solemnization of marriage, and property and civil rights. The wording used for certain other classes makes them seem classes of fact, but these they cannot be. They must be read as the "trade and commerce" clause is worded: thus "seacoast and inland fisheries" truly means "laws regulating seacoast and inland fisheries." Similarly with such classes or categories as postal service, defence, banking, insolvency, and local works and undertakings. The late Chief Justice Harvey of Alberta seems to have put his finger on the point here being made when he said, in a recent case concerned with "banking" in section 91(15): "The word is used as the Statute [the BNA Act] says as describing a subject for legislation, not a definite object." We do not look just for banking as a matter of economic fact, we must look for regulation of banking as a matter of law.

II. The Application of Sections 91 and 92 of the BNA Act

Certain of the essential principles for the interpretation of the *BNA Act* now require consideration in detail in light of the foregoing analysis. In the first place the categories of laws enumerated in sections 91 and 92 are not in the logical sense mutually exclusive; they overlap or encroach upon one another in many more respects than is usually realized. To put it another way, many rules of law have one feature that renders them relevant to a provincial class of laws and another feature which renders them equally relevant logically to a federal class of laws. It is inherent in the nature of classification as a process that this should be so, and hence the concluding words of section 91 represent aspiration for the unattainable. It will be recalled that they read as follows: "And any Matter coming within any of the classes of subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Over eighty years of judicial interpretation have demonstrated conclusively the impossibility of such mutual exclusion.

[Determining] the several features of a law [in order that] it may be classified ... takes us back to the question of the true meaning of the challenged law. In many of the cases we are told that it all depends on what is determined to be the "subject-matter" of the rule. Presumably this phraseology coupling "subject" and "matter" comes from the wording of the opening parts of sections 91 and 92, which speak of "exclusive Legislative Authority" extending "to all Matters coming within the Classes of Subjects next hereinafter enumerated" (s. 91), and "Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated" (s. 92). As has been pointed out, what is really being dealt with is power to enact *laws coming within the classes of laws next hereinafter enumerated*

This suggests the main thesis of this essay: *That a rule of law for purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect.* The thesis so stated points to the heart of the problem of interpretation, i.e. whence come the criteria of relative importance necessary for such a decision? In this inquiry, the judges are beyond the aid of logic, because logic merely displays the many possible classifications, it does not assist in a choice between them. If we assume that the purpose of the constitution is to promote the well-being of the people, then some of the necessary criteria will start to emerge. When a particular rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked, Is it better for the people that this thing be done on a national level, or on a provincial level? In other words is the feature of the challenged law which falls within the federal class

more important to the well-being of the country than that which falls within the provincial class of laws? Such considerations as the relative value of uniformity and regional diversity, the relative merits of local versus central administration, and the justice of minority claims, would have to be weighed. Inevitably, widely prevailing beliefs in the country about these issues will be influential and presumably the judges should strive to implement such beliefs. Inevitably there will be some tendency for them to identify their own convictions as those which generally prevail or which at least are the right ones. On some matters there will not be an ascertainable general belief anyway. In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith, and a capacity to discount their own prejudices. No doubt it is also fair to ask that they be men of high professional attainment, and that they be representative in their thinking of the better standards of their times and their countrymen.

Furthermore, our judges need all the assistance they can be afforded by the provision of data relevant for their constitutional decisions. ... [It is true that] Canadian judges do not have to consider the substantive merit of a challenged law ... ; indeed they are accustomed to labour the point that they are not concerned with whether such a law is good or bad, necessary or unnecessary.

They say in effect that the malady and its proper cure are not their concern, rather that they have to ask only, Who is to be the physician? Yet does not the choice of physician depend to an important degree on the nature of the malady and of the proposed remedy? Admittedly if the challenged law is logically classifiable in only one way there is no problem, but the main thesis here is that such a situation will be rare, and that often so far as logic is concerned the challenged law will have features of meaning relevant to both federal and provincial classes of laws. Then our judges cannot be content simply to ask, Who is to be the physician? They must rather ask, Who is the better physician to prescribe in this way for this malady? ...

Lest a false impression of complete uncertainty and fluidity be conveyed by the foregoing, the importance of the rules of precedent that obtain in our courts should be remembered. However open logically the classification of a given type of law may have been when first it was considered by the highest court, that decision will in all probability foreclose the question of the correct classification should the same type of law come up again. ...

[F]requently there will be new laws ... which the precedents on classification will not touch decisively [Thus, w]ithin the limits set by the terms of particular laws being challenged before them from time to time, the judges frequently confront this question *just as starkly as did the original constitution-makers themselves*. Further, as conditions change with the years, the relative importance of various classifiable features of particular laws may change as well. For instance the motor vehicle has brought to highway traffic today an interprovincial and international character undreamed of forty years ago; hence regulation of highway-using enterprises is now to be regarded to some extent in a new light. Another way to put this point is to say that changed economic and social conditions and a different moral climate will give to present or proposed laws new features of meaning by which they may be classified and may also alter judgments on the relative importance of their several classifiable features. ... The authority of appropriate precedents then will remove much of the uncertainty just described as implicit in the process of classification but inevitably much unpredictability will remain. The principles of stare decisis are important in our courts, but the degree of certainty and predictability their operation can provide is often much overestimated or misconceived.

The Supreme Court of Canada's general approach to questions of validity in the federalism context was summarized recently by Wagner CJ writing for a majority of the Court in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \[GGPPA References\]](#):

[51] At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its "pith and substance," or true subject matter: *2018 Securities Reference*, at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at paras. 28 and 166. The court does so with a view to identifying the statute's or provision's main thrust, or dominant or most important characteristic: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 31. To determine the purpose of the challenged statute or provision, the court can consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53; *Canadian Western Bank*, at para. 27. In considering the effects of the challenged legislation, the court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the "side" effects that flow from the application of the statute: *Kitkatla*, at para. 54; *R. v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at p. 480. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute's enactment as well as at the words used in it: *Ward v. Canada (AG)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18.

[52] Three further points with respect to the identification of the pith and substance are important here. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("Assisted Human Reproduction Act"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 U.T.L.J. 487, at p. 490.

[53] Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In the courts below, a central issue was the permissibility of including the means of the statute in the definition of the subject matter of the GGPPA. In *Ward* and other cases, this Court cautioned against "confus[ing] the purpose of the legislation with the means used to carry out that purpose": *Ward*, at para. 25; see also *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 24. However, those cases did not establish a blanket prohibition on considering the means in characterizing the pith and substance of a law. Rather, they stand for the basic proposition that Parliament's or a provincial legislature's choice of means is not determinative of the legislation's true subject matter, although it may sometimes be permissible to consider the choice of means in defining a statute's purpose. This Court has in fact frequently included references to legislative means when defining the pith and substance of laws: *Ward*, at para. 28; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 ("Firearms"), at paras. 4 and 19; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2002] 2 S.C.R. 669, at para. 34; *2011 Securities Reference*, at para. 106. And

there may be cases in which an impugned statute's dominant characteristic or main thrust is so closely tied to its means that treating the means as irrelevant to the identification of the pith and substance would make it difficult to define the matter of a statute or a provision precisely. In such a case, a broad pith and substance that does not include the means would be the very type of vague and general characterization, like "health" or "the environment," that this Court described as unhelpful in *Desgagnés Transport*, at paras. 35 and 167 (citing *Assisted Human Reproduction Act*, at para. 190).

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[56] Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binne J. noted in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create "a danger that the whole exercise will become blurred and overly oriented towards results." The characterization exercise must ultimately be rooted in the purpose and the effects of the impugned statute or provision.

The *Morgentaler* case, excerpted below, was decided by the Supreme Court of Canada 30 or so years ago. As indicated by the fact that it is cited by Wagner CJ in the extract just quoted, it continues to illustrate the kinds of factors a court can take into account in determining the matter or the pith and substance of a law.

R v Morgentaler

[1993] 3 SCR 463, 1993 CanLII 74

SOPINKA J (Lamer CJ and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ concurring):

The question in this appeal is whether the Nova Scotia *Medical Services Act*, RSNS 1989, c. 281, and the regulation made under the Act, NS Reg. 152/89, are *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make it an offence to perform an abortion outside a hospital.

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Facts and Legislation

In January 1988, this Court ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated women's *Charter* guarantee of security of the person: *R v. Morgentaler*, [1988] 1 SCR 30 (*Morgentaler (1988)*). At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power, *Morgentaler v. The Queen*, [1976] 1 SCR 616 (*Morgentaler (1975)*). ... It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. A year later, in January 1989, [the respondent confirmed an intention to establish] a free-standing abortion clinic in Halifax. ...

On March 16, 1989, the ... Nova Scotia government ... approved two identical regulations ... which prohibited the performance of an abortion anywhere other than in a place approved as a hospital under the *Hospitals Act*. At the same time it made a regulation ... denying medical services insurance coverage for abortions performed outside a hospital. These regulations are referred to collectively as the "March regulations." ...

... [A] court challenge to the March regulations was still outstanding on June 6, 1989, when the Minister of Health and Fitness introduced the *Medical Services Act* for first reading. The Act ... received third reading and Royal Assent on June 15, the last day of the legislative session. The relevant portions of the Act are as follows:

2. The purpose of this Act is to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.

3. In this Act,

(a) "designated medical service" means a medical service designated pursuant to the regulations

4. No person shall perform or assist in the performance of a designated medical service other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.

5. Notwithstanding the *Health Services and Insurance Act*, a person who performs or for whom is performed a medical service contrary to this Act is not entitled to reimbursement pursuant to that Act.

6(1) Every person who contravenes this Act is guilty of an offence and liable upon summary conviction to a fine of not less than ten thousand dollars nor more than fifty thousand dollars

7. Notwithstanding any other provision of this Act, where designated medical services are being performed contrary to this Act, the Minister may, at any time, apply to a judge of the Supreme Court for an injunction, and the judge may make any order that in the opinion of the judge the case requires.

8(1) The Governor in Council, on the recommendation of the Minister, may make regulations

(a) after consultation by the Minister with the Medical Society of Nova Scotia, designating a medical service for the purpose of this Act

The Medical Society was consulted after the passage of the Act, and a list of medical services was finalized. On July 20, 1989, the *Medical Services Designation Regulation*, NS Reg. 152/89, was made, designating the following medical services for the purposes of the Act:

(a) Arthroscopy

(b) Colonoscopy (which, for greater certainty, does not include flexible sigmoidoscopy)

(c) Upper Gastro-Intestinal Endoscopy

(d) Abortion, including a therapeutic abortion, but not including emergency services related to a spontaneous abortion or related to complications arising from a previously performed abortion

(e) Lithotripsy

(f) Liposuction

(g) Nuclear Medicine

(h) Installation or Removal of Intraocular Lenses

(i) Electromyography, including Nerve Conduction Studies

The March regulations were revoked on the same day Item (d) of the new regulation continued the March regulations' prohibition of the performance of abortions outside hospitals. Section 5 of the Act continued the denial of health insurance coverage for abortions performed in violation of the prohibition.

Despite these actions, Dr. Morgentaler opened his clinic in Halifax as predicted. ... He was charged with 14 counts of unlawfully performing a designated medical service ... contrary to s. 6 of the *Medical Services Act*. ...

... Dr. Morgentaler did not dispute that he had performed the abortions as alleged. He argued, instead, that the Act and the regulation were inconsistent with the Constitution of Canada [as, *inter alia*] ... an unlawful encroachment on the federal Parliament's exclusive criminal law jurisdiction. He also argued that the regulation was an abuse of discretion by the provincial cabinet and therefore in excess of its jurisdiction. ...

Analysis

A. General

The appellant argued that the *Medical Services Act* and the regulation are valid provincial legislation It relies particularly on heads (7), (13), and (16) of s. 92 of the *Constitution Act, 1867*, which give the province exclusive legislative authority over [hospitals, property and civil rights, and generally all matters of a merely local or private nature]

The ground on which the legislation is challenged is head (27) of s. 91, which reserves "The Criminal Law ..." to Parliament. On the basis of the analysis that follows I conclude that the *Medical Services Act* and *Medical Services Designation Regulation* are criminal law in pith and substance and consequently *ultra vires* the province of Nova Scotia. The appeal must therefore be dismissed. ...

B. Classification of Laws

(1) "What's the 'Matter'?"

Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*. ...

A law's "matter" is its leading feature or true character, often described as its pith and substance. *Union Colliery Co. of British Columbia v. Bryden*, [1899] AC 580 (PC), at p. 587; see also *Whitbread v. Walley*, [1990] 3 SCR 1273, at p. 1286. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided ... While both the purpose and effect of the law are relevant considerations in the process of characterization ... , it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity. ...

(2) Purpose and Effect

(a) "Legal Effect" or Strict Legal Operation

Evidence of the "effect" of legislation can be relevant in two ways: to establish "legal effect" and to establish "practical effect." The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. "Legal effect" or "strict legal operation" refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself. ... Legal effect is often a good indicator of the purpose of the legislation ... , but is relevant in constitutional characterization even when it is not fully intended or appreciated by the enacting body. ...

The analysis of pith and substance is not, however, restricted to the four corners of the legislation (see, e.g., *Reference re Anti-Inflation Act*, [1976] 2 SCR 373, at pp. 388-89). Thus the court "will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve," its background and the circumstances surrounding its enactment ... and, in appropriate cases, will consider evidence of the second form of "effect," the actual or predicted

practical effect of the legislation in operation The ultimate long-term, practical effect of the legislation will in some cases be irrelevant ...

(b) The Use of Extrinsic Materials

In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable. Reference re Residential Tenancies Act, 1979, [1981] 1 SCR 714, at p. 723, *per* Dickson J. This clearly includes related legislation ... , and evidence of the "mischief" at which the legislation is directed: Alberta Bank Taxation Reference, [Reference re Alberta Legislation; AG Alberta v AG Can, [1939] AC 117 (PC)], at pp. 130-33. It also includes legislative history ... ; as Ritchie J, concurring in Reference re Anti-Inflation Act, *supra*, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

... [U]ntil recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J in Reference re Residential Tenancies Act, 1979, *supra*, at p. 721 as "inadmissible as having little evidential weight," and was excluded in Reference re Upper Churchill Water Rights Reversion Act, ... [[1984] 1 SCR 297, 1984 CanLII 17], at p. 319, and Attorney General of Canada v. Reader's Digest Association (Canada) Ltd., [1961] SCR 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. ...

I would therefore hold ... that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics *per se*. ...

(3) Scope of the Applicable Heads of Power

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(a) The Criminal Law

Section 91(27) of the Constitution Act, 1867 gives the federal Parliament exclusive legislative jurisdiction over criminal law in the widest sense of the term. ...

[Justice Sopinka's discussion of the criminal law cases is omitted. Criminal law is defined, for the purposes of the division of powers, as any law that has as its dominant characteristic the prohibition of an activity, subject to penal sanctions, for a public purpose such as peace, order, security, health, or morality.]

(b) Provincial Health Jurisdiction

The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the Constitution Act, 1867, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and (16). Section 92(16) also gives them general jurisdiction over health matters within the province. ...

In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally

(c) The Regulation of Abortion

In the UK and Canada, the prohibition of abortion with penal consequences has long been considered a subject for the criminal law. ... As Dickson J (as he then was) said in *Morgentaler* (1975), *supra*, at p. 672, "since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place."

The two *Morgentaler* decisions focus attention on the purpose or concern of abortion legislation to determine if it is truly criminal law: Is the performance or procurement of abortion prohibited as socially undesirable conduct? Is protecting the state interest in the foetus or balancing the interests of the foetus against those of women seeking abortions a primary objective of the legislation? Is the protection of the woman's health only an ancillary concern? And are other provincial concerns such as the establishment of hospitals or the regulation of the medical profession or the practice thereof merely incidental?

... [A]ny provincial jurisdiction to regulate the delivery of abortion services must be solidly anchored in ... [the province's] jurisdiction to legislate in relation to such matters as health, hospitals, the practice of medicine and health care policy.

C. Application of the Principles to the Case at Bar

An examination of the terms and legal effect of the *Medical Services Act* and the *Medical Services Designation Regulation*, their history and purpose and the circumstances surrounding their enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion.

(1) Legal Effect: The Four Corners of the Legislation

Starting with the terms of the legislation, the *Medical Services Act* makes it an offence subject to significant fines (s. 6) to perform abortions or other services designated by the *Medical Services Designation Regulation* outside a hospital approved as such under the *Hospitals Act* (s. 4). It is impossible to tell from the legislation itself whether this amounts to a total prohibition of abortion (which all parties concede would be *ultra vires* the province), since extrinsic evidence is necessary to establish that abortions are available in Nova Scotia hospitals. The Act also denies public health insurance coverage for the performer and recipient of such services (s. 5), and provides for injunctive relief against violations of its terms (s. 7). It is entitled "*An Act to Restrict the Privatization of Medical Services*," and its purpose is expressed to be the prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province (s. 2) ...

The majority in the Court of Appeal conceded that the province had the legislative authority to pass a law in the present form. I acknowledge that the legislation has the legal effect of preventing privatization by prohibiting the private (i.e., outside a hospital) provision of the designated services. But the legislation expressly prohibits the performance of abortions in certain circumstances with penal consequences, a subject, as I have said, traditionally regarded as part of the criminal law. ... The present legislation, prohibiting traditionally criminal conduct, is therefore of questionable validity on its face

(2) Beyond the Four Corners

(a) *Duplication of Criminal Code Provisions*

Once the legal effect of legislation is ascertained, it can be compared with that of any relevant legislation passed by the other level of government ... Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code* The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference

The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law ... or to fill perceived defects or gaps therein The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion ... ; and the present legislation prohibits other services besides abortion and directly concerns public health insurance coverage. ... [H]owever, ... in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect

In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b) *Background and Surrounding Circumstances*

The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) *The Course of Events*

It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. The Crown concedes this. The respondent was clearly, as the trial judge concluded, a "mischief" against which the legislation was directed. The government knew of Dr. Morgentaler's intention to open a clinic by some time in January 1989. It responded with the March regulations, which prohibited abortions outside hospitals and "de-insured" such services. ... The March regulations were the first response to Dr. Morgentaler's announcement, and the subsequent legislation was the continuation and consolidation of that response. Together they constituted a hastily devised plan aimed directly at ridding the province of Dr. Morgentaler and his proposed clinic. The course of events suggests that this purpose was the principal purpose of the legislation and contributes to the impression that privatization and quality assurance were only incidental concerns at best.

(ii) *Hansard*

I have reviewed the evidence of the legislative debates on the *Medical Services Act*, and have concluded that they give a clear picture of what the members of the House, both government and opposition, saw as being in issue. ...

The Hansard evidence demonstrates both that the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and that there was a common and emphatically expressed opposition to free-standing abortion clinics *per se*. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the appellant submits the legislation is primarily directed—privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services—were conspicuously absent throughout most of the legislative proceedings. ...

The appellant argues that even if the object of the legislation was to suppress free-standing abortion clinics on grounds of public morals, this is not fatal to provincial jurisdiction. Although there has been some recognition of a provincial "morality" power, it is clear that the exercise of such a power must be firmly anchored in an independent provincial head of power.

While legislation which authorizes the establishment and enforcement of a local standard of morality does not *ipso facto* "invade the field of criminal law" (see *Nova Scotia Board of Censors v. McNeil*, [[1978] 2 SCR 662, 1978 CanLII 6], at pp. 691-92 [SCR]), it cannot be denied that interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law.

In view of the foregoing, there is a strong inference that the purpose of the legislation and its true nature relate to a matter within the federal head of power in respect of criminal law. In order to determine whether this is its dominant purpose or characteristic, it is necessary to compare the above indicia of federal subject matter with indications of provincial objectives.

(iii) Searching for Provincial Objectives

At trial the appellant presented evidence that the Act's objectives were to prevent privatization and the consequent development of a two-tier system of medical service delivery, to ensure the delivery of high-quality health care, and to rationalize the delivery of medical services so as to avoid duplication and reduce public costs. [T]his evidence was not established at trial to have been the basis for the impugned legislation. Indeed, Kennedy Prov. Ct. J considered the evidence and found that any privatization concerns were "incidental to the paramount purpose of the legislation."

First, ... there is no evidence in the record to indicate that abortions performed in clinics like Dr. Morgentaler's pose any danger to the health of women. Counsel conceded that the quality of medical service in free-standing abortion clinics is comparable to that available in hospitals.

Second, the government did not express concerns about privatization in relation to this legislation or the March regulations until the Act was moved for second reading.

Third, it is significant that there is no evidence of any prior study or consultation regarding the cost-effectiveness or quality of medical services delivered in private clinics.

The lack of prior study or consultation is not raised to show that the province acted indiscreetly or ineffectually in pursuing provincial objectives, but rather to indicate that the evidence simply does not support the submission that these provincial objectives were the basis for the legislative action in question.

Another factor I consider relevant is that the "cost-effectiveness" rationale appears to be divorced from reality. Dr. Morgentaler's clinic will not represent a direct increase in the cost to the province of the provision of health care services.

A fifth consideration is the list of designated medical services itself. There is no apparent link between the different services. The only common denominator suggested by the appellant is that the government anticipated that these services might be attractive to private facilities. The appellant argued at trial and maintained before us, however, that the government's policy was to oppose the performance of any and all surgical procedures outside hospital. If that were the case, one might wonder why the Act did not prohibit the performance of surgical procedures generally outside a hospital. Designating nine apparently unrelated procedures does not accomplish this purpose.

If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose. In *Westendorp v. The Queen*, [[1983] 1 SCR 43, 1983 CanLII 1], Laskin CJ held that it was specious to regard a by-law which prohibited street prostitution as relating to control of the streets, since if that were its true purpose, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do" (at p. 51). Here, one would expect that if the province's policy were to prohibit the performance of any surgical procedures outside hospitals, the legislation would have simply done so.

Finally, although I put little weight on this factor, I agree with both courts below that the relatively severe penalties provided for by the Act are relevant to its constitutional characterization. Section 6(1) of the Act prescribes fines of \$10,000 to \$50,000 for each infraction of the Act. Kennedy Prov. Ct. J and Freeman JA considered the relative severity of the fines as one indication that the fines were not simply measures to enforce a regulatory scheme, but penalties to punish abortion clinics as inherently wrong. Of course, s. 92(15) of the *Constitution Act, 1867* allows the provinces to impose punishment to enforce valid provincial law, and the mere addition of penal sanctions to an otherwise valid provincial legislative scheme does not make the legislation criminal law . . . However, the unusual severity of penalties may be taken into account in characterizing legislation . . .

D. Conclusion

(1) Pith and Substance

This legislation deals, by its terms, with a subject historically considered to be part of the criminal law—the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face. Its legal effect partially reproduces that of the now defunct s. 251 of the *Criminal Code* . . . Its legislative history, the course of events leading up to the Act's passage and the making of NS Reg. 152/89, the Hansard excerpts and the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the *Medical Services Act* and the *Medical Services Designation Regulation* were aimed primarily at suppressing the perceived public harm or evil of abortion clinics. . . The primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes . . .

... I find unpersuasive the argument that this legislation is solidly anchored in s. 92(7), (13) or (16) of the *Constitution Act, 1867*. There is nothing on the surface of

the legislation or in the background facts leading up to its enactment to convince me that it is designed to protect the integrity of Nova Scotia's health care system by preventing the emergence of a two-tiered system of delivery, to ensure the delivery of high-quality health care, or to rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs. Any such objectives are clearly incidental to the central feature of the legislation, which is the prohibition of abortions outside hospitals as socially undesirable conduct subject to punishment. ...

Appeal dismissed.

NOTES AND QUESTIONS

1. The characterization of a law's pith and substance is a crucial step in the determination of its constitutional validity. Yet, as Swinton noted above, the choice between competing characterizations of a law is not a "mechanistic" exercise. Lederman also emphasized that logic cannot be determinative: it "merely displays the many possible classifications, it does not assist in a choice between them." The choice between competing characterizations will inevitably be influenced by background understandings of federalism and the values described by Simeon that ought to be furthered by a federal constitutional design. What values do you think influenced Sopinka J's characterization of the *Medical Services Act*, RSNS 1989, c 281, as invalid criminal law rather than a valid law in relation to medical services? Were these values ones that ought to influence the interpretation of the division of powers?

2. If the province had evidence that the medical procedures listed in the Act posed greater dangers when performed outside hospitals, would the result have been different? If not, what other sorts of evidence do you think would have been necessary to ground the Act in provincial jurisdiction?

3. Justice Sopinka declared the *Medical Services Act ultra vires* the Nova Scotia legislature even though, on its face, the Act appeared to deal exclusively with a matter within provincial legislative competence: the delivery of medical services. In fact, s 2 of the Act contained a provision explicitly stating that "[t]he purpose of this Act is to prohibit the privatization of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians." In essence, Sopinka J determined that the title of the Act, its stated purpose, and its terms masked its real purpose: punishing the provision of abortion services as a public evil. When the courts determine that legislation on its face addresses matters that are within its jurisdiction, but in pith and substance it is directed at matters outside its jurisdiction, they normally say the legislation is "colourable." In its decision in *Reference re Firearms Act (Can)*, [2000 SCC 31](#), the Supreme Court of Canada provided the following description of the colourability doctrine in the context of a broader discussion of the way in which a law's effects are taken into account in the characterization process:

[18] Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. ... Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning" In some cases, the effects of the law may suggest a purpose other than that which is stated in the law In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable."

In a puzzling portion of the *Morgentaler* judgment not reproduced above, Sopinka J stated that the colourability doctrine was not relevant to his analysis. Arguably, his judgment is a

classic example of a court not allowing a legislature to covertly regulate a matter through colourable legislation when it lacks jurisdiction to regulate that matter openly. Why would he not have thought it appropriate to apply the colourability doctrine?

4. Justice Sopinka canvassed a wide range of evidence in reaching his conclusion that the dominant characteristic of the *Medical Services Act* was the criminal suppression of the provision of abortion services. He considered the text of the legislation, the events leading up to its enactment, the related policy documents prepared by the government, statements made in the legislature, the law's effects, and the plausibility of its stated purpose. The law with respect to the evidence that can be brought to bear in characterizing legislation has recently been summarized by Karakatsanis J in *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17:

[34] To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications: *Firearms Reference*, at para. 17.

5. *Morgentaler* exemplifies two common features of division of powers litigation in which the validity of legislation is called into question. One is the tendency of the opposing lawyers to present to the court two very different characterizations of the impugned legislation, one of which will provide the court with a basis on which to strike it down and the other of which will provide the court with a basis on which to uphold it. The second is a willingness on the part of courts to accept that their job is simply to choose between those two opposing characterizations. In the earlier case, Dr Morgentaler's lawyer argued that the appropriate characterization of the *Medical Services Act* was "[prohibiting] the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion" (at 488), whereas the government's lawyer argued that it was "[regulating] the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system" (at 488), and Sopinka J defined the issue as being which of the two characterizations the Court should accept. Although it may be inevitable that the opposing lawyers would approach such cases in this way, it is not inevitable that the courts should understand their role in terms of simply choosing between the two options presented to them. It is clearly open to them to come up with their own characterization. Assuming that it is not inevitable, do you think it is advisable for the courts to understand their role in such limited terms?

In *Reference re Genetic Non-Discrimination Act*, three sets of reasons apply essentially the same approach to characterization and yet arrive at three distinct renditions of the pith and substance of the relevant legislation. How do we account for this? Does Lederman's approach, set out above, assist?

6. On occasion, precedent will play an overriding role in the characterization process. A good example of this having occurred is the Supreme Court of Canada's decision in *Reference re Securities Act*, 2011 SCC 66, a case excerpted in Chapter 10.

Given the passage of time since the *Constitution Act, 1867* was enacted, it is rare nowadays for there to be any serious dispute about the scope and meaning of the competing heads of power in federalism cases in which the validity of legislation is called into question. Most such cases therefore turn on which characterization of the impugned legislation—which pith and substance or matter—the court accepts. However, courts are still on occasion asked to define the scope and meaning of one of the heads of power in s 91 or 92. That occurred in a reference by the Quebec government to the Quebec Court of Appeal that ended up in the

Supreme Court of Canada, *Reference re Employment Insurance Act (Can), ss 22 and 23, 2005 SCC 56*, excerpted below. The specific head of power at issue in that case was s 91(2A), which grants jurisdiction to Parliament over unemployment insurance. As noted in Chapter 6, s 91(2A) was added to the list of heads of power in s 91 in 1940 after the Privy Council struck down the *Employment and Social Insurance Act*, SC 1935, c 38, a federal statute enacted in 1934 as part of Canada's "New Deal" that represented the first attempt to provide unemployment insurance to Canadian workers. The Privy Council held that the statute invaded provincial jurisdiction over "Property and Civil Rights" in s 92(13). (This decision, *Canada (AG) v Ontario (AG)*, [1937 CanLII 363, \[1937\] AC 355 \(UKJCPC\)](#), is excerpted in Chapter 6, The 1930s: The Depression and the New Deal.)

As you will see from the excerpted passages below, the primary interpretive question raised by the 2005 reference was whether the courts should be bound, as the government of Quebec argued, to give effect to the particular conception of unemployment insurance that the federal and provincial politicians responsible for adding s 91(2A) to the federal catalogue of powers in 1940 had in mind. The Quebec Court of Appeal had answered that question in the affirmative, and the relatively narrow interpretation of s 91(2A) to which that answer led effectively resolved the case for that court in favour of the provincial government and resulted in the impugned provisions being struck down. The fact that the Quebec Court of Appeal had accepted the government of Quebec's argument was noteworthy given the limited weight that arguments based on the intent of the drafters—known as originalism in the United States, where it has a great deal of support among judges and scholars alike—have traditionally been accorded by Canadian courts. The appeal of that judgment gave the Supreme Court of Canada an opportunity to consider the appropriateness of this change in approach to arguments based on the drafter's intent in the context of Canada's Constitution.

Reference re Employment Insurance Act (Can), SS 22 and 23 2005 SCC 56

[At issue in this case was the validity of the maternity and parental benefit provisions of the *Employment Insurance Act*, SC 1996, c 23, enacted in 1971 and 1984, respectively. The position of the Quebec government was that these provisions were directed at supporting families with children and therefore fell within s 92(13), "Property and Civil Rights," or s 92(16), "Generally All Matters of a Merely Local or Private Nature in the Province." The position of the federal government was that the provisions were directed at providing replacement income for working mothers and parents when their employment is interrupted as a result of the birth or adoption of a child and fell within "Unemployment Insurance" in s 91(2A). As noted above, the Quebec Court of Appeal accepted the argument of the Quebec government and struck down the impugned provisions, and the federal government appealed.]

Justice Deschamps, writing for a unanimous panel of seven members of the Supreme Court, allowed the federal government's appeal and upheld the impugned provisions. She began her analysis by characterizing the provisions as being "in pith and substance [mechanisms] for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child" (at para 75). She then addressed the question of whether s 91(2A) could be understood broadly enough to support provisions so characterized.]

DESCHAMPS J (McLachlin CJ and Binnie, LeBel, Fish, Abella, and Charron JJ concurring):

2.1 Principles of Interpretation

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[9] ... [I]n order to identify the head of power, the Court takes a progressive approach to ensure that Confederation can be adapted to new social realities. The Court has on numerous occasions cited the "living tree" metaphor, and we need not revisit it here: *Reference re Same-Sex Marriage* [2004 SCC 79, [2004] 3 SCR 698], at para. 29. While the debates or correspondence relating to the constitutional amendment are relevant to the analysis as regards the context, they are not conclusive as to the precise scope of the legislative competence. They reflect, to a large extent, the society of the day, whereas the competence is essentially dynamic ... In giving them predominant weight, the Quebec Court of Appeal adopted an original intent approach to interpreting the Constitution rather than the progressive approach the Court has taken for a number of years.

[10] A progressive interpretation cannot, however, be used to justify Parliament in encroaching on a field of provincial jurisdiction. To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court's view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments. If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches.

[11] Some heads that set forth narrow powers leave little room for interpretation. Other, broader, heads result in legislation that can have several aspects.

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2.3.1 Background

[37] When the Privy Council declared the *Employment and Social Insurance Act* to be unconstitutional, there was no doubt that, *prima facie*, measures relating to insurance, and in particular measures relating to contracts of employment, were in relation to property and civil rights and were within the exclusive competence of the provincial legislatures Because the UIA [*Unemployment Insurance Act*], 1940 essentially reiterated the provisions of the *Employment and Social Insurance Act*, it cannot be denied that it affected contracts of employment or insurance relating to those contracts. This means that when the Constitution was amended, a portion of the jurisdiction over property and civil rights was detached so that the aspects relating to unemployment insurance could be assigned to Parliament.

[38] There can be no doubt that a public unemployment insurance plan, in addition to the fact that it concerns insurance relating to contracts of employment, is also a social measure. Characterizing it in this way does not mean, however, that it can be associated exclusively with any one head of power. The term "social measure" has a number of aspects that may be associated just as validly with property and civil rights as with unemployment insurance. ... The question that must be asked in order to determine the head of power to which maternity benefits relate is whether the

provision, in pith and substance, falls within the jurisdiction assigned by the constitutional amendment.

[39] The Attorney General of Quebec submits that the jurisdiction over unemployment insurance is limited by the parameters defined in the early legislation. Under those Acts, to be entitled to benefits, insured persons had to have lost their employment involuntarily, and had to be capable of and available for work. In so arguing, the Attorney General of Quebec equates the field of jurisdiction assigned by s. 91(2A) of the *Constitution Act, 1867* to the initial exercise of the federal power. This approach is inappropriate in more than one respect, the most obvious being that the eligibility requirements established in the scheme of the UIA, 1940 may be modified, provided that the scheme still represents a valid exercise of the jurisdiction over unemployment insurance. Thus, no one would think of questioning the right to modify the eligibility requirements to calculate insurable periods in hours rather than weeks. Such a modification would plainly make the scheme more accessible to part-time workers, but it would in no way change the fundamental nature of unemployment insurance. The question is therefore not the way in which Parliament initially exercised its jurisdiction, but the scope of its jurisdiction over unemployment insurance.

[40] While the views of the framers are not conclusive where constitutional interpretation is concerned, the context in which the amendment was made is nonetheless relevant. If the objectives of the framers are taken as a starting point, it will be easier to determine the scope of the jurisdiction that was transferred, and then to determine how it may be adapted to contemporary realities.

2.3.2 Circumstances of the Transfer of Jurisdiction

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[43] In essence, the purpose of the transfer of jurisdiction was to equip Canada with the tools it needed to mitigate the effects of anticipated unemployment by providing certain classes of unemployed persons with benefits and by setting up job search centres. The transfer of jurisdiction was to be a tool for internal organization involving both short-term relief measures, namely benefits, and medium-term measures, namely job placement services for the unemployed.

[44] ... The nature of unemployment has changed as prevailing conditions in Canada, and the needs of Canadians, have changed. Parliament must adapt its actions to new circumstances, in a manner consistent with the limits resulting from the constitutional division of powers. In a case such as this, where a specific power has been detached from a more general power, the specific power cannot be evaluated in relation to the general power, because any evolution would then be regarded as an encroachment. Rather, it is necessary to consider the essential elements of the power and to ascertain whether the impugned measure is consistent with the natural evolution of that power.

2.3.3 Essential Elements of Unemployment Insurance

[45] On the one hand, no constitutional head of power is static. On the other hand, the evolution of society cannot justify changing the nature of a power assigned by the Constitution to either level of government. ...

[46] In constitutional interpretation, the essential elements of a power are determined by adopting a generous reading of the words used, taken in their strictly legal context. The interpretation may also be expanded by having regard to relevant historical elements.

[47] The jurisdiction over unemployment insurance must be interpreted progressively and generously. It must be considered in the context of a measure that applies

throughout Canada and the purpose of which, according to the intention of the framers of the constitutional amendment, is to curb the destitution caused by unemployment and provide a framework for workers' re-entry into the labour market.

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[66] The extent of the protection required by Canadian society changes with the needs of the labour force. A growing portion of the labour force is made up of women, and women have particular needs that are of concern to society as a whole. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility. Women's connection to the labour market is well established, and their inclusion in the expression "unemployed persons" is as natural an extension as the extension involving other classes of insured persons who lose their employment income. To limit a public unemployment insurance plan, from a constitutional perspective, to cases in which contributors are actively seeking employment or are available for employment would amount to denying its social function. The social nature of unemployment insurance requires that Parliament be able to adapt the plan to the new realities of the workplace. Some eligibility requirements derive from the essence of the unemployment concept, while other requirements are, rather, mechanisms that reflect a social policy choice linked to the implementation of the plan.

2.3.6 Conclusion with Respect to the Identification of the Head of Power

[67] The Attorney General of Quebec submits that the social program under which maternity benefits are paid is, in pith and substance, a measure to assist families. While that is an undeniable effect, it is not the pith and substance of the program. The EIA [*Employment Insurance Act*, SC 1996, c. 23] governs the entitlement to benefits: it entitles pregnant women to receive benefits when they sustain an interruption of earnings. However, not all the various aspects of interruptions of work associated with maternity relate to unemployment insurance. Maternity leave is not governed by the EIA. Parliament does not grant female workers either maternity leave or job security. Because the provinces have a general power in relation to civil rights, it is the provinces that are responsible for establishing most of the rules that are needed to protect the jobs of pregnant women. Those rules are provided for in provincial statutes, and are often incorporated into individual contracts of employment and collective labour agreements. ...

[68] In pith and substance, maternity benefits are a mechanism for providing replacement income during an interruption of work. This is consistent with the essence of the federal jurisdiction over unemployment insurance, namely the establishment of a public insurance program the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment.

[Justice Deschamps then went on to hold that parental benefits could be supported by s 91(2A).]

NOTES AND QUESTIONS

- Was Deschamps J correct to use the original conception of unemployment insurance invoked by the government of Quebec as merely the starting point for her analysis of the scope of s 91(2A) instead of as a binding constraint? Does it make sense for judges to say that the original intent of the drafters is an appropriate source of guidance in the interpretation of a constitutional provision but then give it such little weight? Is your answer different if the original intent is unclear?

2. The Supreme Court of Canada had occasion to consider the constitutionality of several other provisions of the *Employment Insurance Act* in *Confédération des syndicats nationaux v Canada (AG)*, [2008 SCC 68](#). The provisions under attack dealt with a broad range of issues, including the addition of new benefits (wage subsidies; earnings supplements; self-employment assistance; job-creation partnerships; and skills, loans, and grants); rate-setting mechanisms; the accumulation of surpluses; and the allocation of surpluses to the federal government's Consolidated Revenue Fund. All but one of the provisions were upheld (the one exception was a rate-setting mechanism that was held to offend s 53 of the *Constitution Act, 1867*, which prescribes a special process for the levying of taxes). In his analysis of the constitutionality of the provisions creating the new benefits, LeBel J, writing for a unanimous Court, invoked the judgment in the *Employment Insurance Act Reference* in support of the following propositions:

[30] In [the] analysis of the content of legislative powers, changes in the way such powers are exercised and in the interplay of the powers assigned to the two levels of government often raise difficult problems. The solutions that must be applied when exercising powers change where new problems must be addressed. However, the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system. The power in question must be interpreted generously, but in a manner consistent with its legal context, having regard to relevant historical elements (*Reference*, at paras. 45-46; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel*, 5th ed. (2008), at 201-2).

3. For another example of a case in which the meaning and scope of a head of power was at issue, see *Reference re Same-Sex Marriage*, [2004 SCC 79](#). One of the four questions put to the Supreme Court of Canada in that case required the Court to decide whether the term "marriage" in s 91(26), which grants jurisdiction over "Marriage and Divorce" to Parliament, had to be understood today as it would have been in 1867 and as therefore meaning the union of a man and a woman. The Court, invoking the image of Canada's Constitution as a "living tree," unanimously rejected such an interpretive approach and held that it was open to Parliament today to redefine marriage to include unions between people of the same sex. The Court made the following statement about "progressive" interpretation of the heads of power in ss 91 and 92:

[23] A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted. For instance, Parliament's legislative competence in respect of telephones was recognized on the basis of its authority over interprovincial "undertakings" in s. 92(10)(a) even though the telephone had yet to be invented in 1867: *Toronto (City) v. Bell Telephone Co.* (1904), [1905] A.C. 52 ((P.C.). Likewise, Parliament is not limited to the range of criminal offences recognized by the law of England in 1867 in the exercise of its criminal law power in s. 91(27): *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), at p. 324.

4. The Supreme Court of Canada recently summarized the modern approach with regard to interpretation of constitutional provisions in *R v Comeau*, [2018 SCC 15](#):

[52] The modern approach to statutory interpretation provides our guide for determining how [the relevant constitutional provision] should be interpreted. The text of the provision must be read harmoniously with the context and purpose of the statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §2.6. Constitutional provisions must be "placed in [their] proper linguistic, philosophic and historical contexts": *Big M Drug Mart*, at

p. 344. Constitutional texts must be interpreted in a broad and purposive manner: *Hunter*, at pp. 155–56; *Big M Drug Mart*, at p. 344; *Reference re Supreme Court Act*, at para. 19. Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they “must continually adapt to cover new realities”: *Reference re Same-Sex Marriage*, at para. 30; see also *Reference re Employment Insurance Act*, at para. 9. This is the living tree doctrine: *Edwards*, at pp. 106–7. Finally, the underlying organizational principles of the constitutional texts, like federalism, may be relevant to their interpretation: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25; *Reference re Manitoba Language Rights, Marriage*, at para. 30; see also *Reference re Employment Insurance Act*, at para. 9. This is the living tree doctrine: *Edwards*, at pp. 106–7. Finally, the underlying organizational principles of the constitutional texts, like federalism, may be relevant to their interpretation: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

5. In your view, what role, if any, should the original intent of the drafters play in assisting courts to determine the scope and meaning of the heads of power in ss 91 and 92 of the *Constitution Act, 1867*?

B. DOUBLE ASPECT DOCTRINE

The double aspect doctrine, although frequently invoked, is somewhat difficult to explain with precision. The courts have, over time, understood and applied the doctrine with different emphasis, even if the core meaning has remained much the same. As we will see, at least four different understandings, each with different emphasis, have emerged over time. The doctrine has its origins in *Hodge v The Queen* (1883), 9 AC 117 (PC), excerpted in Chapter 4, The Late Nineteenth Century: The Courts Set an Initial Course. At issue in that case was the validity of a comprehensive licensing regime enacted by the Ontario legislature to regulate the retail trade in liquor in that province. In support of its contention that the legislation was *ultra vires*, the federal government argued that, given that Parliament's temperance legislation had been upheld by the Privy Council a year earlier in *Russell v The Queen* (1882), 7 AC 829 (PC), the retail trade in liquor had effectively been assigned in its entirety to federal jurisdiction—hence, the provincial legislatures had no power to legislate in relation to it. Lord Fitzgerald rejected that argument, saying that “subjects [here, the liquor trade] which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91” (at 130). The mere fact that the Privy Council had upheld federal legislation that took a prohibitory approach to the liquor trade did not therefore preclude the provincial legislatures from taking a regulatory approach to it. Lord Fitzgerald went on to uphold the provincial regulatory regime under a combination of ss 92(8), (10), and (15).

As applied in *Hodge*, the nascent double aspect doctrine served a limited purpose. It simply eliminated from the viable bases for challenge to the *vires* of the provincial legislation the argument that, because federal legislation directed at the area in question—the liquor trade—had been upheld as valid, that area was completely off limits to the provincial legislatures. Application of the doctrine did not itself result in that provincial legislation being upheld; to reach that conclusion, the Privy Council had to go through a characterization process in relation to the province's regulatory regime and decide—as it did—that it could be anchored in the three heads of power just noted. In effect, this original understanding of the double aspect doctrine does no more than open the door to the possibility that both levels of government might be able to legislate in the same area. Whether that possibility is realized in a given context depends on the manner in which the legislation at issue is characterized.

With the passage of time, the courts, in particular the Supreme Court of Canada, came to accord a much more important role to the double aspect doctrine than the limited one it

played in *Hodge*. Instead of viewing it simply as a "door opener," the courts came to view it as capturing the notion that *not only is it possible* in some circumstances for both levels of government to legislate in the same area, *it is often inevitable and sometimes (if not usually) a good thing* that they should be able to do so. Applying the double aspect doctrine understood in this second way came to mean accepting that the area in question was one in which both Parliament and the provincial legislatures have the authority to legislate. This richer understanding of the doctrine eventually led to courts invoking it to justify upholding federal and provincial legislation touching the same areas that overlapped to a significant degree. Typically, such use of the doctrine would include a statement—in the nature of a conclusion rather than a particular form of analysis—to the effect that "this is an appropriate case for the application of the double aspect doctrine."

Areas in which such overlapping has been permitted—which are now numerous and include highway driving, the regulation of films and videos, nude entertainment, gaming, support and custody in matrimonial disputes, interest rates, and insolvency—have become known as areas of *de facto* (or functional) legislative concurrency. (The term "*de facto*" here serves to distinguish this form of jurisdictional concurrency from the *de jure* form spelled out in the text of the *Constitution Act, 1867* in provisions such as s 95, which in express terms grants concurrent legislative jurisdiction over agriculture and immigration to Parliament and the provincial legislatures.)

As the examples of highway driving, films and videos, nude entertainment, and gaming suggest, the double aspect doctrine has frequently been invoked in relation to laws regulating public order, safety, and morality. For a relatively recent example of this tendency, consider *Chatterjee v Ontario (AG)*, [2009 SCC 19](#), discussed in Chapter 11, in which the Supreme Court of Canada unanimously upheld as valid provincial legislation providing for the forfeiture to the Crown of both the tools and the proceeds of unlawful activity, in spite of the close association of the legislation with the criminal law. The result has been that "legislative power is concurrent ... over much of the field which may loosely be thought of as criminal law": Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf) at 18–35.

Note that this account of the development of the double aspect doctrine comes with two important caveats. The first is that, in spite of the judiciary's growing fondness for the doctrine over time, there are a few areas in which it has never been applied. These are areas in which, for reasons left largely unexplained, the courts have decided that the exclusivity of legislative jurisdiction as between Parliament and the provincial legislatures as provided for by the terms of ss 91 and 92 should be preserved. They include, most notably, the regulation of trade (with Parliament being restricted to international and interprovincial trade and the provincial legislatures to intraprovincial trade: see Chapter 10) and labour relations (with Parliament being limited to labour relations within federally regulated undertakings and the provincial legislatures to labour relations within local undertakings: see *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [\[1988\] 1 SCR 749, 1988 CanLII 81](#) [Bell No 2], excerpted below). For examples of this unwillingness to apply the double aspect doctrine in a particular area, see *Quebec (AG) v Lacombe*, [2010 SCC 38](#), and, more recently, *Rogers Communications Inc v Châteauguay (City)*, [2016 SCC 23](#), in which a majority of the Supreme Court of Canada declined to apply it to save a municipal measure regulating the choice of the location of radio-communication infrastructure in spite of the acknowledged provincial power over the health and well-being of citizens and the development of a city's territories. The minority judge, Gascon J, was of the view that the case was an appropriate one in which to apply the doctrine and was critical of the majority's refusal to make use of it.

The second caveat is that some members of the Canadian judiciary have expressed serious reservations about the broader view of the double aspect doctrine, most notably Beetz J, who served on the Supreme Court of Canada in the 1970s and 1980s. A strong supporter of provincial autonomy throughout his distinguished judicial career, he was deeply troubled by the implications for the provinces of opening up too many areas to both federal and

provincial legislation. He articulated his cautious view of the double aspect doctrine in *Bell No 2*, excerpted at some length below in Section V:

It follows from this theory that two relatively similar rules or sets of rules may validly be found, one in legislation within exclusive federal jurisdiction, and the other in legislation within exclusive provincial jurisdiction, because they are enacted for different purposes and in different legislative contexts which give them distinct constitutional characterizations.

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However, in *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 AC 588, Viscount Haldane issued a warning about the double aspect theory. This is what he said about this theory, at p. 596:

... [it] is now well established, but none the less ought to be applied only with great caution ...

The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the *Constitution Act, 1867* and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution: see Laskin's *Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 525.

The double aspect theory is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. Its effect must not be to create concurrent fields of jurisdiction ... in which Parliament and the legislatures may legislate on the same aspect [emphasis in original]. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal.

The primary reason for Beetz J's concern was, as this passage suggests, almost certainly the federal paramountcy doctrine, under which valid provincial legislation that conflicts with valid federal legislation must be held inoperative to the extent of the conflict. Expanding the double aspect doctrine would produce more conflict and inoperability at the cost of provincial autonomy. We will see below that the modern version of the paramountcy doctrine significantly reduces the chance of provincial measures being declared inoperative, and presumably this reality must be factored into considerations of the availability of the double aspect doctrine.

It is apparent from some of the double aspect jurisprudence, however, that there are further understandings that now affect the way in which the double aspect doctrine is applied. A third understanding emerged from the approach to division of powers questions advocated by William Lederman, "Classification of Laws and the British North America Act," excerpted below. That approach called for courts to ask (1) whether legislation being challenged on division of powers grounds had a federal aspect—that is, whether it could plausibly be connected to one or more of the heads of power in s 91; (2) whether it also had a provincial aspect—that is, whether it could plausibly be connected to one or more provincial heads of power in s 92; and (3) if the legislation was held to have both federal and provincial aspects, which of those aspects could be said to be the more important (in the special sense in which Lederman understood "importance" in this context). In the following passage from that same article, Lederman explained how, using his preferred approach, the double aspect doctrine comes into play. We have referred to this as a third understanding where double aspect is concerned, and historically speaking that is true, but in more practical terms one could say that Lederman was finally providing a detailed account of a doctrine that was first recognized in *Hodge* and later given even wider sway.

William R Lederman, "Classification of Laws and the British North America Act"

in William R Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 243-45 (footnotes omitted)

Having explored the main problem of interpretation regarding our constitutional division of legislative powers, we may now attend in detail to the particular doctrines developed by the judges to facilitate the making of the necessary decisions. In [some] case[s] ... , the overlapping of federal and provincial categories of laws logically relevant is inevitable The courts have dealt with this overlapping in a number of ways. For one thing, they have limited the generality of the classes of laws in sections 91 and 92 by the so-called principle of "mutual modification," and have thus eliminated some of the encroachment of one upon the other. [Here Lederman gave as an example "trade and commerce" and "property and civil rights."] ... By [this technique,] the overlapping of the literal words of the statute is reduced and some additional degree of exclusiveness is imparted to federal and provincial classes of laws. The reading of sections 91 and 92 as a whole certainly makes it clear that some of this rewording is necessary.

Nevertheless, in spite of all that can or should be done by mutual modification, some overlapping inevitably remains. Where this occurs, either one of two things has then been done. First, the nature of the challenged law relevant to a provincial class of powers has been completely ignored as only an "incidental affectation" of the provincial sphere, and the law concerned has been classed only by that feature of it relevant to a federal class of laws. Thus, in spite of the logical overlap the decision is made that only the federal Parliament has power to enact the challenged law. Obviously this decision involves a judgment that the provincial feature of the law is quite unimportant relative to its federal feature. On the other hand if the federal feature be deemed quite unimportant relative to the provincial feature, then the converse decision would be made.

But if the contrast between the relative importance of the two features is not so sharp, what then? Here we come upon the double aspect theory of interpretation, which constitutes the second way in which the courts have dealt with inevitable overlapping categories. When the court considers that the federal and provincial features of the challenged rule are of roughly equivalent importance so that neither should be ignored respecting the division of legislative powers, the decision is made that the challenged rule could be enacted by either the federal Parliament or a provincial legislature. ... Clearly this decision raises some further problems. Under such principles of interpretation there may well be both a valid federal law and a valid provincial law directed to the same persons concerning the same things, but requiring from them different courses of conduct and thus having certain differing effects. ... [I]f the two rules call for inconsistent behaviour from the same people, they are in conflict or collision and both cannot be obeyed. In these circumstances the courts have laid [down] ... the doctrine of "Dominion paramountcy." Thus, it is a principle of our constitution that in the event of collision between a federal law and a provincial law each valid under the double aspect theory, the federal features of the former law are considered in the last analysis more important than the provincial features of the latter. At this ultimate point of conflict, presumably the federal classes and features relevant to them are deemed the more important simply because they have a national as opposed to a sectional reference. At any rate, "Dominion paramountcy" is said to be called for by the concluding words of section 91, quoted earlier.

In the following excerpt from *Multiple Access Ltd v McCutcheon*, Dickson J (as he then was) relies on Lederman's understanding of the operation of the double aspect doctrine to find a double aspect over regulation of insider trading in the securities of federally incorporated companies even in circumstances where the federal Act essentially duplicated valid provincial provisions.

Multiple Access Ltd v McCutcheon

[1982] 2 SCR 161, 1982 CanLII 55

[The Ontario Securities Act, RSO 1970, c 426 prohibited insider trading in shares trading on the Toronto Stock Exchange. The *Canada Corporations Act*, RSC 1970, c C-32 had almost identical provisions, applicable to corporations incorporated under federal law.

Insider trading is the purchase or sale of corporate securities by someone who has information about the value of the shares not available to other shareholders or members of the general public. Insider-trading prohibitions protect such shareholders by regulating the marketplace in shares and by enabling them to initiate proceedings against alleged insider traders. Such a shareholder action was initiated against insiders of Multiple Access Inc, a federally incorporated company, with respect to trades on the Toronto Stock Exchange.

A shareholder initiated the proceeding under the Ontario Securities Act, and the Ontario Securities Commission took carriage of the case. The respondents, the alleged insider traders, argued that the regulation of the trading in shares of federally incorporated companies falls within exclusive federal jurisdiction. In the alternative, they relied on the doctrine of paramountcy to assert that the Ontario provisions were rendered inoperative by the provisions of the *Canada Corporations Act* that deal with the issue.

The Supreme Court's approach to the paramountcy issue is discussed below, in Section IV. Before reaching the paramountcy issue, the Court had to find that the relevant provisions of the *Canada Corporations Act* and the Ontario Securities Act were both valid and that both applied to trading in Ontario in the shares of a federally incorporated company. The Court's analysis relies heavily on the double aspect doctrine, reproduced below. The majority held that both statutes were valid and applicable on the facts. Three judges, Estey, Beetz, and Chouinard JJ, decided that the federal provisions were invalid. The dissenters characterized the legislation as the regulation of securities transactions falling within provincial jurisdiction over property and civil rights rather than as regulation of the functional aspects of a federally incorporated company.]

DICKSON J (Laskin CJ and Martland, Ritchie, McIntyre, and Lamer JJ concurring):

I should like to turn now to the first constitutional question, namely, are ss. 100.4 and 100.5 of the *Canada Corporations Act* ultra vires the Parliament of Canada in whole or in part? ...

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... [T]here may be a temptation to regard the insider trading provisions of the *Canada Corporations Act* as redundant having regard to the almost identical provisions found in the Ontario legislation applicable to federal companies as well as Ontario companies. Any such temptation should be resisted. The validity of the federal legislation must be determined without heed to the Ontario legislation.

Further, a number of the provinces have not yet enacted insider trading legislation. Striking down the federal legislation would leave federal companies, having head offices in those provinces, and their shareholders, without the double protection, which Ontario shareholders now enjoy. A declaration of invalidity of the federal act would create a potential gap in the present regulatory schemes that might be exploited by the unprincipled.

I turn now to the main question. Does the "matter" (or pith and substance) of the insider trading provisions of the federal act fall within a "class of subject" (or head of power) allocated to Parliament? ... Sections 100.4 and 100.5 put teeth into s. 100 of the Act. Viewed in isolation it can no doubt be argued that their matter is the trading in securities. Viewed in context, however, they are, in my opinion, company law. They fit properly and comfortably into Part I of the *Canada Corporations Act*. The provisions deal with obligations attached to the ownership of shares in a federal company, which extend to shareholders, officers and employees of such companies, a subject matter that is not within the exclusive jurisdiction of provincial legislatures. The provisions are also directed to the relationship between management and shareholders of federal companies. Their enactment by Parliament is in the discharge of its company law power.

It has been well established ever since *John Deere Plow Co. v. Wharton*, [1915] AC 330 (PC) that the power of legislating with reference to the incorporation of companies with other than provincial objects belonged exclusively to the Dominion Parliament as a matter covered by the expression "the peace, order and good government of Canada." ... The power of Parliament in relation to the incorporation of companies with other than provincial objects has not been narrowly defined. The authorities are clear that it goes well beyond mere incorporation. It extends to such matters as the maintenance of the company, the protection of creditors of the company and the safeguarding of the interests of the shareholders. It is all part of the internal ordering as distinguished from the commercial activities Insider malfeasance affects, directly and adversely, corporate powers, organization, internal management. It affects also financing because shareholders and potential shareholders must be assured the company's affairs will be scrupulously and fairly conducted; otherwise the raising of capital, clearly an element of company law, will be inhibited

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Because "[t]he language of [ss 91 and 92] and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme" (*John Deere Plow Co. v. Wharton*, *supra*, at p. 338 per Viscount Haldane), a statute may fall under several heads of either s. 91 or s. 92. For example, a provincial statute will often fall under both s. 92(13), property and civil rights and s. 92(16), a purely local matter, given the broad generality of the language. There is, of course, no constitutional difficulty in this. The constitutional difficulty arises, however, when a statute may be characterized, as often happens, as coming within a federal as well as a provincial head of power. "To put the same point in another way, our community life—social, economic, political, and cultural—is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring. There are inevitable difficulties arising from this that we must live with so long as we have a federal constitution" (Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 *McGill LJ* 185). As Professor Ziegel has stated "[s]ecurities legislation clearly has a double character" ("Constitutional Aspects of Canadian Companies" in *Canadian Company Law* (1967), Chapter 5, at p. 167) and, "there is no simple dichotomy between legislation of a company law character and legislation affecting property

and civil rights in the province. Viewed in its proper social and economic context the legislation may well have a double character" (at pp. 192-93).

I incline to the view that the impugned insider trading provisions have both a securities law and a companies law aspect and would adopt as the test for applying the double aspect doctrine to validate both sets of legislative provisions, that formulated by Professor Lederman

[Justice Dickson then quoted from Lederman, "Classification of Laws and the British North America Act," excerpted above.]

The double aspect doctrine is applicable, as Professor Lederman says, when the contrast between the relative importance of the two features is not so sharp. When, as here, the corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in importance there would seem little reason, when considering validity, to kill one and let the other live.

Although the application of the double aspect doctrine has been most prevalent in the highway traffic field there is ample precedent for its use in the field of provincial securities regulations. ... Concurrent matters or fields have been recognized, among others, in the realms of temperance, insolvency, highways, trading stamps and aspects of Sunday observance. ...

Justice Dickson went on to discuss whether the provisions of the Ontario Securities Act were rendered inapplicable to insider trading in the securities of federally incorporated companies under the doctrine of interjurisdictional immunity or inoperative by the overlapping provisions of the Canada Corporations Act under the federal paramountcy doctrine. He held that neither doctrine applied. The latter portion of his judgment is reproduced below in Section V.]

A fourth type of understanding of the double aspect doctrine focuses less on the particular measure being challenged and more on the areas, facts, persons, or activities to which both federal and provincial legislative measures may apply. As the Supreme Court of Canada recently stated in the *GGPPA References* at para 125: "If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply." As the Court stated, the doctrine *may* apply. This is because, whatever the past history regarding regulation of a particular area of activity (fact situation, group of persons), each new legislative measure must satisfy the requirements of characterization and classification set out earlier in this chapter.

Public servants and other constitutional advisors, not to mention comparative constitutional lawyers, are often asked to identify areas of activity in Canadian society where federal and provincial legislators share an ability to legislate. Whereas it would be wrong, after the *GGPPA References*, to claim that there is a double aspect with respect to "establishing minimum national standards of [greenhouse gas (GHG)] price stringency to reduce GHG emissions" (at para 207), this being the specific new federal power recognized in that decision, it is entirely justifiable to speak more generally of a double aspect with regard to "the regulation of greenhouse gases," the provinces anchoring their measures under s 92(13), for example, and Parliament anchoring its measures under peace, order, and good government or other heads of federal power. Similarly, one can speak of a double aspect with respect to highway driving given that the provinces can properly legislate under s 92(16) and Parliament under the criminal law power, s 92(27). But using "double aspect" in this way cannot be understood as determinative of the validity of provincial or federal provincial legislation. Each measure must be validated by means of the characterization and classification process. There is a risk,

for example, in saying that there is a double aspect with respect to "health" if one understands that statement to mean that federal legislation, for example, has an automatic place in that regulatory space, with the federal paramountcy that ensues. If, on the other hand, one keeps in mind that such double aspect as there might be with respect to "health" is first and foremost a function of whether federal and provincial legislation regulating health can be validly anchored under, respectively, federal and provincial heads of power, then the risk to the federal equilibrium can be controlled.

The double aspect doctrine was the subject of discussion in *Reference re Assisted Human Reproduction Act*, [2010 SCC 61](#), found in Chapter 11, which involved a challenge to all but a small handful of the provisions of that recently enacted federal statute. Of particular interest to us here is the manner in which LeBel and Deschamps JJ analyzed what they termed the three "levels" at which the doctrine could be viewed. This they did in the following paragraph:

[268] The double aspect doctrine can be viewed at three different levels: (1) that of the facts themselves regardless of their legal characterization; (2) that of the legal perspectives represented by the legislative rules; and (3) that of the power in the context of the constitutional division of powers. The double aspect relates primarily to the second level, that is, to the different normative perspectives that make it possible to understand certain corresponding facts at the first level. When the doctrine applies, these rules at the second level are connected, on the basis of their pith and substance, with different powers at the third level, one of which may come under federal authority while the other comes under provincial authority.

After setting out this framework, LeBel and Deschamps JJ went on to find that the double aspect doctrine could be applied to some of the provisions in the Act—that is, the provisions that prohibited certain activities outright in the belief that they cause "social evil" (at para 269) because those activities "could be viewed from two different perspectives: ... that of the suppression of evil [federal] and ... that of the regulation of the practice of medicine and the delivery of health care [provincial]" (at para 270). However, they concluded that the doctrine could not be applied to other provisions—for example, the provisions governing those activities "that are already found in medical practice and research and that, as a whole, form part of a health service" (at para 269). The reason they gave for not applying the doctrine to the latter set of provisions was that those provisions could only be viewed from one perspective, the regulation of health care (provincial).

As LeBel and Deschamps JJ noted, the double aspect doctrine relates primarily to the second level that they identified, "that of the legal perspectives represented by the legislative rules" (at para 268). The focus on the legislative text explains why we consider double aspect at the level of characterization and pith and substance. As noted, however, there is some not infrequent broadening of the meaning of the term "double aspect" when it is used to describe the reality of federal and provincial regulatory presence at the level of the "the facts themselves," the first level in LeBel and Deschamps JJ's framework. In *Desgagnés Transport Inc v Wärtsilä Canada Inc*, [2019 SCC 58](#), for example, the Supreme Court of Canada discussed the double aspect doctrine with apparent emphasis on the factual context—that is, the first level: "the double aspect doctrine recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power" (at para 84). This understanding of double aspect was approved in the *GGPPA References*, as we have just seen.

NOTES

1. It is important to remember that not every case in which a court is asked to consider the double aspect doctrine is analyzed in the manner in which Lederman proposed. In fact, in most cases, application of the doctrine simply entails the court evidencing a willingness to

apply the pith and substance doctrine flexibly and to characterize similar federal and provincial enactments in such a manner as to permit the court to uphold both enactments as valid. However, *Multiple Access* is not the only case in which the Supreme Court of Canada has adopted Lederman's approach to the application of the doctrine. *Law Society of British Columbia v Mangat*, [2001 SCC 67](#), is another. At issue in *Mangat* was a provision of the federal *Immigration Act*, RSC 1985, c I-2, that permitted non-lawyers to represent clients in proceedings before the Immigration and Refugee Board (IRB) and a provision of the BC *Legal Profession Act*, SBC 1987, c 25, that prohibited non-lawyers from engaging in the practice of law. After quoting from Lederman, Gonthier J, writing for the Court, stated, at para 50, that

[b]oth the federal and provincial features of the challenged provisions are of equivalent importance, and so neither should be ignored in the analysis of the division of powers. Parliament must be allowed to determine who may appear before tribunals it has created, and the provinces must be allowed to regulate the practice of law as they have always done.

The double aspect doctrine applied because there were roughly equivalent federal and provincial aspects to the regulation of legal representation in immigration matters.

2. In the *GGPPA References*, Wagner CJ found that the double aspect doctrine applies to "cases in which the federal government has jurisdiction on the basis of the national concern doctrine" (at para 126). He went on to say that "[t]his approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power" (at para 126). This statement would appear to confirm that we have travelled considerable distance from *Hodge* and the first "exceptional" understanding of the double aspect doctrine. It was noted earlier in this section, however, that there are certain areas—regulation of trade and labour relations—where the doctrine has not been applied. There are also cases, involving federally regulated undertakings, for example, where the Court has shown a distinct reluctance to invoke the double aspect doctrine (see, for example, *Lacombe* and *Rogers Communications*). Given the Supreme Court's recent assertion regarding the applicability of the double aspect doctrine to every head of power, how should we understand the non-application of the doctrine in these cases? Is it possible that the double aspect doctrine was available in principle but that *Lacombe*, *Rogers*, and other cases are instances where the pith and substance of the measure in question could not be anchored under a relevant head of power, regardless of the theoretical availability of the doctrine? (See also *Reference re Environmental Management Act (British Columbia)*, [2019 BCCA 181](#) and *Reference re Environmental Management Act*, [2020 SCC 1](#).)

3. We have noted four different understandings of double aspect over the history of the division of powers in Canada, each with different emphasis. How many of these understandings are still relevant in the 21st century? How should we read the following statement by Wagner CJ in the *GGPPA References*?

[128] [T]he fact that the double aspect doctrine *can* apply does not mean that it *will* apply in a given case. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy in this Court's jurisprudence. [Emphasis in original.]

C. ANCILLARY POWERS

The pith and substance doctrine results in a law being upheld if its dominant characteristic falls within the classes of subject matter allocated to the jurisdiction of the level of government that enacted the law. This means that a law may have an impact on matters outside the enacting legislature's jurisdiction as long as these effects remain secondary or incidental features of the legislation rather than its most important feature. For example, the former abortion provision of the *Criminal Code* was a valid exercise of the federal criminal law power even though the

provision had a range of important effects on provincial matters such as hospitals, health, and the medical profession. These effects were considered incidental to the provision's dominant characteristic: the punishment of abortion on moral grounds. This principle is sometimes referred to as the incidental effects rule. (See the *Carnation* case discussed in Chapter 10 for a further helpful example.)

An extension of the idea of incidental effects is the ancillary powers doctrine (sometimes, and more often in the past, called the "necessarily incidental" doctrine). The ancillary powers doctrine is used in cases where the challenge is to a part of a larger scheme of legislation rather than to the entire scheme. When the impugned part is examined in isolation, it appears to intrude or overflow into the jurisdiction of the other level of government. However, if the larger scheme of which the impugned provision forms part is constitutionally valid, the impugned provision may also be found valid because of its relationship to the larger scheme. This will depend on the extent of the intrusion or overflow and how well the offending part is integrated into the valid legislative scheme. If it is not closely enough related, it will be declared invalid and severed. If it is closely enough related, it will be deemed "ancillary" or "necessarily incidental" to the valid scheme, and both the part and the rest of the scheme will be upheld. In this way, the ancillary powers doctrine, like the pith and substance doctrine, permits the federal and provincial governments to intrude, sometimes quite substantially, on the other level of government's jurisdiction as long as the most important features of their laws remain within their jurisdiction.

An early attempt to use this doctrine, albeit unsuccessfully, is found in *The King v Eastern Terminal Elevator Co*, [1925] SCR 434, 1925 CanLII 82, excerpted in Chapter 5, The Early Twentieth Century: The Beginnings of Economic Regulation, in which the federal government attempted to have the validity of certain provisions in the *Canada Grain Act*, RSC 1985, c G-10 regulating grain elevators (which *prima facie* fall within provincial legislative jurisdiction under s 92(10) or (13)) upheld by arguing that such regulation was necessarily incidental to larger purposes of the Act as a whole—that is, the regulation of the interprovincial and international trade in grain.

An extensive modern analysis of the ancillary powers doctrine, which recognizes the balancing exercise involved in applying it, is found in the judgment of Dickson CJ in *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, 1989 CanLII 133, immediately below.

General Motors of Canada Ltd v City National Leasing

[1989] 1 SCR 641, 1989 CanLII 133

[City National Leasing (CNL) brought a civil action against General Motors (GM), alleging that it suffered losses as a result of a discriminatory pricing policy that constituted a kind of anti-competitive behaviour prohibited by the *Combines Investigation Act*, RSC 1970, c C-23. The civil action was authorized by s 33.1 of the Act. GM argued that s 33.1 was beyond the jurisdiction of Parliament because the creation of civil causes of action falls within provincial jurisdiction in relation to "Property and Civil Rights."

The *General Motors* ruling is notable for its holding that the *Combines Investigation Act* (now the *Competition Act*, RSC 1985, c C-34) is a valid exercise of the federal power over the "general regulation of trade"; see Chapter 10. It is also notable for setting out the general approach to the necessarily incidental doctrine. When the constitutional challenge is focused on a single provision of a larger legislative scheme, how is the constitutional validity of the challenged provision to be determined? The excerpts below address this issue.]

DICKSON CJ (Beetz, McIntyre, Lamer, La Forest, and L'Heureux-Dubé JJ concurring):

[I]n circumstances such as exist in the case at bar, it will normally be necessary to consider both the impugned provision and the Act as a whole (or a significant part of it) when undertaking a constitutional analysis. ... The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further. In that situation both the provision and the act are constitutionally unimpeachable. If, as may occur in some instances, the impugned provision is found to be constitutionally unimpeachable while the act containing it is not, then the act must be assessed on its [sic] own. In these instances, it is clear that the claim of invalidity should originally have been made against the act and not against the particular provision. In most cases like the present, however, it will be concluded that the impugned provision can be characterized, *prima facie*, as intruding to some extent on provincial powers: the question is to what extent. I emphasize that in answering this initial question the court is considering the provision on its own and not assessing the act; thus the answer it reaches does not provide a conclusion with respect to the ultimate constitutional validity of the provision. The purpose is merely to ascertain the degree to which the provision could be said to intrude on provincial powers, so that this intrusion can be weighed in light of the possible justification for the section.

Such a justification will result from the impugned provision's relationship to valid legislation. Thus the next step in the process is to ascertain the existence of valid legislation. . . .

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The final question is whether the provision can be constitutionally justified by reason of its connection with valid legislation. As Laskin CJ remarked in *Vapor Canada*, ... [[1977] 2 SCR 134, 1976 CanLII 181], inclusion of an invalid provision in a valid statute does not necessarily stamp the provision with validity. Here the court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.

In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate. I reiterate what I said on this

general theme (although in a slightly different context) in *OPSEU v. Ontario (Attorney General)*, [1987] 2 SCR 2, at p. 18:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.

The above comments also emphasize that the question in this appeal of how far federal legislation may validly impinge on provincial powers is one part of the general notion of the "pith and substance" of legislation; i.e., the doctrine that a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa). On p. 334 of his book *Constitutional Law of Canada* (2nd ed. 1985), Professor Hogg explains this in the following way:

The pith and substance doctrine enables a law that is classified as "in relation to" a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body.

I emphasize that these comments should not be seen as altering the balance of constitutional powers. Both provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government's sphere of power. I quote from Professor Hogg again, where at p. 336 he states: "I think it is plain both on principle and on authority that the provincial enumerated powers have exactly the same capacity as the federal enumerated powers to affect matters allocated to the other level of government."

In the present appeal, the appellant focuses its attack on a particular section of the Act. The issue is not whether the Act as a whole is rendered *ultra vires* because it reaches too far, but whether a particular provision is sufficiently integrated into the Act to sustain its constitutionality. In numerous cases courts have considered the nature of the relationship which is required, between a provision which encroaches on provincial jurisdiction and a valid statute, for the provision to be upheld. In different contexts courts have set down slightly different requirements, viz: "rational and functional connection" in *Papp v. Papp*, [1970] 1 OR 331, *R v. Zelenksy*, [1978] 2 SCR 940, and *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161; "ancillary," "necessarily incidental" and "truly necessary" in the *Regional Municipality of Peel v. MacKenzie* (1982), 139 DLR (3d) 14; "intimate connection," "an integral part" and "necessarily incidental" in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 SCR 115; "integral part" in *Clark v. Canadian National Railway Co.*, [1988] 2 SCR 680; "a valid constitutional cast by the context and association in which it is fixed as a complementary provision" in *Vapor Canada, supra*; and "truly necessary" in *R v. Thomas Fuller Construction Co.* (1958) Ltd., [1980] 1 SCR 695. I believe the approach I have outlined is consistent with the results of this jurisprudence. These cases are best understood as setting out the proper test for the particular context in issue, rather than attempting to articulate a test of general application with reference to all contexts. Thus the tests they set out are not identical. As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained. In surveying past

jurisprudence it is to be expected that some example of patterns between the appropriate test of fit, and the head of power under which the federal legislation is valid, will be found. Such patterns exist not only because of a possible degree of similarity between the federal legislation which falls under any one head of power, but also for the reason that certain federal heads of power, for example, s. 92(10), are narrow and distinct powers which relate to particular works and undertakings and are thus quite susceptible to having provisions "tacked-on" to legislation which is validated under them, while other federal heads of power, for example, trade and commerce, are broad and therefore less likely to give rise to highly intrusive provisions.

The steps in the analysis may be summarized as follows: First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent (if it does not intrude, then the only possible issue is the validity of the act). Second, the court must establish whether the act (or a severable part of it) is valid. ... If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. ... I note that in certain cases it may be possible to dispense with some of the aforementioned steps if a clear answer to one of them will be dispositive of the issue. For example, if the provision in question has no relation to the regulatory scheme then the question of its validity may be quickly answered on that ground alone. The approach taken in a number of past cases is more easily understood if this possibility is recognized.

Does Section 31.1 Encroach on Provincial Powers?

The first step, therefore, ... is to determine whether the impugned provision can be seen as encroaching on provincial powers, and if so, to what extent. As s. 31.1 creates a civil right of action it is not difficult to conclude that the provision does, on its face, appear to encroach on provincial power to some extent. The creation of civil actions is generally a matter within provincial jurisdiction under s. 92(13) of the Constitution Act, 1867. This provincial power over civil rights is a significant power and one that is not lightly encroached upon. In assessing the seriousness of this encroachment, however, three facts must be taken into consideration. The first is that s. 31.1 is only a remedial provision; its purpose is to help enforce the substantive aspects of the Act, but it is not in itself a substantive part of the Act. By their nature, remedial provisions are typically less intrusive vis-à-vis provincial powers. The second important fact is the limited scope of the action. Section 31.1 does not create a general cause of action; its application is carefully limited by the provisions of the Act. The third relevant fact is that it is well-established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted. This Court has sustained federally-created civil actions in a variety of contexts

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In sum, the impugned provision encroaches on an important provincial power; however, the provision is a remedial one; federal encroachment in this manner is not unprecedented and, in this case; encroachment has been limited by the restrictions of the Act.

[Chief Justice Dickson turned to the second stage of the analysis and concluded that the *Combines Investigation Act* constituted a scheme of regulation validly enacted

by Parliament pursuant to its power to enact laws in relation to trade and commerce; see the portion of the judgment found in Chapter 10.]

The Validity of Section 31.1 of the Combines Investigation Act

Having found that the *Combines Investigation Act* contains a regulatory scheme, valid under s. 91(2) of the Constitution, the only issue remaining to be addressed is the constitutional validity of s. 31.1. As I have already noted, mere inclusion in a valid legislative scheme does not *ipso facto* confer constitutional validity upon a particular provision. The provision must be sufficiently related to that scheme for it to be constitutionally justified. The degree of relationship that is required is a function of the extent of the provision's intrusion into provincial powers. I have already discussed this issue and concluded that s. 31.1 intrudes, though in a limited way, on the important provincial power over civil rights. In this light, I do not think that a strict test, such as "truly necessary" or "integral," is appropriate. On the other hand, it is not enough that the section be merely "tacked on" to admittedly valid legislation. The correct approach in this case is to ask whether the provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme. A similar test has been applied in other cases, as I have noted, and I think it is also the proper test for the circumstances of this appeal.

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I am of the opinion that the necessary link between s. 31.1 and the Act exists. Section 31.1 is an integral, well-conceived component of the economic regulation strategy found in the *Combines Investigation Act*. Even if a much stricter test of fit were applied—for instance, one of "necessarily incidental"—s. 31.1 would still pass the test. Under the test of "functionally related" the section is clearly valid.

[Chief Justice Dickson noted that s 31.1 is a remedy bounded by the parameters of the Act; it does not create an open-ended private right of action. He also relied on the fact that s 31.1 is integrated into the purpose and underlying philosophy of the Act; privately initiated and conducted proceedings can help fulfill the objectives of the legislation.]

For these reasons, I conclude that s. 31.1 is an integral part of the *Combines Investigation Act* scheme regulating anti-competitive conduct. The relationship between the section and the Act easily meets the test for the section to be upheld. This finding should not be interpreted as authority for upholding all provisions creating private civil action that are attached to a valid trade and commerce regulatory scheme or any other particular type of scheme. Section 31.1 is carefully constructed and restricted by the terms of the *Combines Investigation Act*.

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Appeal dismissed.

NOTES

1. The approach to the ancillary powers doctrine outlined by Dickson CJ is equally applicable when a provision of a provincial law that is part of a larger scheme of regulation is challenged on the ground that it encroaches on a federal area of jurisdiction. For example, in *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21, the Supreme Court upheld s 141(1)(b) of the British Columbia Securities Act, RSBC 1996, c 418, a provision that empowers the BC Securities Commission (BCSC) to make orders requiring brokers registered in the province to produce records in their control "to assist in the administration of the securities laws of another jurisdiction." The BCSC entered into an agreement with the US

Securities and Exchange Commission (SEC) to provide each other with mutual assistance in investigating violations of their respective jurisdictions' securities laws. Pursuant to a request from the SEC, which was investigating possible violations of US law, the BCSC ordered Global Securities to produce records in its possession. The company refused to produce some of the requested records and sought a declaration that s 141(1)(b) was in pith and substance in relation to the enforcement of foreign laws and was thus *ultra vires*. The Court disagreed, finding that the impugned provision was in pith and substance part of a reciprocal arrangement in relation to the uncovering of violations of local securities laws and thus within provincial jurisdiction over "property and civil rights."

In reaching this conclusion, Iacobucci J, writing for the Court, identified two dominant purposes of the impugned provision: obtaining reciprocal cooperation from other securities regulators and uncovering violations of foreign law by brokers registered in British Columbia. He went on to note that had the provision been found to lie outside provincial jurisdiction on the ground that it was primarily concerned with assisting in the enforcement of foreign law, it would have been saved by the ancillary powers or necessarily incidental doctrine articulated by the Court in *General Motors*. The impugned section, he said, "is a part of a valid legislative scheme, namely, the *Securities Act*. Moreover, even assuming that the most rigorous version of the ancillary doctrine applies, I believe that s. 141(1)(b) is 'necessarily incidental' to the *Securities Act* and would therefore also uphold it under the ancillary doctrine" (at para 45). See also *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, in which the Court upheld a provision of BC's *Heritage Conservation Act*, RSBC 1996, c 187, that specifically referred to "aboriginal" artifacts.

2. In a more recent application of the ancillary powers doctrine by the Supreme Court of Canada in the *Assisted Human Reproduction Reference*, excerpted in Chapter 11, four of the nine members of the Court were of the view that, because the challenge was to a large number of the provisions of the legislation at issue rather than just one or two, it was appropriate to reverse the order of the first two of the three questions that Dickson CJ set out above in *General Motors* and consider the validity of the statute as a whole first. Chief Justice McLachlin, who wrote for this group of four judges, explained this reordering in the following terms:

[17] ... In this case, the Attorney General of Quebec is challenging the bulk of the *Assisted Human Reproduction Act*. While it concedes that ss. 5 to 7 of the Act are valid, it challenges almost all of the remaining operative provisions. Under these circumstances, it is impossible to meaningfully consider the provisions at issue without first considering the nature of the whole scheme.

This reordering of the questions was criticized, however, by four other members of the Court, writing through LeBel and Deschamps JJ. They argued that "[s]ince the purposes and effects of a statute's many provisions can be different, it is important to consider the impugned provisions separately before considering their connection with other provisions of the statute" (at para 194). The ninth member of the Court, Cromwell J, who wrote separately, made no comment on the appropriateness of the reordering. In your view, which of the two groups of four judges had the better of this debate?

3. The position taken by LeBel and Deschamps JJ in the *Assisted Human Reproduction Reference* on the proper ordering of the three questions included a reference to this statement by Dickson CJ in *General Motors* (at 667): "[I]n answering this initial question the court is considering the provision on its own and not assessing the act." Did Dickson CJ, when he came to apply his three-part analytical framework to s 31.1 of the *Combines Investigation Act* in that case, remain true to that admonition? Did he really "consider [that] provision on its own"? Or did he consider it within the broader context of the statute as a whole? (Look carefully at the first two of the three reasons he gave for concluding that the encroachment by s 31.1 was not serious.)

Does it even make sense to consider the impugned provision(s) on their own? Robin Elliot has argued that

the *General Motors* analytical framework is flawed ... because it is based on the erroneous assumption that one can engage in a meaningful analysis ... of the impugned part without first considering the nature of the relationship, if any, between that part and the larger whole with which it is allegedly associated.

He then proceeds to propose a new framework for the application of the ancillary powers doctrine, which entails asking first "whether there is a functional connection between the impugned part and that larger whole." If that question is answered in the negative, the ancillary powers doctrine has no further role to play, but if the answer is in the affirmative, then one asks, second, "is the larger whole valid?" On the assumption that it is, then the court should, third, "conduct a full-fledged pith and substance analysis of the impugned part ... [taking] into account not just the existence, but the nature and degree, of the connection between part and whole. In other words, the tighter the court finds that connection to be, the more willing it should be to find the part valid, and the looser it finds that connection to be, the less willing it should be to find the part valid": see Robin Elliot, "Quebec (AG) v Lacombe and Quebec (AG) v COPA: Ancillary Powers, Interjurisdictional Immunity and 'The Local Interest in Land Use Planning Against the National Interest in a Unified System of Aviation Navigation'" (2011) 55 SCLR (2d) 403 at 424-25. Do you think that this alternative framework would be preferable to the *General Motors* framework? In what way or ways?

4. Although the approach to the ancillary powers doctrine outlined by Dickson J in *General Motors* suggests that that doctrine is to be applied whenever the validity of a single part of a larger whole is called into question, the Court has not always applied the doctrine in such circumstances and has instead applied a standard pith and substance analysis, without any reference to the three-step framework prescribed in *General Motors*. For example, the doctrine was not applied in either the *Employment Insurance Reference* or *Multiple Access*, both excerpted above, even though the challenge in both cases was to small components of large statutes. The Court has not explained why it has not been consistent in this regard. Can you think of any reasons why the Court has not been consistent?

We turn now to a relatively recent application of the ancillary powers doctrine in which the Supreme Court of Canada added a refinement to the third step of the test set forth in *General Motors*.

Quebec (AG) v Lacombe

2010 SCC 38

[At issue in this case was the validity of a by-law enacted in 1995 by a municipality in the province of Quebec (referred to as By-law No 260 in the reasons for judgment excerpted below). That by-law had been enacted after a vigorous lobbying campaign by the owners of summer homes and other users of a recreational lake called Gobeil Lake who objected to the operation of a private aerodrome on the lake by a company that provided float plane sightseeing services. By its terms, By-law No 260 explicitly prohibited the construction and use of aerodromes within a particular part of the municipality that included the lake.]

Chief Justice McLachlin, writing for a seven-member majority of the Court, was of the view that, because the impugned by-law had taken the form of an amendment to the municipality's general zoning by-law, the outcome of the challenge turned

on the application of the ancillary powers doctrine, which she applied in accordance with the analytical framework established in *General Motors*. She held that, viewed on its own, the by-law amounted to an unconstitutional trenching on federal jurisdiction over aeronautics. She accepted that the general zoning by-law was valid provincial legislation under s 92(13) and then proceeded to address the question of whether the impugned by-law could be upheld because of its relationship with the general zoning by-law. We reproduce here both her general discussion of the ancillary powers doctrine and her analysis of that final question.]

(1) The Ancillary Powers Doctrine

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[35] The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body: *General Motors* [v *City National Leasing*, [1989] 1 SCR 641], at pp. 667-70. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial

[36] The ancillary powers doctrine is not to be confused with the incidental effects rule. The ancillary powers doctrine applies where, as here, a provision is, in pith and substance, outside the competence of its enacting body. The potentially invalid provision will be saved where it is an important part of a broader legislative scheme that is within the competence of the enacting body. The incidental effects rule, by contrast, applies when a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government. It holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body. Mere incidental effects will not warrant the invocation of ancillary powers.

[37] Nor is the ancillary powers doctrine to be confused with the double aspect doctrine. In *Canadian Western Bank* [v *Alberta*, 2007 SCC 22] at para. 30, Binnie and LeBel JJ. explained that the double aspect doctrine recognizes the overlapping jurisdiction of the two levels of government. ... By contrast, ancillary powers apply only where a legislative provision does not come within those heads of power assigned to its enacting body under the *Constitution Act, 1867*.

[38] In summary, only the ancillary powers doctrine concerns legislation that, in pith and substance, falls outside the jurisdiction of its enacting body. Laws raising a double aspect come within the jurisdiction of their enacting body, but intrude on the jurisdiction of the other level of government because of the overlap in the constitutional division of powers. Similarly, the incidental effects rule applies where the main thrust of the law comes within the jurisdiction of its enacting body, but the law has subsidiary effects that cannot come within the jurisdiction of that body.

[Chief Justice McLachlin discussed some of the early jurisprudence on the ancillary powers doctrine and summarized the test proposed by Dickson CJ in *General Motors*, which, she noted, "has been applied, *mutatis mutandis*, in all subsequent decisions of this Court in which the possibility of ancillary jurisdiction was canvassed" (at para 42). She then proceeded to acknowledge that that test has been criticized on a number of grounds, including the concern "that it involves a difficult distinction between serious

and less serious intrusions (one's view of the seriousness of an intrusion may vary depending on whether one is intruding or being intruded upon, for example)," and the fact "that in applying the combined test, this Court has always backed away from a test of strict necessity, almost always applying the more flexible rational functional test" (at para 43). However, she decided that it was "unnecessary to decide the merits of these criticisms in the present appeal because the legislation here at issue does not constitute a serious intrusion on federal jurisdiction. In my view, the rational functional test is applicable to this case" (at para 44). She continued:]

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[45] Under the rational functional test used by Laskin J.A. in *Papp v Papp*, [1970 1 OR 331], and repeatedly affirmed in the jurisprudence of this Court, ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly furthers. It is not enough that the measure supplement the legislative scheme; it must actively further it.

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(2) Application of the Ancillary Powers Doctrine

[47] The question is whether the amendments brought by by-law No. 260, which in pith and substance lie outside the provincial power, are nevertheless valid because they are ancillary to valid provincial provisions—in other words, whether the amendments are rationally and functionally connected to valid provincial zoning objectives in the sense described in the preceding section.

[48] As is illustrated by the above cited examples from the jurisprudence, the application of ancillary powers to habilitate *prima facie* invalid legislation requires that the impugned provision, both rationally and in its function, further the purposes of the valid legislative scheme of which it is said to be part. ... [T]he basic purpose of this inquiry is to determine whether the impugned measure not only supplements, but complements, the legislative scheme; it is not enough that the measure be merely supplemental: *Papp*.

[49] This brings us to the inquiry at hand. The starting point is the purpose of the legislative scheme that by-law No. 260 is alleged to further. This scheme is found in ... the broader zoning framework of the municipality of Sacré-Cœur. By-law No. 210 is generally valid legislation in relation to land use planning The question is whether the general ban on aerodromes in zone 33-RF introduced by by-law No. 260 is rationally and functionally connected to by-law No. 210, such that it should be sustained as a functional part of the whole—notwithstanding its *prima facie* constitutional invalidity. In my view, the answer to this question is no.

[50] Zoning legislation ... has as its purpose the regulation of land use, having regard to the underlying characteristics and uses of the land in question It functions by establishing zones, or regions, where particular activities may be conducted, having regard to the nature of the territory and related factors. It thus seeks to establish a rational and fair basis upon which land users may predicate their behaviour. It generally seeks to treat similar areas similarly, and avoids stand-alone one-off prohibitions. The underlying purpose of zoning legislation ... is to rationalize land use for the benefit of the general populace.

[51] A close examination of the purposes and effects of by-law No. 260 reveals that it does not further the objectives of zoning law generally, or by-law No. 210 in particular.

[52] ... [T]he Province asserts that by-law No. 260 was passed to protect the use of Gobeil Lake and similar areas by vacationers. However, by-law No. 260 does not confine its ban on aerodromes to vacation areas. Rather, it bans aerodromes *throughout the municipality*, which spans a variety of land uses.

[53] The lack of connection between by-law No. 260 and the general zoning purposes of by-law No. 210 is evidenced by the lack of correlation between the nature of the areas affected and the ban on aerodromes.

[54] By-law No. 260 treats similar parcels of land differently by expressly permitting aerodromes in zone 61-RF, but not in the adjacent zone 33-RF. These two zones are identical in essentially banning all but a few land uses. The only difference between the zoning of 33-RF and 61-RF is that the latter permits aerodromes. If the purpose of the broader zoning scheme in zone 33-RF—to protect use by vacationers—is established by these land use restrictions, then the same must hold for zone 61-RF. Yet it does not.

[55] Conversely, by-law No. 260 treats different parcels the same by broadly banning water aerodromes throughout the municipality, not only in areas used by vacationers. Again, this broad prohibition does not correlate with the land uses in the area covered.

[56] ... [B]y-law No. 260 purports to regulate the location of aerodromes without reference to the underlying land use regime. It does not function as zoning legislation, but rather, is a stand-alone prohibition. It treats similar parcels differently, and different parcels the same, belying the first principle of zoning legislation.

[57] At the end of the day, what is missing is evidence of any purpose for by-law No. 260 other than the prohibition of certain aeronautical activities in a significant portion of the municipality. There is no evidence of a gap in by-law No. 210 that by-law No. 260 fills. There is no evidence of a feature of by-law No. 210 that by-law No. 260 enhances; no evidence of an inconsistency or uncertainty that it removes from by-law No. 210's operation. There is no evidence that by-law No. 260 is an integrated feature of the zoning scheme, viewed as a whole. Indeed, it is difficult to say that by-law No. 260 is even supplemental to the zoning scheme, given its arbitrary focus on banning aeronautics without regard to underlying land use, and in any event supplementation would not be enough to save it: *Papp*. In sum, there simply is not the kind of connection one finds in the cases where invalid legislation has been resuscitated through the ancillary powers doctrine.

[58] I conclude that the amendments brought by by-law No. 260 do not meet the rational functional connection test in *General Motors*.

[Justice Deschamps dissented in this case, essentially on the basis that a municipality has the power under s 92(13) of the *Constitution Act, 1867* to regulate land use in what it considers to be the best interests of its residents, even when such regulation is directed at the establishment of private aerodromes. In support of that holding, she relied on the double aspect doctrine. Justice LeBel agreed with Deschamps J in relation to that holding but aligned himself with the majority in the result because he was of the view that the fact that the owner of the float plane sightseeing business had been given an operator's permit under the federal *Aeronautics Act*, RSC 1985, c A-2, meant that the doctrine of federal paramountcy applied and the municipality's by-law had to be held inoperative.]

NOTES AND QUESTIONS

- Chief Justice McLachlin decided that "[By-law No 260] does not constitute a serious intrusion on federal jurisdiction" (at para 44) and therefore held that the more relaxed "rational and functional connection" standard was the appropriate standard to apply when she came to apply the third and final part of the *General Motors* test. Curiously, she provided no reasoning in support of that decision. What reasons do you suppose she would have had? Whatever those reasons might have been, do you think that decision was the right one? (You

might want to revisit the latter question after reading her judgment in *Quebec (AG) v Canadian Owners and Pilots Association*, [2010 SCC 39](#) [COPA], excerpted below in Section IV, in which she held that jurisdiction over the siting of private aerodromes falls within the core of federal jurisdiction over aeronautics. Can it plausibly be said that provincial legislation that encroaches on a core area of federal jurisdiction does not represent a serious intrusion on that jurisdiction?

2. Justice McLachlin said that, in order for an otherwise *ultra vires* provision to be sustained on the basis of the rational-and-functional connection standard, “[i]t is not enough that the measure supplement the legislative scheme; it must actively further it” (at para 45). Is the distinction that she draws between “supplementing” and “actively furthering” a legislative scheme a meaningful one? Could it not be said of s 31.1 of the *Combines Investigation Act* (the provision upheld on the basis of this standard in *General Motors*) that it “supplemented” the main body of the Act by providing a new civil enforcement mechanism?

3. It is clear that the majority’s unwillingness to uphold By-law No 260 under the ancillary powers doctrine turned to a significant degree on the manner in which McLachlin CJ characterized the defining elements of “true” zoning legislation, in particular her statement to the effect that such legislation “generally seeks to treat similar areas similarly and avoids stand-alone one-off prohibitions” (at para 50). Do you think that McLachlin CJ provided adequate support for that characterization of zoning legislation?

4. How would you analyze *Lacombe* through the lens of Simeon’s three criteria of choice? Which of those criteria would you see being most relevant: community, functional efficiency, or democracy? What impact would each of the three criteria have on your thinking about the appropriate outcome?

IV. OPERABILITY: THE PARAMOUNTCY DOCTRINE

Federal systems require a mechanism for dealing with the possibility of conflict between valid national and regional laws. In some federal constitutions, the rules for dealing with such conflicts are provided expressly by the constitutional document. In Canada, however, the Constitution is silent on the issue, with three very specific, narrowly defined exceptions. Section 95 of the *Constitution Act, 1867* recognizes agriculture and immigration as areas of concurrent jurisdiction and provides that provincial laws shall have effect only to the extent that they are not “repugnant” to any Act of Parliament. Similarly, s 92A, added by constitutional amendment in 1982, confers on provincial legislatures a concurrent power to enact laws in relation to the export of natural resources to other provinces, subject to the paramountcy of federal legislation in the case of conflict. Section 94A, added by constitutional amendments in 1951 and 1964, provides for concurrency in relation to old-age pensions and supplementary benefits (including survivors’ and disability benefits) but provides a form of provincial paramountcy by stating that no federal law “shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.” But for most subjects of legislation, including all of those listed in ss 91 and 92, no paramountcy rule is specified in the Constitution.

The absence in the Constitution of a general set of rules for dealing with conflict between federal and provincial laws may be explained by the belief of the drafters, in 1867, that overlap would not occur given the exclusivity of the spheres of legislative jurisdiction set out in ss 91 and 92 or perhaps that any problems of conflict that did arise between federal and provincial laws would be solved in the political arena through the federal Parliament’s exercise of the declaratory power in s 92(10)(c) or the powers of reservation and disallowance granted to the governor general in s 90. In any event, a judicially created rule filled the gap: the doctrine of federal paramountcy, modelled on the rule found in s 95. It provides that in cases of conflict between federal and provincial laws, the federal law is paramount and the provincial law is *inoperative* to the extent of the conflict.

Note that if a conflict is found to exist by virtue of the application of the paramountcy rule, the provincial law is not declared invalid. Its operation is merely suspended to the extent that, and for as long as, it conflicts with federal legislation. If the federal legislation is repealed, the conflict disappears, and the provincial law may once again be applied.

The key issue in cases in which the federal paramountcy doctrine is invoked is whether a real conflict exists between federal and provincial laws. The answer to that question depends on what the term "conflict" is understood to mean for this purpose. As you will see, the Supreme Court of Canada has been asked to consider a broad range of different meanings of that term, and your main challenge as you read through the case excerpts that follow will be to determine, as best you can, which of these meanings have been accepted and which have been rejected. Before we run through the various meanings that have been proposed to the Court, it is important to note that the choice between a narrow and a broad conception of "conflict" has profound implications for the balance of power between the federal and provincial levels of government in Canada. A narrow conception—one that results in a conflict being found in only the rarest of circumstances—leaves much greater room for provincial legislation to operate in areas in which federal legislation is also applicable than does a broad conception—one that results in a conflict being found in many more circumstances. Be sensitive to the importance of this choice for Canadian federalism as you assess the reasoning process that the Court uses when it is called on to make it.

The different meanings of, or tests for, "conflict" to which you will see the Supreme Court making reference, either on its own initiative or on the initiative of one of the parties, in the cases that follow can usefully be summarized as follows:

1. *Impossibility of dual compliance* (also known as "express contradiction" and "operational conflict"). This asks whether it is impossible for the people who are subject to the federal and provincial enactments in question to comply with both.
2. *Duplication*. This asks whether the provincial legislation duplicates the federal legislation.
3. *Impossibility of giving dual effect* (usually placed under the rubric of impossibility of dual compliance, but arguably better understood as a distinct understanding in its own right). This asks whether a judge or other government decision-maker before whom both enactments are relied on by contesting parties can give effect to both.
4. *Frustration of federal purpose*. This asks whether permitting the provincial enactment to operate in the circumstances in question would serve to frustrate the purpose underlying the federal enactment.
5. *Federal intention to cover the field* (also known as "negative implication" or "occupying the field"). This asks whether Parliament, by legislating in a particular area, has enacted a code that was intended to be complete and thus by implication was intended to oust the operation of any provincial laws.

Note that, by listing all five of these different understandings, or tests, of conflict here, we are not implying that they have all been accepted as appropriate definitions by the Supreme Court. They have been included on the list because they have all been proposed to or considered by the Supreme Court at various times. It is also important to note that these tests are not mutually exclusive—that is, accepting one does not mean rejecting others; it would not be impossible, at least in theory, for the Court to accept all five.

Note also that the language we have used to describe the third understanding of conflict—that is, the impossibility of giving dual effect—has hardly ever been used by the Supreme Court. (See, by way of rare example, Binnie and LeBel JJ in *British Columbia (AG) v Lafarge Canada Inc*, 2007 SCC 23 at para 82.) We use it here because we think that it is important to give it the status of a distinct understanding rather than leave it, as the Court has tended to do, as an unacknowledged branch of the impossibility of dual compliance understanding. What distinguishes this understanding from the impossibility of dual compliance understanding is

not just that it focuses on a different legal entity—the state decision-maker instead of the person subject to the federal and provincial legislation at issue—and asks a different question. It also allows for the paramountcy doctrine to have much broader reach than that understanding. Take, for example, a situation in which the federal legislation in question creates a legally enforceable right for someone's benefit that the provincial legislation makes it illegal to exercise. Under a strict interpretation of the impossibility of dual compliance understanding, that test is not met because the individual who has been given the legally enforceable right can comply with both enactments simply by not exercising that right. By contrast, a court before whom that individual invokes that federally granted right in defence to a charge under the provincial legislation cannot both give effect to the right (and acquit the individual) and the provincially created offence (which, assuming that the necessary facts are established by the Crown, would lead to a conviction). Acceptance of this understanding, therefore, has significant implications for the balance of federal and provincial authority.

The cases excerpted below are all of relatively recent origin, the oldest having been decided in the mid-1970s. The jurisprudence that predated these cases was far from consistent. During the Judicial Committee of the Privy Council (JCPC) era, considerable support was shown for the occupying the field test. When the Supreme Court assumed the status of court of last resort, that test was rejected, and a much narrower one took its place. That narrower approach, which left a great deal of room for the concurrent operation of federal and provincial statutes, was exemplified by a series of cases dealing with highway traffic offences decided in the 1960s and 1970s, in which the Court declined to hold inoperative provincial statutes that imposed different—and almost always stricter—standards for driving offences than those set out in the *Criminal Code*. We begin with a case that deals not with highway traffic offences as such but with the consequences flowing from having been convicted of such an offence, in this instance an offence created by the *Criminal Code*.

Ross v Registrar of Motor Vehicles

[1975] 1 SCR 5, 1973 CanLII 176

[In 1972, under s 234 of the *Criminal Code*, Ross was convicted of driving while impaired. At the time, s 238(1) of the Code allowed a trial judge to make, in addition to any other punishment, "an order prohibiting the accused from driving a motor vehicle in Canada, at all times or at such times and places as may be specified in the order ... during any period not exceeding three years." (Section 238(1) had recently been amended; the previous version had only allowed for an order for a single, continuous period.) Section 238(2) provided that a copy of any order made under s 238(1) was to be sent to the registrar of motor vehicles for the province that had issued the accused's driver's licence. The judge sentencing Ross ordered that "[t]he accused shall be prohibited from driving for a period of six months except Monday to Friday, 8:00 a.m. to 5:45 p.m. in the course of employment and going to and from work" (at 7). The order further provided that Ross's driver's licence was not to be suspended and that the registrar of motor vehicles be advised of the order.

Despite the order, the registrar of motor vehicles in the province of Ontario, where Ross resided, suspended Ross's licence for three months in accordance with s 21 of the Ontario *Highway Traffic Act*, RSO 1990, c H.8. That section provided that the licence of any person convicted of an offence under any of several sections of the *Criminal Code*, including s 234, was thereupon suspended for a period of three months for the first offence and six months where personal injury, death, or damage to property occurred in connection with the offence.

Ross sought a declaration that s 21 of the *Highway Traffic Act* was inoperative because of its conflict with s 238 of the *Criminal Code*. The registrar of motor vehicles and the provincial attorney general responded by requesting a declaration that s 238(1) of the *Criminal Code* was *ultra vires*. The Supreme Court was required to deal with three issues: (1) was the provincial legislation—that is, s 21 of the *Highway Traffic Act*—valid; (2) was the federal legislation—that is, s 238(1) of the *Criminal Code*—valid; and (3) if both pieces of legislation were valid, was there a conflict between the two provisions, requiring the application of the rule of federal paramountcy, with the result that the provincial legislation would be inoperative.]

PIGEON J (Abbott, Martland, Ritchie, and Dickson JJ concurring):

[Justice Pigeon began by addressing the challenges to the validity of the federal and provincial enactments at issue. He rejected those challenges and therefore held that both laws had been validly enacted. With respect to the provincial legislation, he found that it dealt with licensing for the purpose of regulating highway traffic, primary responsibility for which rests with the provinces, and was not in its true character an attempt to prescribe further penalties for criminal offences. He found no basis for a claim that the federal legislation invaded provincial jurisdiction. He then proceeded to address the question of whether there was a conflict between the two enactments.]

The direction that Ross's operator's licence was not to be suspended shows that the judge who made the prohibitory order considered not only that the prohibition may be limited as to time and place, but also that the person to whom the order is directed should enjoy the right to drive at a specified time and place, irrespective of provincial legislation concerning the suspension of driving privileges. In terms, the *Criminal Code* merely provides for the making of prohibitory orders limited as to time and place. If such an order is made in respect of a period of time during which a provincial licence suspension is in effect, there is, strictly speaking, no repugnancy. Both legislations can fully operate simultaneously. It is true that this means that as long as the provincial licence suspension is in effect, the person concerned gets no benefit from the indulgence granted under the federal legislation. But is the situation any different in law from that which was considered in the *Egan* case [*Provincial Secretary of Prince Edward Island v Egan*, [1941] SCR 396], namely, that due to the provincial legislation, the right to drive was lost by reason of the conviction, although the convicting magistrate had made no prohibitory order whatsoever?

Reference was made in this case to s. 5(1) of the *Criminal Code* which reads:

- 5(1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,
 - (a) a person shall be deemed not to be guilty of that offence until he is convicted thereof; and
 - (b) a person who is convicted of that offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

It should now be taken as settled that civil consequences of a criminal act are not to be considered as "punishment" so as to bring the matter within the exclusive jurisdiction of Parliament ...

In *O'Grady v. Sparling*, [1960] SCR 804, the question of repugnancy between *Criminal Code* provisions and provincial motor vehicle legislation was considered by the full Court. The problem was whether provincial legislation making it an offence to drive "without due care and attention" was repugnant to s. 221(1) (now

s. 233(1) of the *Criminal Code*). It was determined that the federal enactment did not make a crime of inadvertent negligence and [the provincial negligence offence] was valid. Only the two dissenting judges considered that "by necessary implication," the *Criminal Code* [also said what kinds or degrees of negligence shall (not) be punishable] In other words, the majority decided that Parliament did not implicitly permit conduct which did not come within the description of the *Criminal Code* offence. Therefore, the legislation could validly prohibit such conduct under penalty as long as this was done for a proper provincial purpose. ...

In my view, it should be said in the present case that Parliament did not ... purport to deal generally with the right to drive a motor vehicle after a conviction for certain offences. The only change effected was that a larger area of discretion was given to the convicting magistrate. Instead of being authorized only to make an order prohibiting driving for a definite length of time not exceeding the period stated, the magistrate was empowered to issue an order limited as to time and place. No authorization was given to make an order such as made in the present case, directing that the licence of the person convicted be not suspended. It seems clear to me that this order was made by an inferior Court completely without jurisdiction and is to be ignored.

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It may be of some interest to observe that under the Australian constitution, a principle was developed to determine whether a field of legislation is to be considered as occupied by federal legislation so as to exclude or make inoperative State legislation. The rule was stated by Dixon J, in *Ex p. McLean* (1930), 43 CLR 472 at p. 483, in the following statement that was subsequently approved by the Privy Council (*O'Sullivan v. Noarlunga Ltd.*, [1957] AC 1 at p. 28):

The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.

Of course, if we were to apply that rule, it would have to be said that Parliament did not purport to state exhaustively the law respecting motor driving licences, or the suspension or cancellation for driving offences. Therefore, the question whether this could validly be done by Parliament does not arise.

For those reasons, I would answer the questions of law stated in the order of the Supreme Court of Ontario by stating that s. 21 of the *Highway Traffic Act* is valid and operative legislation, and that s. 238 of the *Criminal Code* (as amended), is also valid. I would make no order as to costs as none were demanded.

JUDSON J (dissenting in part):

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Turning now to the questions submitted, I am not in any doubt ... [that] s. 21 of the *Highway Traffic Act* is valid provincial legislation, and s. 238(1) of the *Criminal Code*, either in its original form or as amended in 1972, is within the powers of the Parliament of Canada. This was clearly decided in *Provincial Secretary of Prince Edward Island v. Egan*. The difficulty arises with respect to ... whether s. 21 of the *Highway Traffic Act* is rendered inoperative by s. 238(1) of the *Criminal Code*....

In the *Ross* case, the *Criminal Code*, as applied, and the provincial statute, s. 21 of the *Highway Traffic Act*, are in direct conflict and the federal legislation must prevail. This situation did not arise in the *Egan* case, where there was no order for the

suspension of the licence made by the convicting magistrate. The power of the Province to impose an automatic suspension must give way to an order for punishment validly made under the *Criminal Code* and to that extent the provincial suspension is inoperative. ...

SPENCE J (dissenting in part):

... I have come to the conclusion that I agree with the views expressed by Mr. Justice Judson. ...

By the enactment of s. 238(1) in its amended form in 1972, Parliament has stipulated the penalties attached to the offence of, *inter alia*, impaired driving, and therefore the matters specified are excluded from provincial jurisdiction.

For the reasons outlined by my brother Judson, after the enactment of s. 238(1) in its present form and when that section is used by the Court ..., the subject-matter of the order made by that Court within its jurisdiction cannot be affected by the provision of the provincial statute dealing with suspension of licences and particularly s. 21 of the *Highway Traffic Act*. ...

I would therefore dispose of the Ross appeal in the fashion proposed by my brother Judson.

Judgment accordingly.

The narrower approach to paramountcy that emerged in the highway traffic cases in the 1960s and 1970s was confirmed by the Supreme Court of Canada in 1982 in *Multiple Access Ltd v McCutcheon*, immediately below, which is regarded as the foundational case on the modern approach to paramountcy. However, you will see from the cases that have succeeded *Multiple Access* that this remains an uncertain area of law as the Court has tried to respond to some of the limitations of a strict impossibility of dual compliance test while striving to adhere to the principle of leaving ample legislative space to the provinces.

Multiple Access Ltd v McCutcheon

[\[1982\] 2 SCR 161, 1982 CanLII 55](#)

[The facts of this case are set out in more detail in the excerpt dealing with the double aspect doctrine in Section III.B. Briefly, the case involved federal and Ontario statutes regulating insider trading in securities. The Ontario *Securities Act*, RSO 1970, c 426, prohibited insider trading in any and all shares trading on the Toronto Stock Exchange. The *Canada Corporations Act*, RSC 1970, c C-32, had almost identical provisions, but applicable only to trading of shares in corporations incorporated under federal law. A shareholder action was initiated against insiders of Multiple Access Inc, a federally incorporated company, with respect to trades on the Toronto Stock Exchange. The shareholder initiated the proceeding under the Ontario *Securities Act*, and the Ontario Securities Commission took carriage of the case. The respondents, the alleged insider traders, argued on the basis of the doctrine of interjurisdictional immunity that the Ontario statute could not validly apply to their case because the regulation of the trading in shares of federally incorporated companies falls within a core area of exclusive federal jurisdiction. In the alternative, they relied on the doctrine of federal paramountcy to assert that, in the case of a federally incorporated company, the Ontario provisions were rendered inoperative by the provisions of the *Canada Corporations Act* that deal with the issue. This latter

argument was advantageous to the alleged insider traders because the limitation period for initiating an action under the federal statute had already elapsed.

The trial judge ruled that the federal and provincial laws could operate concurrently, but both the Divisional Court and the Court of Appeal took the view that the provincial law was inoperative by virtue of the doctrine of paramountcy. In the case extract reproduced in Section III, a majority of the Supreme Court relied on the double aspect doctrine to hold that both enactments were valid. That majority also held that the provincial legislation could constitutionally be applied to the trading in Ontario of the shares of federally incorporated companies. The majority then turned to the paramountcy issue: was the Ontario legislation rendered inoperative to the extent that it overlapped with the virtually identical provisions of the federal Act? Three dissenting judges decided that the federal provisions were invalid and thus did not reach the paramountcy issue.

The paramountcy issue usually requires judges to determine the degree of overlap or conflict between federal and provincial statutes that differ in at least some aspects. This case is distinctive in that the two pieces of legislation regulated insider trading in virtually identical ways. The question, therefore, was whether duplicate legislation could operate at both the federal and provincial levels, or was duplication itself a kind of conflict that should give rise to federal paramountcy? As you consider the issue, bear in mind the criteria outlined by Simeon at the outset of this chapter that are likely to influence judicial interpretation of the division of powers. What values could be invoked in favour of letting both laws stand? What values could be invoked in favour of using paramountcy to eliminate duplication and overlap?]

DICKSON J (Laskin CJ and Martland, Ritchie, McIntyre, and Lamer JJ concurring):

Having found ss. 100.4 and 100.5 of the *Canada Corporations Act* to be *intra vires* the Parliament of Canada, and ss. 113 and 114 of the *Ontario Securities Act* to be *intra vires* the Legislature of Ontario, there remains but to respond to the third and final question. [Are ss. 113 and 114 of the *Ontario Act* suspended and rendered inoperative in respect of corporations incorporated under the laws of Canada? ...

Although the appellant argues, weakly, that there are minor differences in the legislation, Henry J found an identity of purpose, conduct and remedy. Does mere duplication constitute "the conflict" required by the paramountcy doctrine in order to render a provincial statutory provision inoperative? This is the issue upon which Mr. Justice Henry at trial and Mr. Justice Morden in the Divisional Court parted ways. The same difference of opinion is reflected by the commentators.

Mr. Justice Henry chose a more narrow and if I may say so, more modern, test of conflict with the concomitant result of leaving to the provinces ample legislative room. He adopted the test propounded by Mr. Justice Martland in *Smith v. The Queen*, [1960] SCR 776 at 800:

It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.

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On the basis of the "overwhelming weight of recent authority" Mr. Justice Henry found that the two sets of statutory provisions could "live together and operate concurrently." Any "diseconomies" resulting from the proliferation of laws and administration were inherent in the federal system. Double liability would be avoided by "cooperation between administrators and the ordinary supervision of the courts over duplication of proceedings before them."

Mr. Justice Henry and Professor Hogg are of one mind. Professor Hogg writes:

There is no reason why duplication should be a case of inconsistency once the negative implication or covering the field test is rejected. On the contrary, duplication is "the ultimate in harmony." The argument that it is untidy, wasteful and confusing to have two laws when only one is needed reflects a value which in a federal system often has to be subordinated to that of provincial autonomy. Nor does the latter value disappear when provincial law merely duplicates federal law, because the suspension of a provincial law may create a gap in a provincial scheme of regulation which would have to be filled by federal law—a situation as productive of untidiness, waste and confusion as duplication.

[PW Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 110.]

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Morden J adopts the older and more prevalent view of the commentators that "The authorities establish one of the implications of Dominion paramountcy to be that provincial duplicative legislation is suspended and inoperative. Simple duplication by a province is not permitted": Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 *McGill LJ* 185 at p. 195; see also B. Laskin, *Laskin's Canadian Constitutional Law* (Scarborough, ON: Carswell, 1975), at p. 117: "If member and federal measures are substantial duplicates, every situation covered by one is likewise covered by the other and there is no provincial room left, given full operation of the federal law." Morden J finds that "Resort to one statute, from a practical point of view, precludes the other from having any application."

The conflict between the reasons of Mr. Justice Henry and the reasons of Mr. Justice Morden lies in large measure upon the opinion of the latter that the paramountcy doctrine became applicable because a plaintiff could resort to one set of provisions only and, having done so, there would be no scope for the other to have operational effect. That ... is not, in my view, conclusive. The provincial legislation merely duplicates the federal; it does not contradict it. The fact that a plaintiff may have a choice of remedies does not mean that the provisions of both levels of government cannot "live together" and operate concurrently. ...

• • •

... [T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.

The respondents strenuously support Mr. Justice Morden's reasons in this court. Counsel for the respondent McCutcheon argues: "Where two actions are brought under the federal and provincial legislation against the insider, either concurrently or *seriatum*, the Court will not permit both to proceed to judgment. Both pieces of legislation cannot operate concurrently in that resort to one precludes resort to the other. In such case, the two statutes meet and are in conflict." I am not of that opinion.

With Mr. Justice Henry I would say that duplication is, to borrow Professor Lederman's phrase, "the ultimate in harmony." ... **Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.**

The following passage from Professor Lederman's article "The Concurrent Operation of Federal and Provincial Laws in Canada," *supra*, at p. 199 (fn. 39), is apposite:

[O]ur country is increasingly moving away from the older classical federalism of "watertight compartments" with provincial legislatures and federal parliament carefully

keeping clear of one another. We seem to be moving towards a co-operative federalism. ... The multiplication of concurrent fields is one of the facets of this trend.

In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. The courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions. The fact that a court must authorize proceedings under the Ontario Act provides a safeguard No court would permit double recovery.

I find that ss. 113 and 114 of the *Securities Act* of Ontario are not suspended or rendered inoperative in respect of corporations incorporated under the laws of Canada by ss. 100.4 and 100.5 of the *Canada Corporations Act*.

• • •

Appeal allowed.

NOTES AND QUESTIONS

1. What are we to make of Dickson CJ's statement that "[t]he courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions"? Can this statement, which focuses on the position of a court seized of a dispute to which both enactments could be applied, be interpreted as lending support to the notion that the Court sees merit in the "impossibility of giving dual effect" understanding of conflict, either as a branch of the impossibility of dual compliance understanding or as a distinct understanding in its own right?

2. *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961, 1999 CanLII 648 (cited with approval in *Lafarge* at para 82), concerned an alleged conflict between federal and provincial farm debt legislation. A stay of proceedings was issued under federal law at the same time as an order authorizing foreclosure proceedings pursuant to provincial legislation. A particular creditor could comply with both laws if they held off on foreclosure until the stay was lifted. Once the creditor sought to initiate foreclosure proceedings, however, a court could not also give effect to the federally imposed stay. On that basis, the Supreme Court of Canada held that there was "express contradiction" within the extended meaning of the relevant jurisprudence" (at para 42), and therefore the doctrine of federal paramountcy was triggered. Does *M & D Farm* support the inclusion of the impossibility of giving dual effect understanding of conflict in the list of accepted understandings? Why or why not?

3. The fact situation in *Multiple Access* involved duplicative legislation where there was no policy conflict between the federal and provincial schemes. Are the reasons adopted by the Court for favouring an "express contradiction" test compelling in situations where the overlapping federal and provincial laws differ in their objectives? Does *Multiple Access* mean that even in cases where the federal and provincial laws differ in that respect the courts are not to consider policy conflict in determining paramountcy but are only to ask whether a citizen can comply with both? See *Bank of Montreal v Hall*, [1990] 1 SCR 121, 1990 CanLII 157, which follows.

4. How should the courts deal with overlapping penal legislation? For example, how should the courts deal with a case where an individual could be prosecuted for an offence under both the federal *Criminal Code* and provincial regulatory legislation? This might happen in the case of a death in a workplace accident. Should the court consider principles of criminal law, such as double jeopardy? What is the effect of s 11(h) of the *Canadian Charter of Rights and Freedoms*? See *R v Wigglesworth*, [1987] 2 SCR 541, 1987 CanLII 41.

Bank of Montreal v Hall

[\[1990\] 1 SCR 121, 1990 CanLII 157](#)

[In return for a bank loan, Hall, a farmer, granted the bank a security interest on a piece of farm machinery pursuant to what was then s 178 of the federal *Bank Act*, RSC 1985, c B-1 (now s 427 of the *Bank Act*, 1991, c 46). Hall defaulted on his loan, and the bank, pursuant to the provisions of the *Bank Act*, seized the piece of machinery and brought an action to enforce its real property mortgage loan agreement. The bank did not follow the procedures established in the provincial *Limitation of Civil Rights Act*, RSS 1978, c L-16. Under s 27 of that Act, failure to give the requisite notice of intention to seize resulted in the termination of the security interest and the release of the debtor from further obligations. The Court of Queen's Bench of Saskatchewan decided that the bank was not required to comply with the *Limitation of Civil Rights Act* in enforcing a security interest under the *Bank Act*. The Saskatchewan Court of Appeal reversed. On further appeal, the Supreme Court of Canada considered the validity of the relevant provisions of both Acts, as well as whether the security interest created under the *Bank Act* could be subjected to the provincial procedures for enforcement of security interests.

The judgment of the court was delivered by La Forest J. He held that ss 19 to 36 of the *Limitation of Civil Rights Act* came within property and civil rights under s 92(13) and were thus *intra vires*. He then concluded that ss 178 and 179 of the *Bank Act* were also *intra vires* the federal government under s 91(15). The banking power was found to empower Parliament not only to create the security interest but also to define the methods for realization and enforcement of that security interest. Reviewing the history of the s 178 security interest, which showed that its creation was predicated on the pressing need to provide, on a nationwide basis, for a uniform security mechanism, La Forest J reasoned that the definition of the precise manner in which a bank is permitted to realize on its s 178 security interest was not a mere appendage or gloss but actually inseparable from the legislative scheme.

In concluding that there was a conflict, La Forest J appears to depart somewhat from the narrow understanding of conflict articulated in *Multiple Access*. What values does La Forest J invoke, or what values could be invoked, in favour of his approach? What values could have been invoked in favour of an approach to paramountcy that would have upheld the Saskatchewan legislature's attempt to provide greater financial security to farmers?]

La FOREST J (Wilson, L'Heureux-Dubé, Sopinka, and Cory JJ concurring):

Do sections 178 and 179 of the *Bank Act* conflict with ss. 19 to 36 of the *Limitation of Civil Rights Act* so as to render inoperative ss. 19 to 36 in respect of security taken pursuant to s. 178 by a chartered bank?

The decision of this Court in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1, has delimited the circumstances that will justify application of the doctrine of paramountcy, whereby otherwise validly enacted provincial legislation will be held to be inoperative to the extent that it conflicts with federal legislation. In a widely quoted passage, Dickson J, as he then was, espoused the view that the doctrine of paramountcy would only need to be invoked in instances where it is impossible to comply with both legislative enactments. ...

Multiple Access Ltd. v. McCutcheon was a case involving duplicative federal and provincial legislation. This Court rejected the view that such enactments could not operate concurrently simply because resort to the one would preclude resort to the other. . . . In the following excerpt Dickson J provides a cogent and succinct rationale for this view, at pp. 189-90 SCR:

... there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament. [Emphasis added.]

On the basis of these principles, the question before me is thus reducible to asking whether there is an "actual conflict in operation" ... in the sense that the legislative purpose of Parliament stands to be displaced in the event that the appellant bank is required to defer to the provincial legislation in order to realize on its security. This calls for an examination of the provincial legislation. [Justice La Forest's detailed examination is omitted.]

On a comparison of the two enactments, can it be said that there is an "actual conflict in operation" between them, giving that phrase the meaning above described? I am led inescapably to the conclusion that there is. The *Bank Act* provides that a lender may, on the default of his borrower, seize his security, whereas *The Limitation of Civil Rights Act* forbids a creditor from immediately repossessing the secured article on pain of determination of the security interest. There could be no clearer instance of a case where compliance with the federal statute necessarily entails defiance of its provincial counterpart. The necessary corollary to this conclusion is that to require the bank to defer to the provincial legislation is to displace the legislative intent of Parliament. As the dissenting judge, Wakeling J, put it in the Court of Appeal, at pp. 34-35:

The provincial legislation obviously intends that the unqualified right of seizure granted to the bank is to be restricted. It does so by saying a bank may exercise the right of seizure given by s. 178(3) but only by leave of a judge, who will apply criteria formulated by the Province as to when and under what circumstances seizure can take place.

I do not think it is open to a provincial legislature to qualify in this way a right given and defined in a federal statute; see *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co.*, [1941] SCR 87, per Duff CJ, at p. 95.

I am not, with respect, dissuaded from this conclusion by the reasoning of the majority in the Court of Appeal to the effect that requiring a bank to defer to the provisions of the *Limitation of Civil Rights Act* would, in any given instance, have, in all likelihood, the sole effect of delaying the bank's ability to take possession of its security. ...

The reasoning of the majority ... rests on a misinterpretation of what was said in *Multiple Access Ltd. v. McCutcheon*. For, as we have seen, dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose. In this instance ... Parliament's legislative purpose in defining the unique security interest created by ss. 178 and 179 of the *Bank Act* was manifestly that of creating a security interest susceptible of uniform enforcement by the banks nationwide, that is to say a lending regime *sui generis* in which [citing *Canadian Imperial Bank of Commerce v. R* (1984), 52 CBR 145, at p. 159], the "bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (emphasis added). This, of course, is merely another way of saying that Parliament, in its wisdom, wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on provincial legislation governing the realization and enforcement of security interests.

I can only conclude that it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in

the *Bank Act* itself. ... [T]he security interest and realization procedure must, in essence, be viewed as a single whole in that both components of the legislation are fully integral to Parliament's legislative purpose in creating this form of financing. In other words, a s. 178 security interest would no longer be cognizable as such the moment provincial legislation might operate to superadd conditions governing realization over and above those found within the confines of the *Bank Act*. To allow this would be to set at naught the very purpose behind the creation of the s. 178 security interest.

Accordingly, the determination that there is no repugnancy cannot ... rest on the [fact] that, at the end of the day, the bank might very well be able to realize on its security if it defers to the provisions of the provincial legislation. ... That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible. Such is the case here. ...

... At the end of the day, ... this is simply a case where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation.

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Appeal allowed.

NOTES AND QUESTIONS

1. The decision in *Hall* is difficult to reconcile with a number of earlier cases that upheld as operative provincial laws requiring compliance with more stringent standards than their federal counterparts. For example, in *Ross*, excerpted above, the Court held that drivers who were convicted of a serious driving offence under the federal *Criminal Code*, but then permitted by the sentencing judge to continue driving to and from work, could comply with the more severe licence suspension, which provincial legislation imposed as a result of the conviction, by simply not driving at all. Similarly, as Professor Hogg has pointed out, it was possible for a bank to comply with both laws in *Hall*: "If the bank had served the notice required by the provincial law, the bank would not have been in breach of the federal law. The sole effect of compliance with the provincial law would be to delay the bank in realizing its security": Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (looseleaf) at 16-8. After *Hall*, it appeared that the "conflict in operation" referred to in *Multiple Access* that is necessary to give rise to federal paramountcy can be satisfied by either an impossibility of dual compliance or an incompatibility of legislative purposes.

2. Justice La Forest attached considerable importance in his reasoning process to the finding that, in his view, "it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the *Bank Act* itself." Are we to take from this recognition of the "federal intention to cover the field" as a distinct basis on which to apply the federal paramountcy doctrine, or does it merely suggest that such a federal intention is a relevant consideration in applying the "frustration of federal purpose" test?

3. Do you believe that the federal intention to cover the field understanding of conflict should be a distinct basis on which to apply the paramountcy doctrine? Should it be open to Parliament to trigger the application of the doctrine simply by including language in federal legislation to the effect that "Parliament intends that this legislation apply even if it means that valid provincial legislation directed to the same area will have to be held inoperative"? For an argument that it should not be open to Parliament to do that, see Robin Elliot, "Safeguarding

Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 SCLR (2d) 629.

4. At the end of his judgment in *Bell No 2*, found below in Section V, Beetz J inserted an *obiter dictum* suggesting that "a practical and functional incompatibility" between two legal regimes should be sufficient to give rise to federal paramountcy. Justice Beetz held that the interjurisdictional immunity doctrine (see Section V below) prevented the application of Quebec health and safety legislation to federal undertakings. Therefore, a paramountcy issue did not arise. If it had arisen, however, he would have held the provincial law inoperative. As he explained (at para 332),

a procedural conflict may suffice to render the provincial act inoperative if the conflict is irreconcilable or if, as the majority held, it leads to a deadlock. The mere duplication of two enactments certainly does not make the Act inoperative: *Multiple Access Ltd. v. McCutcheon* However, in view of the difference between the mechanisms resulting in re-assignment in both statutes, between the rights conferred on workers under the two schemes, between the types of danger which give rise to the right, between the procedures and the avenues of appeal, I am inclined to think as did the majority on the Court of Appeal that there is a practical and functional incompatibility between the two groups of provisions.

5. What values influence the choice between the broader test of paramountcy favoured by La Forest J in *Hall* and Beetz J in *Bell No 2* and the narrower approach favoured by Dickson J in *Multiple Access*? Which of the "criteria of choice" identified by Simeon at the outset of this chapter would you invoke in favour of each approach?

6. The *Hall* incompatibility of legislative purposes approach to paramountcy was followed in *Mangat*. The case involved a conflict between a provision of the BC *Legal Profession Act* that prohibited non-lawyers from appearing as counsel for a fee and provisions of the federal *Immigration Act* that permitted non-lawyers to appear as counsel before the IRB. (The federal legislation made provision for regulations to be made concerning the appearance of persons other than members of a provincial bar before immigration tribunals, but no such regulations had been promulgated.) Justice Gonthier, writing for the Court, found that both laws were valid; the regulation of legal representation in immigration proceedings had a double aspect. Turning to the paramountcy issue, Gonthier J concluded as follows:

[72] In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal* ... , dual compliance is impossible. To require "other counsel" to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*. In those provisions, Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals. Where there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose. Finally, it would be impossible for a judge or an official of the IRB to comply with both acts.

Note that Gonthier J applied more than the frustration of federal purpose understanding of conflict in this passage. Which other understandings did he also apply?

7. The *Hall* approach was also applied in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001 SCC 40](#). At issue was a municipal by-law that restricted the use of pesticides to specified locations for specified purposes. The Court ruled that the by-law

was not rendered inoperative by the federal *Pest Control Products Act*, SC 2002, c 28. The federal Act regulated which pesticides could be registered for manufacture or use in Canada. Justice L'Heureux-Dubé, writing the principal judgment for four members of the Court, characterized the federal law as permissive legislation that did not purport to exhaustively regulate pesticides. In those circumstances, she ruled, there was no conflict that gave rise to federal paramountcy. There was no impossibility of dual compliance, L'Heureux-Dubé J wrote, nor did the by-law displace or frustrate the purpose of the federal legislation.

Rothmans, Benson & Hedges Inc v Saskatchewan

2005 SCC 13

MAJOR J (McLachlin CJ and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, and Charron JJ concurring):

[1] The question on this appeal is whether Saskatchewan legislation, and in particular s. 6 of *The Tobacco Control Act*, SS 2001, c. T-14.1, is sufficiently inconsistent with s. 30 of the federal *Tobacco Act*, SC 1997, c. 13, so as to be rendered inoperative pursuant to the doctrine of federal legislative paramountcy. At the end of the hearing, the Court concluded that that question should be answered in the negative and allowed the appeal, with reasons to follow.

I. Facts

[2] In 1997, Parliament enacted the *Tobacco Act*. Section 4 of the statute speaks to its purpose as follows:

4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
 - (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
 - (b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
 - (c) to protect the health of young persons by restricting access to tobacco products; and
 - (d) to enhance public awareness of the health hazards of using tobacco products.

[3] Section 19 of the *Tobacco Act* prohibits the promotion of tobacco products and tobacco product-related brand elements, except as authorized elsewhere in the *Tobacco Act* or its regulations. Section 18 of the *Tobacco Act* defines "promotion" as:

... a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

[4] The provisions that follow s. 19 both prohibit specific types of tobacco product promotion, and permit other types of promotion that s. 19 would otherwise prohibit. Among those provisions, s. 30(1) provides that, "[s]ubject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element." Section 30(2) further provides that retailers may post signs indicating the availability and price of tobacco products.

[5] On March 11, 2002, *The Tobacco Control Act* came into force in Saskatchewan. Section 6 of that Act bans all advertising, display and promotion of tobacco or

tobacco-related products in any premises in which persons under 18 years of age are permitted.

[6] The respondent sued the appellant in the Saskatchewan Court of Queen's Bench, seeking two forms of relief: a declaration that s. 6 of *The Tobacco Control Act* is inoperative in light of s. 30 of the *Tobacco Act*, and a declaration that ss. 6 and 7 of *The Tobacco Control Act* are of no force and effect in light of s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The respondent applied ... for a summary determination by the court as to whether s. 6 of *The Tobacco Control Act* is inoperative in light of s. 30 of the *Tobacco Act* by virtue of the doctrine of federal legislative paramountcy.

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III. Analysis

[11] The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency. *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, is often cited for the proposition that there is an inconsistency for the purposes of the doctrine if it is impossible to comply simultaneously with both provincial and federal enactments. Dickson J (as he then was) wrote, at p. 191:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. ...

[12] However, subsequent cases indicate that impossibility of dual compliance is not the sole mark of inconsistency. Provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the doctrine. In *Bank of Montreal v. Hall*, [1990] 1 SCR 121, at p. 155, La Forest J wrote:

A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. **The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose.**

[Reference was also made to *Spraytech* and *Mangat*, both discussed above.]

[13] This concern about frustration of Parliament's legislative purpose may find its roots in *McCutcheon*, in which Dickson J stated, at p. 190:

... [T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; *the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament*. [Emphasis added.]

[14] In my view, the overarching principle to be derived from *McCutcheon* and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means. In this way, impossibility of dual compliance is sufficient but not the only test for inconsistency.

[15] It follows that in determining whether s. 6 of *The Tobacco Control Act* is sufficiently inconsistent with s. 30 of the *Tobacco Act* so as to be rendered inoperative through the paramountcy doctrine, two questions arise. First, can a person simultaneously comply with s. 6 of *The Tobacco Control Act* and s. 30 of the *Tobacco Act*? Second, does s. 6 of *The Tobacco Control Act* frustrate Parliament's purpose in enacting s. 30 of the *Tobacco Act*?

[16] Before answering those questions, it is necessary to examine the character of s. 30 of the *Tobacco Act*.

[17] Read in the context of the *Tobacco Act* as a whole, it is clear that the purpose and effect of s. 30 is to define with greater precision the prohibition on the promotion of tobacco products contained in s. 19. Specifically, it serves to exclude from the wide net of s. 19 promotion by way of retail display. In this way, it is like ss. 22(2), 26(1) and 28(1) of the *Tobacco Act*, which also exclude from the s. 19 prohibition certain types of tobacco product promotion that it might otherwise capture. This demarcation of the s. 19 prohibition represents a measured approach to protecting "young persons and others from inducements to use tobacco products," one of the purposes of the *Tobacco Act* set out in s. 4.

[18] However, in demarcating the scope of the s. 19 prohibition through s. 30, Parliament did not grant, and could not have granted, retailers a positive entitlement to display tobacco products. That is so for two reasons.

[19] First, ... the *Tobacco Act* is directed at a public health evil and contains prohibitions accompanied by penal sanctions. Accordingly, ... it falls within the scope of Parliament's criminal law power contained in s. 91(27) of the *Constitution Act, 1867*. ... As the criminal law power is essentially prohibitory in character, provisions enacted pursuant to it, ... do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament. This limited reach of s. 91(27) is well understood: see, for example, *O'Grady v. Sparling*, [1960] SCR 804; *Ross v. Registrar of Motor Vehicles*, [1975] 1 SCR 5; and *Spraytech*.

[20] Second, it is difficult to imagine how granting retailers a freestanding right to display tobacco products would assist Parliament in providing "a legislative response to a national public health problem of substantial and pressing concern" (*Tobacco Act*, s. 4). To put it slightly differently, an interpretation of s. 30 as granting retailers an entitlement to display tobacco products is unsupported by, and perhaps even contrary to, the stated purposes of the *Tobacco Act*.

[21] I do not accept the respondent's argument that Parliament, in enacting s. 30, intended to make the retail display of tobacco products subject only to its own regulations. In my view, to impute to Parliament such an intention to "occup[y] the field" in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady* (p. 820).

A. Impossibility of Dual Compliance

[22] It is plain that dual compliance is possible in this case. A retailer can easily comply with both s. 30 of the *Tobacco Act* and s. 6 of *The Tobacco Control Act* in one of two ways: by admitting no one under 18 years of age on to the premises or by not displaying tobacco or tobacco-related products.

[23] Similarly, a judge called upon to apply one of the statutes does not face any difficulty in doing so occasioned by the existence of the other. The judge, like this Court, can proceed on the understanding that *The Tobacco Control Act* simply prohibits what Parliament has opted not to prohibit in its own legislation and regulations.

[24] For an impossibility of dual compliance to exist, s. 30 of the *Tobacco Act* would have to require retailers to do what s. 6 of *The Tobacco Control Act* prohibits—i.e., to display tobacco or tobacco-related products to young persons.

B. Frustration of Legislative Purpose

[25] Section 6 of *The Tobacco Control Act* does not frustrate the legislative purpose underlying s. 30 of the *Tobacco Act*. Both the general purpose of the *Tobacco Act* (to address a national public health problem) and the specific purpose of s. 30 (to circumscribe the *Tobacco Act*'s general prohibition on promotion of tobacco products set out in s. 19) remain fulfilled. Indeed, s. 6 of *The Tobacco Control Act* appears to further at least two of the stated purposes of the *Tobacco Act*, namely, "to protect young persons and others from inducements to use tobacco products" (s. 4(b)) and "to protect the health of young persons by restricting access to tobacco products" (s. 4(c)).

[26] The conclusion that s. 6 of *The Tobacco Control Act* does not frustrate the purpose of s. 30 of the *Tobacco Act* is consistent with the position of the Attorney General of Canada, who intervened in this appeal to submit that the *Tobacco Act* and *The Tobacco Control Act* were enacted for the same health-related purposes and that there is no inconsistency between the two provisions at issue. While the submissions of the federal government are obviously not determinative of the legal question of inconsistency, there is precedent from this Court for bearing in mind the other level of government's position in resolving federalism issues

IV. Conclusion

[27] There is no inconsistency between s. 6 of *The Tobacco Control Act* and s. 30 of the *Tobacco Act* that would render the former inoperative pursuant to the doctrine of federal legislative paramountcy. ...

Appeal allowed.

NOTES AND QUESTIONS

1. Justice Major considered, but rejected, the argument made by the tobacco company in this case that s 6 of the provincial statute should be held inoperative because Parliament, in enacting s 30 of the federal statute, intended "to make the retail display of tobacco products subject only to its own regulations" (at para 21). In your view, did he reject that argument because he refused to accept that the federal intention to cover the field understanding of conflict can be used as a distinct basis for applying the doctrine of federal paramountcy, or did he reject it because he was unwilling to find on the evidence available that Parliament had such an intention when it enacted s 30? Why is that an important question to ask?

2. Does para 23 of this decision, in which Major J said that "a judge called upon to apply one of the statutes does not face any difficulty in doing so occasioned by the existence of the other," lend support to the recognition of the impossibility of giving dual effect understanding of conflict as a distinct basis on which to apply the doctrine of federal paramountcy?

3. In *Canadian Western Bank*, excerpted in Section V below, the Supreme Court of Canada, after rejecting the application of the doctrine of interjurisdictional immunity on the facts of the case, was unanimous in rejecting a claim that the Alberta legislation regulating the promotion of insurance was rendered inoperative in relation to banks under the doctrine of federal paramountcy. The banks had argued that "the federal *Bank Act* authorizes the banks to promote insurance, subject to enumerated restrictions, and that these enactments are

comprehensive and paramount over those of the province" (at para 98). Justices Binnie and LeBel for the majority, and Bastarache J writing separately, held that neither the impossibility of dual compliance test nor the frustration of federal purpose test was satisfied in the circumstances of that case. The reasoning of Binnie and Lebel JJ in relation to the paramountcy issue included the following passages:

[37] The "dominant tide" [of constitutional interpretation] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that

the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.

("The Supreme Court and the Law of Canadian Federalism" (1973), 23 *U.T.L.J.* 307, at p. 308)

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[74] ... [C]are must be taken not to give too broad a scope to *Hall*, *Mangat* and *Rothmans*. The Court has never given any indication that it intended, in those cases, to reverse its previous decisions and adopt the "occupied field" test it had clearly rejected in *O'Grady* in 1960. The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occupy[] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady*" (*Rothmans*, at para. 21).

[75] An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia* [[1982] 2 SCR 307], at p. 356). To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

4. By contrast, in *Lafarge*, Binnie and LeBel JJ, writing for a majority of six, held that the provincial legislation there at issue—a municipal zoning and development by-law—conflicted with and was thus rendered inoperative by the provisions of the *Canada Marine Act*, which authorized the Vancouver Port Authority to regulate land use on property it owned. In their view, both tests for finding a conflict were satisfied. The impossibility of dual compliance test was said to be satisfied because "[i]f the Ratepayers had succeeded in persuading the City to seek an injunction to stop the Lafarge project from going ahead without a city permit, the judge could not have given effect both to the federal law (which would have led to a dismissal of the application) and the municipal law (which would have led to the granting of an injunction)" (at para 82). The frustration of federal purpose test was said to be satisfied because "the

[Canada Marine Act] has authorized the [Vancouver Port Authority] to make its decision about the project and has enabled Lafarge to proceed on the basis of that authorization" (at para 84). Do you agree with the majority's application of these tests in that case? In relation to the first, is the majority using the impossibility to give dual effect test? In relation to the second, has the majority not substituted the intention to cover the field test for the frustration of the federal purpose test? (For an argument that the paramountcy doctrine was misapplied, see Carissima Mathen & Michael Plaxton, "Developments in Constitutional Law: The 2006-2007 Term" (2007) 38 SCLR (2d) 111 at 134-36.)

5. In COPA, excerpted in Section V below, the majority, speaking through McLachlin CJ, held that the provincial land-use legislation at issue was inapplicable to the location of a private aerodrome on the basis of the doctrine of interjurisdictional immunity. Although it was therefore unnecessary to address the paramountcy issue that had been raised by the challengers as an alternative line of argument in their attempt to avoid the reach of the provincial legislation, the majority nonetheless did go on to address it. The challengers' argument on that issue was essentially that the absence of any meaningful federal restrictions on the location of private aerodromes should be understood to mean that Parliament wanted to encourage people to establish such facilities wherever and whenever it wished to and that giving effect to the provincial legislation's prohibition against using land designated agricultural for any other purpose would frustrate that purpose. Chief Justice McLachlin rejected that argument on the basis that there was insufficient evidence in the record to prove that Parliament "deliberately adopted minimal requirements for the construction and licensing of aerodromes in order to encourage the spread of aerodromes" (at para 68). Before reaching that conclusion, McLachlin CJ said the following regarding the burden that rests on a party seeking to invoke the doctrine of federal paramountcy:

[66] ... That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission.

6. For another example of a case in which the Court adopted a restrained approach to the application of the federal paramountcy doctrine, see *Saskatchewan (AG) v Lemare Lake Logging Ltd*, [2015 SCC 53](#). The dispute in that case arose when Lemare Lake Logging Ltd (Lemare) brought an application under s 243(1) of the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA), for the appointment of a receiver over most of the assets of another company, called 3L Company Ltd. That company, which owed Lemare a considerable amount of money and in respect of which Lemare was a secured creditor, was involved in the farming business, which brought it under the protection of the *Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1. That statute stipulated that no civil actions could be commenced with respect to farm land in that province unless and until a number of preliminary steps had been taken. Lemare had not taken any of those steps. In spite of the similarities between this case and *Hall*, Abella and Gascon JJ, writing for the majority, held that the relevant provisions of the provincial statute did not conflict with s 243(1) of the BIA. In their view, the purpose of the latter provision was the narrow one of allowing secured creditors to apply for the appointment of a single, national receiver instead of having to apply for separate receivers in several provinces. It could therefore not be said that the provincial legislation frustrated the federal purpose. In the course of their reasoning, they invoked the principle of cooperative federalism and said that "harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility" (at para 21).

Alberta (AG) v Moloney

2015 SCC 51

[The Supreme Court of Canada was unanimous in this case, on the basis of the frustration of federal purpose test, that the provincial legislation at issue conflicted with, and therefore had to be held inoperative in the face of, the federal legislation at issue. However, there was a sharp disagreement between two sets of judges about the content or meaning of the impossibility of dual compliance test. Two members of the Court, writing through Côté J, argued for a strict interpretation of that test, whereas the other seven members, writing through Gascon J, adopted a more flexible interpretation. We reproduce here passages from each of the two judgments that bring this disagreement to light. As you read through these passages, ask yourself which of the two approaches you find more appealing and why.]

GASCON J (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ concurring):

[2] The alleged conflict in this case concerns, on the one hand, the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), and on the other hand, Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("TSA"). It stems from a car accident caused by the respondent while he was uninsured, contrary to s. 54 of the TSA. The province of Alberta compensated the individual injured in the accident and sought to recover the amount of the compensation from the respondent. The latter, however, made an assignment in bankruptcy and was eventually discharged. The BIA governs bankruptcy and provides that, upon discharge, the respondent is released from all debts that are claims provable in bankruptcy. The TSA governs the activity of driving, including vehicle permits and driver's licences, and allows the province to suspend the respondent's licence and permits until he pays the amount of the compensation.

[3] As a result of his bankruptcy and subsequent discharge, the respondent did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. The respondent contested this suspension, arguing that the TSA conflicted with the BIA, in that it frustrated the purposes of bankruptcy. The province replied that there was no conflict since the TSA was regulatory in nature and did not purport to enforce a discharged debt.

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[18] A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

[Justice Gascon reviewed the Court's prior jurisprudence, starting with *Multiple Access*, and reached the following conclusions:

[22] ... An express contradiction is nothing more than a clear, direct or definite conflict in operation, as opposed to an indirect or imprecise one. It is not an additional condition for a finding of actual conflict in operation.

[23] ... I find no indication in the Court's decisions pertaining to this first branch that the assessment of an actual conflict in operation is limited to the actual words or to the literal meaning of the words of the provisions at issue; quite the contrary.

Justice Gascon then continued as follows:]

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[26] That said, the case law assists in identifying typical situations where overlapping legislation will not lead to a conflict. For instance, duplicative federal and

provincial provisions will generally not conflict . . . Nor will a conflict arise where a provincial law is more restrictive than a federal law . . . The application of a more restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement . . .

[27] Be it under the first or the second branch, the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws . . . Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority . . .

[28] This is not to say, however, that courts must refrain from applying the doctrine where the two laws are genuinely inconsistent. In the assessment of such inconsistency for the purposes of paramountcy, a provincial intention to interfere with the federal jurisdiction is neither necessary nor sufficient. In fact, an intention to intrude may call into question the independent validity of the provincial law . . . The focus of the paramountcy analysis is instead on the effect of the provincial law, rather than its purpose . . . Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly . . .

[Justice Gascon then proceeded to apply his understanding of the impossibility of the dual compliance test to the overlapping legislation at issue in that case. He began this part of his reasons for judgment with a detailed description of the federal and provincial legislation at issue.]

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[60] ... In a case like this one, the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law. In that regard, the debtor's response to the suspension of his or her driving privileges is not determinative. In analyzing the operational conflict at issue in this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with s. 178(2) of the *BIA* . . . Thus, the laws at issue give inconsistent answers to the question whether there is an enforceable obligation: one law says yes and the other says no.

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[63] One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. Both laws cannot operate concurrently . . . "apply concurrently" . . . or "operate side by side without conflict" . . . The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says "yes" ("Alberta can enforce this provable claim"), while the federal law says "no" ("Alberta cannot enforce this provable claim"). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law.

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[69] Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in

order to avoid the alleged conflict with the federal law. To argue that the province is not required to use s. 102 in the context of bankruptcy, or that it can choose not to withhold the respondent's driving privileges, leads to a superficial application of the operational conflict test. To suggest that a conflict can be avoided by complying with the federal law to the exclusion of the provincial law cannot be a valid answer to the question whether there is "actual conflict in operation," as the majority of the Court put it in *Multiple Access* To so conclude would render the first branch of the paramountcy test meaningless, since it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. ...

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[75] I therefore conclude that s. 102 of the *TSA* allows the province, or a third party creditor, to enforce a provable claim that has been released. To that extent, it conflicts with s. 178(2) of the *BIA*. It is impossible for the province to apply s. 102 without contravening s. 178(2) and, as a result, for the respondent to simultaneously be liable to pay the judgment debt under the provincial scheme and be released from that same claim pursuant to s. 178(2) Section 178 is a complete code in that it sets out which debts are released on discharge and which debts survive bankruptcy. In effect, s. 102 creates a new class of exempt debts that is not listed in s. 178(1). Hence, in the words used by my colleague in her reasons ... , "the provincial law allows the very same thing"—the enforcement of a debt released under s. 178(2) of the *BIA*—that "the federal law prohibits." The result is an operational conflict between the provincial and federal provisions.

[Justice Gascon then proceeded in *obiter* to apply the frustration of federal purpose test to the facts of this case. He concluded that it too led to a finding that the provincial legislation conflicted with the federal legislation.]

CÔTÉ J (McLachlin CJ concurring):

[91] I agree that what is at the core of this appeal is the frustration of a federal purpose. Therefore, I concur with Gascon J. insofar as he finds that s. 102 of the [TSA] frustrates the purpose of financial rehabilitation that underlies s. 178(2) of the federal [BIA], and that s. 102 is accordingly inoperative to the extent of the conflict by reason of the doctrine of federal paramountcy. However, I do not believe that there is an operational conflict to speak of in this appeal.

[92] There is no doubt in my mind that s. 102 of the *TSA* allows Alberta to do indirectly what it is implicitly prohibited from doing under s. 178(2) of the *BIA*, but in light of the indirect nature of the conflict, this issue is properly dealt with on the basis of the second branch of the federal paramountcy test, not the first.

[93] In my respectful view, Gascon J.'s analysis contrasts with the clear standard that has been adopted for the purpose of determining whether an operational conflict exists in the context of the federal paramountcy test: impossibility of dual compliance as a result of an express conflict. My colleague's approach conflates the two branches of the federal paramountcy test, or at a minimum blurs the difference between them and returns the jurisprudence to the state it was at before the second branch was recognized as a separate branch. And it has an additional serious adverse effect: by expanding the definition of conflict in the first branch, it increases the number of situations in which a federal law might be found to pre-empt a provincial law without an in-depth analysis of Parliament's intent.

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[95] In the case at bar, it is clear from the provisions themselves that as a result of how the two legislatures decided to exercise their respective powers, dual compliance is not impossible. The provincial and federal provisions at issue do not expressly conflict; they are different in terms of their contents and of the remedies that they provide. One of them does not permit what the other specifically prohibits.

[96] Under s. 178 of the *BIA*, a bankrupt is discharged from all claims provable in bankruptcy. That section says nothing more. One must be careful, in light of the federal purpose of financial rehabilitation, not to add words to the provision.

[97] Thus, s. 102 of the *TSA* does not revive an extinguished claim *per se*; if a debtor chooses not to drive, the province simply cannot enforce its claim. Rather, s. 102 allows the province to suspend a driver's licence, which gives it some leverage to compel payment of the debt *if the driver decides to drive* [emphasis in original]. The bankrupt is still discharged in the literal sense of the words of s. 178(2) of the *BIA*. This is not a situation of express conflict in which one law says "yes" while the other says "no." The two statutes answer different questions. In the end, the literal requirement of the federal statute is, strictly speaking, met. It therefore follows that the two acts can operate side by side without conflict. To conclude otherwise would be to disregard the distinct contents of the two provisions and the remedies that they provide.

[98] This is why I am of the view that this appeal must be decided on the basis of the frustration of a federal purpose, an issue in respect of which the applicable standard is higher, and that requires an in-depth analysis of Parliament's intent.

VII. Impossibility of Dual Compliance

[99] In my colleague's discussion of operational conflict, *impossibility* of dual compliance, instead of being at the forefront of the analysis, seems to be a secondary consideration [emphasis in original]. Yet it is the undisputed standard for determining whether an operational conflict exists, and one that very few cases will meet.

[Justice Côté reviewed at length the paramountcy jurisprudence of the past few decades and concluded that it supports what she terms "a strict standard for operational conflict" (at para 104). She then argued that that strict standard is consistent with the emphasis the Court has placed in its recent federalism jurisprudence on the principle of cooperative federalism, which, she said, "requires that courts accept an overlap 'between the exercise of federal and provincial competencies' as inevitable" (at para 104). She then continued:]

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[109] ... [E]ven a superficial possibility of dual compliance will suffice for a court to conclude that there is no operational conflict By the same logic, a duplication of federal and provincial legislation will not on its own amount to operational conflict In addition, where federal legislation is broad and permissive, a restrictive provincial scheme will usually be deemed not to conflict with it, because it will be possible to comply with both of them by conforming to the more restrictive provincial law

[110] If the federal law is prohibitive, as in the case at bar, the question becomes what exactly it prohibits [emphasis in original]. If the provincial law allows the very same thing the federal law prohibits, there is an operational conflict. If it does not do so, the analysis shifts to the second branch.

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[124] It is important to note that although operational conflict and frustration of purpose are described as two "branches" of a single test, either one is sufficient to trigger the application of the doctrine of federal paramountcy. Where enactments are found to be in operational conflict, the inquiry can end there without further investigation into the purposes of the enactments. A high standard at the first stage merely means that in most cases, the purpose and effects of the legislation at issue will need to be analyzed at the second stage.

[125] Requiring courts to deal with the issue in the second branch has many advantages. For the frustration of purpose analysis, the federal legislative intent with

which the provincial law is alleged to be incompatible must be established by the party relying on it. Clear proof of intent is required. The party must first establish the purpose of the relevant federal statute and then prove that the provincial law is incompatible with or frustrates this purpose

[126] In the second branch, the court can proceed with a careful analysis of Parliament's intent and, if possible, interpret the federal law so as not to interfere with the provincial law Before concluding that the provincial law is inoperative, the court can also consider whether the federal government supports the operation of that law. In *Rothmans*, this Court emphasized that in resolving federalism issues, a court must bear in mind the position of the government at the other level (para. 26). In that case, the federal government intervened in favour of the provincial law, arguing that it had been enacted for the same health-related purpose as the federal law. The Court found that there was no frustration of purpose.

[127] Considering that the doctrine of federal paramountcy operates at the expense of provincial jurisdiction and reduces legislative overlap, these principles encourage governments at both levels to take the lead in defining the scope of their legislative powers. They facilitate intergovernmental dialogue and serve as safeguards of provincial autonomy. In my view, the approach I suggest is more consistent with the principle of co-operative federalism as applied in *Canadian Western Bank*. It also sets a clear precedent by reaffirming that a provincial law will rarely be found to be inoperative in the first branch of the analysis.

NOTES AND QUESTIONS

1. It is a striking feature of the reasons for judgment of both Gascon J and Côté J that neither makes any reference to the thinking that underlies the impossibility of giving dual effect understanding of conflict. Neither saw fit, in other words, to ask whether it would be impossible for a judge to give effect to both s 102 of the TSA and s 178(2) of the BIA when being relied on by opposing parties. What are we to take from that omission? Does it mean that the Court no longer considers it relevant or appropriate to ask whether state decision-makers, before whom both the federal and provincial enactments in question are being relied on, would be able to give effect to both? (Recall that the Court based its finding of conflict in *M & D Farm* on precisely that line of inquiry and that the Court invoked it again in *Mangat*, *Rothmans*, and *Lafarge*.)

2. Is it not the case that, even though he never saw fit to ask the question called for by the impossibility of giving dual effect understanding of conflict, Gascon J would have found it a good deal easier to find the conflict he found if he had asked that question than he did by limiting himself to the impossibility of dual compliance understanding? How could a judge give effect to both s 102 of the TSA (Moloney must pay his debt to the government of Alberta if he wants to keep his driver's licence) and s 178(2) of the BIA (Moloney's debt to the government of Alberta has been discharged) if the former were relied on by the government and the latter by Moloney?

3. Could it be argued that there is no need for the Court to include an impossibility of giving dual effect understanding of conflict now that it has clearly recognized the frustration of federal purpose understanding? Would the latter understanding not capture all of those circumstances in which a state decision-maker would find it impossible to give effect to both enactments?

4. Also missing from these two judgments is any reference to the federal intention to cover the field test, at least as a distinct basis on which to find a conflict. It seems clear, however, that Côté J holds that a relevant consideration in cases in which the paramountcy doctrine is invoked is whether Parliament intended its legislation to operate in the circumstances in which the impugned provincial legislation is being applied. Note the passage in which she says that

[126] ... the court can proceed with a careful analysis of Parliament's intent and, if possible, interpret the federal law so as not to interfere with the provincial law Before

concluding that the provincial law is inoperative, the court can also consider whether the federal government supports the operation of that law.

5. In a more recent case, *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, involving the “untidy intersection” of provincial environmental legislation and federal insolvency legislation” (at para 64), Wagner CJ summarized the state of the law regarding paramountcy as follows:

[65] Over time, two distinct forms of conflict have been recognized. The first is operational conflict, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises “where one enactment says ‘yes’ and the other says ‘no,’ such that ‘compliance with one is defiance of the other’” (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is frustration of purpose, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does “not entail a direct violation of the federal law’s provisions” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose “must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose” (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. “[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of ‘very clear’ statutory language to the contrary” (*Lemare*, at paras. 21 and 27). “It is presumed that Parliament intends its laws to co-exist with provincial laws” (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

Is this an accurate summary of the law in your view? (For further reading, see R Lizius, “Developments in Constitutional Law: Cooperative Federalism and the Division of Powers in 2018-19” (2020) 95 SCLR (2d) 1.)

6. At various times in Canadian discussions of constitutional reform, it has been suggested that the allocation of functions between federal and provincial governments be altered by changing the rules of paramountcy. Often the suggestion is to define areas where the provincial laws will be paramount. David Milne, “Equality or Asymmetry: Why Choose?” in Ronald L Watts & Douglas M Brown, eds, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 285, calls this the “CPP” solution, referring to s 94A of the *Constitution Act, 1867* regarding old-age pensions. He advocates this change to achieve asymmetry in the distribution of powers, allowing a province such as Quebec to assert jurisdiction in areas where other provinces are content to have the federal government continue to take the primary role.

Consider the wording of s 94A. Does it give rise to the same doctrine of paramountcy as the Court has developed in the cases that you have read? Contrast the wording with s 95 of the *Constitution Act, 1867*. If you were a lawyer for the Quebec government, which wording would you prefer and why? Consider which wording is more likely to keep the federal

government from giving grants to individuals or institutions in an area of provincial jurisdiction, such as health care.

7. For further discussion of the doctrine of paramountcy, see William Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill LJ 185; Eric Colvin, "Legal Theory and the Paramountcy Rule" (1979) 25 McGill LJ 82; Eric Colvin, "Case Comment on *Multiple Access v. McCutcheon*" (1983) 17 UBC L Rev 347; Bradley Crawford, "Case Comment on *Bank of Montreal v. Hall*" (1991) 70 Can Bar Rev 142; Robin Elliot, "Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 SCLR (2d) 629.

V. APPLICABILITY: THE INTERJURISDICTIONAL IMMUNITY DOCTRINE

This section deals with another of the basic interpretive doctrines employed by the courts in division of powers cases, that of interjurisdictional immunity. This doctrine constitutes a departure from the tendency of the pith and substance, double aspect, and ancillary powers doctrines to create overlapping jurisdiction and is instead a doctrine that emphasizes exclusivity of jurisdiction. It is in that sense a relic of the watertight compartments era of constitutional interpretation. It comes into play in situations where a provincial law of general application is clearly valid, but, due to the general nature of its wording, it arguably overreaches, affecting a matter falling within a core area of the other level of government's jurisdiction. On an application of the normal pith and substance doctrine, one might expect the conclusion in such cases to be that the effect on the other level's jurisdiction is incidental to the valid law and therefore acceptable. However, the doctrine of interjurisdictional immunity protects certain core areas of legislative jurisdiction from the impact or interference of otherwise valid laws enacted by the other level. To put it another way, in those circumstances where the doctrine of interjurisdictional immunity is engaged, valid laws are not allowed to apply in core areas of jurisdiction assigned to the other level of government.

Although the doctrine of interjurisdictional immunity has, to this point, been used only to protect core areas of federal legislative jurisdiction from encroaching provincial legislation, the Supreme Court of Canada has acknowledged that the doctrine can in principle work the other way—that is, to protect core areas of provincial legislative jurisdiction from encroaching federal legislation—and it has recently entertained attempts to use it to that end: see *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at paras 57-70 and *Carter v Canada (AG)*, 2015 SCC 5 at paras 49-53, discussed in more detail below. (It is worth noting that cases can be found in which the courts have protected what amount to core areas of provincial legislative jurisdiction from encroaching federal legislation without invoking the doctrine but relying on lines of argument similar to those associated with it. For further discussion, see H Brun, G Tremblay & E Brouillet, *Droit constitutionnel*, 6e éd [Constitutional Law, 6th ed] (Cowansville, Qc: Éditions Yvon Blais, 2014) VI-2.59.)

When the interjurisdictional immunity doctrine is successfully invoked, the courts will read down the generally worded provincial (or federal) legislation to protect the core areas of exclusive federal (or provincial) powers from encroachment. Reading down, as we mentioned at the start of this chapter, is a technique of interpretation used to save statutes from being struck down; the words of the statute are interpreted to apply only to matters within the jurisdiction of the enacting body.

The accepted wisdom is that the doctrine of interjurisdictional immunity originated in cases involving federally incorporated companies and federally regulated undertakings. In *John Deere Plow Co Ltd v Wharton*, 1914 CanLII 603, 18 DLR 353 (UKJCPC); *R v Great West Saddlery Company*, 1921 CanLII 408, 58 DLR 1 (UKJCPC); and *Manitoba (AG) v Canada (AG)*, 1928 CanLII 513, [1929] 1 DLR 369 (UKJCPC), the Privy Council held that valid provincial laws would have

to be restricted in their application if they would otherwise have the effect of impairing the status or essential powers of a federally incorporated company. And in *Toronto v Bell Telephone Co*, [1905] AC 52 (UKJCPC), the Privy Council applied similar reasoning in support of its holding that provincial legislation could not impair or sterilize the operations of an interprovincial communications undertaking. (This accepted wisdom has been questioned: see Robin Elliot, "Interjurisdictional Immunity After Canadian Western Bank and Lafarge Canada Inc: The Supreme Court Muddies the Doctrinal Waters—Again" (2008) 43 SCLR (2d) 433.)

Whatever the true origins of the doctrine, it has come to be an accepted—if still contentious—feature of the law of Canadian federalism and, as the cases excerpted and discussed below make clear, has been applied by the Supreme Court of Canada over a long period of time and in a broad range of different areas. It is also clear from the more recent cases, however, that the precise content of the doctrine—the questions it requires courts to answer when it is invoked—remains in a state of some uncertainty.

The doctrine of interjurisdictional immunity has indeed been controversial. Three major concerns have been expressed about it: (1) in its emphasis on exclusivity of jurisdiction, it is at odds with the tendency of modern federalism to allow considerable overlap between federal and provincial powers; (2) it appeared to extend to the federal level of government an exclusivity of jurisdiction not available to the provinces and hence is inconsistent with a balanced approach to Canadian federalism (note that this concern would no longer be valid today, at least at the level of principle, because the Supreme Court of Canada has accepted that the doctrine works both ways); and (3) it is unnecessary because if Parliament wants to protect one of its core areas of legislative jurisdiction from encroaching provincial legislation, it can do so by enacting legislation to cover that area and rely on the federal paramountcy doctrine to oust the provincial legislation.

For most of the 1970s and 1980s, these concerns were limited to constitutional scholars. However, two of them—the first and the third—were explicitly endorsed in *obiter dicta* by Dickson CJ in his concurring reasons for judgment in *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at 17, 1987 CanLII 71, and thereby formed part of the growing body of jurisprudence relating to the doctrine. Chief Justice Dickson phrased his endorsement in these words:

I favour both of these arguments of caution about the scope of the interjurisdictional immunity doctrine. The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather, they have been an undertow against the strong pull of pith and substance, the double aspect doctrine, and, in recent years, a very restrained approach to concurrency and paramountcy issues.

The doctrine of interjurisdictional immunity remains controversial today among both scholars and members of the judiciary. In the next case we examine, *Bell No 2*, the Supreme Court of Canada, speaking through Beetz J, clearly rejected Dickson J's concerns regarding the doctrine. However, as you will see, the Court resurrected those same concerns in two later cases, *Canadian Western Bank and Lafarge*, the first of which is excerpted below.

As you read the cases that follow, note the doctrinal choices that typically face the Court. One option is to allow the provincial law (with one exception, all of the cases we refer to below involve attempts to have the doctrine applied to provincial legislation) to apply to the federal undertaking or other federal matter until Parliament enacts conflicting legislation, which will then have priority by virtue of the doctrine of paramountcy. The other is to grant the requested interjurisdictional immunity to the federal undertaking or other federal matter, with the result that the provincial law is held inapplicable, even if Parliament has not legislated on the matter. Think about the implications of each of these choices. Which of Simeon's values are furthered by each choice?

Note the result of the application of the doctrine of interjurisdictional immunity. Often, where the provincial law in issue is drafted in general terms and is of broad application, the entire provincial law is not found invalid; it is only found *inapplicable* to the federal undertaking or other federal matter. Because the provincial laws in issue in these cases usually appear so clearly to fall within provincial jurisdiction in most of their applications, their validity is assumed. Invalidation is not considered an option. Rather, it is the applicability of the law in particular circumstances that is at issue. When the interjurisdictional immunity doctrine is successfully invoked, the courts will interpret, or read down, generally worded provincial statutes so that they do not apply to matters that fall within the core of exclusive federal powers.

Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)

[1988] 1 SCR 749, 1988 CanLII 81

[This case was one in a trilogy of cases decided at the same time that dealt with the application of generally worded provincial health and safety laws to federal transportation and communications undertakings. The companion cases were *Alltrans Express Ltd v British Columbia (Workers' Compensation Board)*, [1988] 1 SCR 897, 1988 CanLII 83, which dealt with the applicability of provincial regulations requiring the wearing of safety boots to an interprovincial and international trucking business, and *Canadian National Railway Co v Courtois*, [1988] 1 SCR 868, 1988 CanLII 82, which dealt with the ability of a provincial inspector to inquire into a railway accident that caused death and serious injury to workers. The case reproduced here dealt with the application to Bell Canada of a Quebec law giving a right to protective reassignment to a pregnant worker. As you read Beetz J's reasons for judgment, pay particular attention to two of its features: (1) his attempt—the first one to have been made by a member of the Court—to articulate a general rule or principle that would explain the many prior decisions in which the doctrine had been applied and (2) his response to the criticisms of the doctrine made by constitutional scholars, in particular Peter Hogg. (Note that Beetz J's general views on federalism are discussed in the Swinton excerpt found in Chapter 9, Peace, Order, and Good Government.)]

BEETZ J (Dickson CJ and Lamer, Wilson, Le Dain, and La Forest JJ concurring):

[Justice Beetz began by setting forth what he took to be two well-established rules (or "propositions," as he labelled them) governing jurisdiction over health and labour relations and working conditions. These he articulated in the following terms:]

General legislative jurisdiction over health belongs to the provinces This jurisdiction has historically been seen as resting with the provinces under s. 92(16) of the *Constitution Act, 1867*

In principle, labour relations and working conditions fall within the exclusive jurisdiction of the provincial legislatures: these matters fall into the class of subjects mentioned in s. 92(13)

[Justice Beetz then proceeded to articulate a third proposition, which came to play a critical role in his reasoning process:]

Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the

federal undertakings covered by ss. 91(29) and 92(10)(a), (b) and (c) of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking: ... [list of references, including] *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 ("Bell Canada 1966"). This third proposition reflects, at least in part, a constitutional theory which commentators who have criticized it have called the theory of "interjurisdictional immunity." I will return to this below.

It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction

[Justice Beetz then noted that, in spite of this third proposition, the JCPC had decided that the compensatory scheme established by provincial workers' compensation legislation could be applied to federal undertakings, a decision that he accepted as still good law. He also offered the cautionary thoughts on the double aspect doctrine, quoted above in Section III, Validity: Characterization of Laws, B, Double Aspect Doctrine.]

I think it is quite impossible to distinguish the circumstances of the case at bar from those of *Bell Canada 1966*. The working conditions and labour relations as well as the management of federal undertakings such as Bell Canada, are matters falling within the classes of subject mentioned in s. 91(29) of the *Constitution Act, 1867*, and consequently fall within the exclusive legislative jurisdiction of the Parliament of Canada.

Moreover, as I indicated at the start of these reasons, the exclusivity rule approved by *Bell Canada 1966* does not apply only to labour relations or to federal undertakings. It is one facet of a more general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject.

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2. Criticism of Bell Canada 1966

Bell Canada 1966 has been criticized by certain commentators: ... [including] *Constitutional Law of Canada* (2nd ed. 1985), by Professor Peter W. Hogg, at pp. 329-32 and 465-66.

These analyses have much in common and I think it will suffice to consider the comments of Professor Hogg, which are in greater detail and more recent.

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The first [observation to be made] is that the criticism says nothing of the close study by Martland J in *Bell Canada 1966* of the relevant provisions of ss. 91 and 92 of the *Constitution Act, 1867*.

The second observation is that this analysis does not address the essential question raised and answered by Martland J: the critics refrain from defining the content

of the exclusive legislative authority of Parliament over federal undertakings. This is necessary because the effect of s. 91(29) and the exceptions in s. 92(10) is to create exclusive classes of subject, those of federal undertakings, to which a basic, minimum and unassailible content has to be assigned to make up the matters falling within these classes. Martland J considered that the management of these undertakings and their labour relations are matters which are part of this basic and unassailible minimum, as these matters are essential and vital elements of any undertaking. How is it possible to disagree with this? How can the exclusive power to regulate these undertakings not include at least the exclusive power to make laws relating to their management? Additionally, just as the management of the undertaking and working conditions determined by agreement or by operation of law are parts of the same whole in labour law, how can the exclusive power to legislate as to management of an undertaking not include the equally exclusive power to make laws regarding its labour relations? To deny this, as the critics have done, is to strip the exclusive federal power of its primary content and transform it simply into a power to make ancillary laws connected to a primary power with no real independent content, apart from the power to regulate rates and the availability and quality of services such as telephone services or railway services. The latter undoubtedly fall within the exclusive classes of subject represented by such federal undertakings, but there is nothing in the constitutional provisions, rules or precedents to indicate that the exclusive legislative authority of Parliament must or may be confined to so narrow a field. Indeed, rates and the availability and quality of services are inseparable from the wage scale that the undertaking must pay, the availability of its manpower, leave, vacation—in short, working conditions. This is why in *Bell Canada 1966* Martland J refers at p. 772 to rates and services in their relation to wages, and it is why he comes back to this at p. 777 in arriving at his conclusions.

Professor Hogg writes that the theory which is the basis of *Bell Canada 1966* not only confers a power on Parliament but operates defensively to deny the power of the Legislature. In my view, and I say so with the greatest respect, this theory does not confer on Parliament any power that it does not already have, since it is an integral and vital part of its primary legislative authority over federal undertakings. If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. The exclusivity rule is absolute and does not allow for any distinction between these two types of statute. However, the pith and substance doctrine does require a distinction to be made between these two types of statute, as well as between laws of general application and their application to particular institutions. General legislation on the management and working conditions of undertakings is legislation on matters falling within the property and civil rights class. But particular legislation on the management of federal undertakings and their working conditions, like that in the *Canada Labour Code*, is legislation on matters falling within an exclusively federal class of subjects, that of federal undertakings. The particular effect of general provincial laws that would result from their application to federal undertakings would, in the case at bar, constitute an encroachment on the exclusive jurisdiction of Parliament. ...

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This principle appears to have been omitted in the criticism of *Bell Canada 1966* offered by Professor Hogg. Yet this line of reasoning explains the nature of the exclusive federal power given that working conditions and labour relations cannot be divorced from the management of a federal undertaking.

In one of the foregoing passages, Professor Hogg contrasts exclusive powers with "concurrent" powers. This can only be a way of speaking. Professor Hogg likely intends to refer to the overlapping of federal and provincial legislation which may result from the exercise of an ancillary power by Parliament or the application of the double aspect theory; however, as I said at the start of these reasons, these are not concurrent powers such as the fields of agriculture or immigration.

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That leaves the "policy" argument, according to which it would always be open to Parliament to protect federal undertakings against provincial statutes by an exercise of its so-called ancillary power and the application of the paramountcy of federal legislation.

I must say that I find very little merit in such an argument, both in general terms and when invoked in the particular field of occupational health and safety.

It is an argument which relies on a spirit of contradiction between systems of regulation, investigation, inspection and remedial notices which are increasingly complex, specialized and, perhaps inevitably, highly detailed. A division of jurisdiction in this area is likely to be a source of uncertainty and endless disputes in which the courts will be called on to decide whether a conflict exists between the most trivial federal and provincial regulations, such as those specifying the thickness or colour of safety boots or hard hats.

Furthermore, in the case of occupational health and safety, such a twofold jurisdiction is likely to promote the proliferation of preventive measures and controls in which the contradictions or lack of coordination may well threaten the very occupational health and safety which are sought to be protected.

Federalism requires most persons and institutions to serve two masters; however, in my opinion an effort must be made to see that this dual control applies as far as possible in separate areas.

With all due respect for the opposite view, therefore, I think that the decision in *Bell Canada* 1966 is correct.

[Justice Beetz turned to a consideration of the applicability to this case of the double aspect doctrine, which, in the narrow approach he took to the doctrine, he characterized as permitting Parliament and a province to "enact two relatively similar rules provided they are legislating for different purposes and on the basis of different aspects" (at para 274). After examining the relevant provisions of the Quebec statute and the *Canada Labour Code*, RSC 1970, c L-2, he concluded that "both legislators are pursuing exactly the same objective by similar techniques and means" (at para 298). Since the "legislators have legislated for the same purpose and in the same aspect" (at para 299) (emphasis in original), the double aspect doctrine did not apply. Labour relations and the management of federal undertakings, he held, fall within the exclusive jurisdiction of Parliament. To allow provincial law to apply concurrently, Beetz J argued, would strip the exclusivity of federal power of any distinct or meaningful content.

He concluded that the provincial law had to be read down so as not to apply to federally regulated undertakings such as Bell Canada. Following the approach in *Bell No 1*, he stated that "in order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it" (at para 316). Since the working conditions and management of an undertaking are vital or essential parts of the undertaking, it follows that the Quebec statute could not apply to them.]

Appeal dismissed.

NOTES AND QUESTIONS

1. In *Bell No 2*, Beetz J rested his defence of the interjurisdictional immunity doctrine on a strong understanding of the exclusivity of federal powers. Because federal powers are exclusive, Beetz J argued, and because this rule is "absolute," the application of valid provincial laws is pre-empted. Note that the pith and substance, ancillary powers, and double aspect doctrines rest on a weaker view of exclusivity, one that understands exclusivity as the exclusive ability to enact legislation that has as its dominant characteristic the subject matter in question but that has effects on areas and activities that are also often governed by legislation from the other level of legislature.

2. The doctrine of interjurisdictional immunity has not been applied to all areas of exclusive federal power. It has, however, been applied to a broad range of them, including federal elections, telecommunications undertakings, interprovincial railways, and trucking undertakings, as well as to the postal service, banking, aeronautics, navigation and shipping, the military, Indigenous peoples and lands, the RCMP, federal parks, and even criminal procedure.

3. One issue that had remained unresolved after *Bell No 2* was whether provincial environmental regulations would be applicable to federal undertakings. Arguably, such regulations could involve matters central to the operation and management of federal undertakings. The issue reached the Supreme Court of Canada in *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, 1995 CanLII 112. The case involved a federally regulated railway undertaking that had conducted a controlled burn of dry grass and weeds on its railway right-of-way. A large amount of smoke was produced that created a nuisance for nearby residents, and the railway was charged with unlawful discharge of a contaminant under the Ontario *Environmental Protection Act*, RSO 1990, c E.19. In brief oral reasons, the Supreme Court found the provincial legislation to be applicable to the railway. The Court simply relied on a 19th-century case, *Canadian Pacific Railway Co v Corporation of the Parish of Notre Dame de Bonsecours*, [1899] AC 367 (PC), in which the Privy Council had ruled that a federally regulated railway was required to comply with a municipal order requiring it to clear a blocked drainage ditch on its right-of-way that was causing damage to adjacent land. Is the ruling in *Canadian Pacific* consistent with the rulings in *Bell No 2*?

The Supreme Court of Canada had occasion to reconsider and re-evaluate the doctrine of interjurisdictional immunity in *Canadian Western Bank* and *Lafarge*. In both cases, the doctrine was invoked by federally regulated entities, banks in the first and a port authority in the second. In each case, the Court declined to apply the doctrine for essentially the same reason: application of the provincial legislation at issue was held not to encroach on the core of federal legislative jurisdiction. In *Canadian Western Bank*, promoting "peace of mind" insurance was held not to fall within the core of Parliament's jurisdiction over banking; in *Lafarge*, permitting a cement batching plant to be built on land owned by the port authority was held not to fall within the core of Parliament's jurisdiction over navigation and shipping. In each case, therefore, there was no bar to applying the provincial legislation at issue—regulating the business of insurance in the first and regulating land use within a particular municipality in the second—to the claimants. (Note, however, that a majority of the judges sitting on *Lafarge* went on to hold that the provincial legislation at issue there conflicted with the applicable federal legislation and therefore had to be held inoperative under the paramountcy doctrine.)

Although it was not necessary for the Court to make any general or more expansive comments on the doctrine in either of these two cases, it nevertheless chose to do so, and the bulk of those comments were made in *Canadian Western Bank*, a case in which the Court chose to engage in a broad overview of its general approach to federalism (recall the passage from the case discussing general principles of federalism found at the beginning of this chapter). As you

will see from the majority reasons for judgment of Binnie and LeBel JJ, excerpted below, the comments were wide-ranging and varied. Justices Binnie and LeBel affirmed the doctrine's legitimacy and acknowledged that the doctrine works to protect the exclusivity of both provincial and federal jurisdiction—an issue on which there had been some uncertainty. The main thrust of their comments, however, was to erode the status and role of the doctrine; they resurrected and endorsed the critiques of the doctrine made by scholars such as Peter Hogg, added some new critiques, tightened up some aspects of the test that has to be met in order for the doctrine to be applicable (albeit while affirming others), and expressed a preference for relying on the doctrine of federal paramountcy over the doctrine of interjurisdictional immunity to resolve federalism disputes once the validity of the impugned legislation has been established. These features of their reasoning are reproduced below.

Canadian Western Bank v Alberta

2007 SCC 22

BINNIE and LeBEL JJ (McLachlin CJ and Fish, Abella, and Charron JJ concurring):

(2) The Doctrine of Interjurisdictional Immunity and Its Sources

[33] Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgment of this Court in *Bell Canada [v Québec (Commission de la santé et de la sécurité du travail)]*, [1988] 1 SCR 749], where Beetz J wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by the other level of government. Immunity from such intrusion, Beetz J observed in the context of a federal undertaking, is

an integral and vital part of [Parliament's] primary legislative authority over federal undertakings. If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. [p. 840]

[34] The doctrine is rooted in references to "exclusivity" throughout ss. 91 and 92 of the *Constitution Act, 1867*.... The notion of exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure" (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326 (PC), at p. 354). Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences (*Bell Canada* (1988), at p. 766). At the same time, the doctrine of interjurisdictional immunity seeks to avoid, when possible, situations of concurrency of powers . . .

(3) The Dominant Tide of Constitutional Interpretation Does Not Favour Interjurisdictional Immunity

[35] Despite the efforts to find a proper role for the doctrine, the application of interjurisdictional immunity has given rise to concerns by reason of its potential impact on Canadian constitutional arrangements. In theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment. However, it would appear that the jurisprudential application of the doctrine has produced somewhat "asymmetrical" results. ... In general, ... the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation

[Justices Binnie and LeBel noted Dickson CJ's endorsement of the criticisms of the doctrine of interjurisdictional immunity in the *OPSEU* case and quoted the passage in which Dickson CJ said that the doctrine is inconsistent with the "dominant tide" of federalism jurisprudence.]

[37] The "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. ...

[38] In our view, the sweeping immunity argued for by the banks in this appeal is not acceptable in the Canadian federal structure. The argument exposes the dangers of allowing the doctrine of interjurisdictional immunity to exceed its proper (and very restricted) limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine. The latter have the ability to resolve most problems relating to the validity of the exercise of legislative powers under the heads of power applicable to the activities in question.

[Justices Binnie and LeBel then provided an overview of the early cases involving federally incorporated companies and federally regulated undertakings that are said to have given rise to the doctrine, as well as some of the later cases in which the scope of the doctrine was extended to other areas, including certain "activities" falling within exclusive federal jurisdiction, such as federal elections. They suggested that application of the doctrine to protect federal "activities" from the reach of provincial legislation, as distinct from federal "undertakings, things, or persons," posed special "practical problems" (at para 42).]

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[42] While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities," nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. ... It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.

[43] Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope—difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time ... For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.

[44] Moreover, as stated, interjurisdictional immunity means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called "core" of jurisdiction. This increases the risk of creating "legal vacuums" ... Generally speaking, such "vacuums" are not desirable.

[45] Further, a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation. As stated, this doctrine has in the past most often protected federal heads of power from incidental intrusion by provincial legislatures. The "asymmetrical" application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism. Commentators have noted that an extensive application of this doctrine to protect federal heads of power and undertakings is both unnecessary and "undesirable in a federation where so many laws for the protection of workers, consumers and the environment (for example) are enacted and enforced at the provincial level" ([PW Hogg, *Constitutional Law of Canada* (loose-leaf)], at p. 15-30). The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40, at para. 3).

[46] Finally, the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation. As we shall see, sufficient confirmation of this can be found in the history and operation of the doctrine of federal paramountcy.

[47] For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.

D. A More Restricted Approach to Interjurisdictional Immunity

(1) Impairment Versus Affects

[48] Even in situations where the doctrine of interjurisdictional immunity is properly available, we must consider the level of the intrusion on the "core" of the power of the other level of government which would trigger its application. In *Bell Canada (1988)*, Beetz J wrote, at pp. 859-60:

In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking *affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it.* [Emphasis added.]

... We believe that the law as it stood prior to *Bell Canada (1988)* better reflected our federal scheme. In our opinion, it is not enough for the provincial legislation simply to "affect" that which makes a federal subject or object of rights specifically of federal jurisdiction. The difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does. ... It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

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(2) Identification of the "Basic, Minimum and Unassailable" Content of a Legislative Power

[50] One of the important contributions of *Bell Canada (1988)* was to limit the scope of the doctrine to the "basic, minimum and unassailable content" (p. 839) sometimes referred to as the "core" of the legislative power in question. (By "minimum," we understand that Beetz J meant the minimum content necessary to make the power effective for the purpose for which it was conferred.) This is necessary, according to Beetz J, to give effect to what he called "the principle of federalism underlying the Canadian Constitution" (p. 766). Thus, the success of the appellants' argument in this appeal depended in part on locating the promotion of "peace of mind" insurance at the core of banking. For the reasons already discussed, and particularized below, we do not believe that this aspect of the appellants' argument can be sustained.

(3) The Vital or Essential Part of an Undertaking

[51] In the exercise of their legislative powers, federal and provincial legislators bring into existence "undertakings." The appellant banks are "federal undertakings" constituted pursuant to the s. 91(15) banking power. In *Bell Canada (1988)*, Beetz J spoke of interjurisdictional immunity in relation to "essential and vital elements" of such undertakings (pp. 839 and 859-60). In our view, some text writers and certainly the appellants have been inclined to give too wide a scope to what should be considered "vital or essential" to a federal undertaking. We believe that Beetz J chose his words carefully and intended to use "vital" in its ordinary grammatical sense of "[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial" (*Shorter Oxford English Dictionary* (5th ed. 2002), vol. 2, at p. 3548). The word "essential" has a similar meaning, e.g. "[a]bsolutely indispensable or necessary" (vol. 1, at p. 860). The words "vital" and "essential" were not

randomly chosen . . . What is “vital” or “essential” is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation. In the case of federal undertakings, Beetz J referred to a “general rule” that there is no interjurisdictional immunity, provided that “the application of [the] provincial laws does not bear upon those [federal] subjects *in what makes them specifically of federal jurisdiction*” (*Bell Canada (1988)*, at p. 762 (emphasis added)). In the present appeal, for example, the appellants’ argument inflates out of all proportion what could reasonably be considered “vital or essential” to their banking undertaking. The promotion of “peace of mind” insurance can hardly be considered “absolutely indispensable or necessary” to banking activities unless such words are to be emptied of their ordinary meaning.

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E. The Interjurisdictional Immunity Case Law Relied on by the Appellants

[Justices Binnie and LeBel reviewed many of the prior cases in which either the Privy Council or the Supreme Court had been asked to apply the doctrine for the purpose of showing that the existing jurisprudence supported their view that what is “vital and essential”—or truly “core” to an area of federal legislative jurisdiction—has to be understood narrowly.]

(7) Conclusion

[67] In our view, the above review of the case law cited by the appellants, the respondent and interveners shows that not only *should* the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it *has* been so applied [emphasis in original]. Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner.

[Justices Binnie and LeBel then discussed the appropriate approach to take to the doctrine of federal paramountcy, which is the subject of the previous section of this chapter. Before they applied this approach, however, they expressed their view on the question of the order in which courts should consider the doctrines of interjurisdictional immunity and federal paramountcy after they have satisfied themselves that the impugned legislation is valid on the basis of the pith and substance doctrine. Prior to this case, it was understood that the doctrine of interjurisdictional immunity should always be applied first.]

G. Order of Application of the Constitutional Doctrines

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[77] Although our colleague Bastarache J takes a different view on this point, we do not think it appropriate to always begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of “cores” and “vital and essential” parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things,

persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat [Law Society of British Columbia v Mangat*, 2000 SCC 67].

[78] In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.

[Justices Binnie and LeBel then proceeded to apply the doctrine of federal paramountcy. They concluded that there was no conflict between the provincial and federal legislation at issue and that the provincial legislation could therefore operate in relation to the banks in Alberta that wished to promote "peace of mind" insurance to their customers. This part of the decision is discussed in the previous section of this chapter, dealing with the doctrine of paramountcy.]

NOTES AND QUESTIONS

1. Justice Bastarache concurred in the result in *Canadian Western Bank* but did not agree with the new approach to the doctrine of interjurisdictional immunity outlined by Binnie and LeBel JJ. His view of the doctrine, which is a much more positive one that would have left the doctrine more or less in the state it was in prior to these two cases, is developed in his concurring reasons for judgment in *Lafarge*.

2. A number of scholars commented on the new approach to the doctrine taken by Binnie and LeBel JJ in *Canadian Western Bank* and *Lafarge* immediately after the publication of those decisions, not all of them favourably: see Elizabeth Edinger, "Back to the Future with Interjurisdictional Immunity: *Canadian Western Bank v. Alberta* and *British Columbia v. Lafarge Canada Inc*" (2008) 66 Advocate 553; Peter W Hogg & Rahat Godil, "Narrowing Interjurisdictional Immunity" (2008) 42 SCLR (2d) 623; John G Furey, "Interjurisdictional Immunity: The Pendulum Has Swung" (2008) 42 SCLR (2d) 597; Robin Elliot, "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc*: The Supreme Court Muddies the Doctrinal Waters—Again."

3. Do you think it makes sense to change the order in which the doctrines of interjurisdictional immunity and federal paramountcy are applied in those cases in which a party is invoking the former in a "new" area? On the one hand, what would this mean if the doctrine of interjurisdictional immunity were invoked in support of a core area of provincial legislative jurisdiction against federal legislation? Why should the Constitution be applied differently depending on when a particular kind of challenge is made? On the other hand, given the radically reduced application of the interjurisdictional immunity doctrine as a result of the judgment in *Canadian Western Bank*, does it now make more sense to present validity and operability as the two key analytical categories in Canadian federalism, with interjurisdictional immunity inserted into the analysis on the rare occasions when it arises? Previous editions of this chapter discussed applicability before operability. As you can see, operability is now discussed ahead of applicability. Do you agree with this change?

The restrained approach to the doctrine of interjurisdictional immunity for which Binnie and LeBel JJ argued in *Canadian Western Bank* and *Lafarge* has not had the effect of stemming the flow of cases in which the Court is being asked to apply the doctrine, although the view from the Supreme Court of Canada may be somewhat distorted given that interjurisdictional immunity cases are particularly difficult and therefore more likely to reach the highest level of appeal. Perhaps one of the most important of the more recent cases is *COPA*, a case that in some respects is similar to *Lacombe*, which we reviewed in Section III, in the context of our look at the ancillary powers doctrine. In *Lacombe*, the question was whether a municipal government could restrict by a specially targeted by-law the areas within the municipality in which private aerodromes could be established; in *COPA*, the question was whether generally worded (and valid) provincial legislation creating agricultural land reserves could constitutionally be applied to—and therefore restrict—the establishment of private aerodromes on such reserves. In both cases, the Court was called on to resolve a conflict that McLachlin CJ characterized (in *Lacombe* at para 1) as “pitting the local interest in land-use planning against the national interest in a unified system of aviation navigation.” However, because that conflict presented itself in very different legal forms in the two cases—a validity challenge in the former and an applicability challenge in the latter—the Court had to employ a different doctrine in each to resolve them: the ancillary powers doctrine in the former and the doctrine of interjurisdictional immunity in the latter.

The importance of *COPA* lies in large part in the change it introduced to the test to be used when courts are called on to apply the doctrine of interjurisdictional immunity. Read the excerpted reasons for judgment of McLachlin CJ, who wrote for a majority of six, with an eye to determining what that change is.

Quebec (AG) v Canadian Owners and Pilots Association

2010 SCC 39

[Two Quebec residents, Laferrière and Gervais, constructed an airstrip on a lot they owned near Shawinigan, Quebec. Under the federal *Aeronautics Act*, the construction and operation of an airfield for private (as opposed to commercial) aviation is not subject to a requirement of prior permission. Registration of an aerodrome with the federal minister of transport is optional; however, if registered, a private aerodrome becomes subject to federal standards and is available to anyone who needs to land. Laferrière and Gervais registered their airstrip.]

The land on which Laferrière and Gervais constructed their airstrip was within an area designated as an agricultural region under the province’s *Act respecting the preservation of agricultural land and agricultural activities* (ARPALAA or the Act). Section 26 of the Act prohibits the use of land in a designated agricultural region for any purpose other than agriculture, unless specific authorization from the *Commission de protection du territoire agricole du Québec* (the Commission) has been granted. No such authorization had been obtained by Laferrière and Gervais, and, in 1999, the Commission ordered them to demolish the airstrip because it was located in a designated agricultural region. They challenged the order on the ground that s 26 of the Act was *ultra vires* or, alternatively, inapplicable, insofar as it affected the location of aerodromes (by virtue of the doctrine of interjurisdictional immunity), or inoperative in their case by reason of a conflict with federal law (by virtue of the doctrine of paramountcy). We limit ourselves here to the reasons for judgment relating to the applicability issue.]

McLACHLIN CJ (Binnie, Fish, Abella, Charron, Rothstein, and Cromwell JJ concurring):

[Chief Justice McLachlin had no difficulty concluding that s 26 of the *ARPALAA* is valid provincial legislation under s 92(13) (property and civil rights), s 92(16) (matters of a merely local or private nature), or s 95 (agriculture) of the *Constitution Act, 1867*.]

B. Interjurisdictional Immunity

[25] The next question is whether s. 26 of the Act, having been found valid, applies in a situation where it impacts on the federal power over aeronautics [emphasis in original]. The Attorney General of Canada and COPA [the Canadian Owners and Pilots Association] argue that it does not. They rely on the doctrine of interjurisdictional immunity, which they submit protects core federal competences from impairment by provincial legislation.

[26] ... Following *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, the prevailing view is that the application of interjurisdictional immunity is generally limited to the cores of every legislative head of power already identified in the jurisprudence

[27] The first step is to determine whether the provincial law—s. 26 of the Act—trenches on the protected “core” of a federal competence [emphasis in original]. If it does, the second step is to determine whether the provincial law’s effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity [emphasis in original].

(1) Does Section 26 of the Provincial Act Trench on the Protected Core of a Federal Competence?

[28] The jurisprudence establishes that Parliament has power over aeronautics. Because commercial aviation was not foreseen in 1867, aviation is not articulated as a head of power under s. 91 of the *Constitution Act, 1867*. However, it has been held to be a matter of national importance and hence supported under the federal POGG [peace, order, and good government] power.

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[31] This proposition was most recently affirmed in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 72, per Iacobucci J.: the federal aeronautics jurisdiction “encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports.” Elaborating, Iacobucci J. held that this aspect of federal jurisdiction extends to the location and design of airports.

[32] The Attorney General of British Columbia, intervener, conceded that airports come under the POGG power because of their national dimension, but argued that local aerodromes are excluded from POGG because they are not themselves matters of national importance. In support, he noted that the *Aeronautics Act* distinguishes between aerodromes and airports, and argued that most interprovincial and international flights pass through airports, rather than aerodromes.

[33] This argument cannot prevail. As Kellock J. noted in *Johannesson [v Municipality of West St Paul]*, [1952] 1 SCR 292, 1951 CanLII 55], the local aspects of aviation come under federal jurisdiction because the subject matter of aerial navigation is “non-severable.” Using the term “airport” interchangeably with “aerodrome,” he held that “just as it is impossible to separate intra-provincial flying from inter-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole” (p. 314). This view reflects the reality

that Canada's airports and aerodromes constitute a network of landing places that together facilitate air transportation and ensure safety.

[34] It is thus clear that the federal jurisdiction over aeronautics encompasses the power to determine the location of aerodromes. The next question is whether this power lies at the protected core of the federal power.

[35] The test is whether the subject comes within the essential jurisdiction—the "basic, minimum and unassailable content"—of the legislative power in question: *Bell Canada [v Québec (Commission de la Santé et de la Sécurité du Travail)]*, [1988] 1 SCR 749, 1988 CanLII 811, at p. 839; *Canadian Western Bank*, at para. 50. The core of a federal power is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred": *Canadian Western Bank*, at para. 77.

[36] In *Canadian Western Bank*, Binnie and LeBel JJ. explained that the jurisprudence will frequently serve as a useful guide to identify the core of a federal head of power, and they concluded that interjurisdictional immunity should "in general be reserved for situations already covered by precedent" (para. 77).

[37] Here precedent is available and resolves the issue. This Court has repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power. In *Johannesson*, which concerned a municipal by-law that prevented the plaintiff from constructing an aerodrome on the outskirts of Winnipeg, the Court held that the location of aerodromes is an essential and indivisible part of aeronautics. As noted above, Estey J. held that aerodromes are "an essential part of aeronautics and aerial navigation" (p. 319). The location of aerodromes attracts the doctrine of interjurisdictional immunity because it is essential to the federal power, and hence falls within its core.

[Other cases are discussed.]

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[40] I conclude that the location of aerodromes lies at the core of the federal aeronautics power. Long-standing precedent establishes that where aircraft may take off and land is a matter protected by the doctrine of interjurisdictional immunity. Since s. 26 of the ARPALAA purports to limit where aerodromes can be located, it follows that it trenches on the core of the federal aeronautics power.

[41] The remaining question is whether the impact of s. 26 on the federal power is sufficiently serious to attract the doctrine of interjurisdictional immunity.

(2) Does Section 26 of the Act Unacceptably Interfere with a Federal Competency?

[42] It is not enough that s. 26 of the ARPALAA strikes at the heart of a federal competency; it must be shown that this interference is constitutionally unacceptable. This raises the issue of how serious an interference must be to render a provincial law inapplicable.

[43] After a period of inconsistency, it is now settled that the test is whether the provincial law *impairs* the federal exercise of the core competence: *Canadian Western Bank*, per Binnie and LeBel JJ.

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[45] "Impairment" ... suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. ...

[46] The question is whether applying s. 26 of the ARPALAA to prohibit aerodromes would impair the exercise of the core of a federal power, in this case Parliament's ability to decide when and where aerodromes should be built.

[47] I conclude that the s. 26 prohibition does impair the federal power to decide when and where aerodromes should be built. It prohibits the building of aerodromes in designated agricultural regions unless prior authorization has been obtained from the Commission. As the facts of this case illustrate, the effect may be to prevent the establishment of a new aerodrome or require the demolition of an existing one. This is not a minor effect on the federal power to determine where aerodromes are built.

[48] Section 26 of the *ARPALAA* significantly restricts, or impairs, Parliament's power to determine where aerodromes may be constructed. Section 26 of the *ARPALAA* does not sterilize Parliament's power to legislate on aeronautics; the doctrine of paramountcy would permit Parliament to legislatively override provincial zoning legislation for the purpose of establishing aerodromes [emphasis in original]. But the *ARPALAA* would nevertheless seriously affect the manner in which the power can be exercised. Instead of the current permissive regime, Parliament would be obliged to legislate for the specific location of particular aerodromes. Such a substantial restriction of Parliament's legislative freedom constitutes an impairment of the federal power. Though the focus of the inquiry must be on the power itself, it is worth noting that the practical effect of the *ARPALAA* is hardly trivial. It effectively removes 63,000 km², the total area of the designated agricultural regions, from the territory that Parliament has designated for aeronautical uses. This is not an insignificant amount of land, and much of it is strategically located.

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[50] ... [T]he Province argues that s. 26 of the *ARPALAA* does not impair the federal power because Parliament remains free to designate particular locations where airfields should be constructed, overriding the provincial law by the doctrine of federal paramountcy. In essence, this argument asserts that the doctrine of paramountcy suffices to render the intrusion on the core federal power insignificant. With respect, I do not agree.

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[52] ... [The Province's argument] impermissibly mingles the distinct doctrines of interjurisdictional immunity and paramountcy, in a way that distorts the former. In those circumstances where interjurisdictional immunity applies, the doctrine asks whether the core of the legislative power has been impaired, not whether or how Parliament has, in fact, chosen to exercise that power.

[53] ... [The argument also] does not answer the fact that the impact of s. 26 is to impair the federal aeronautics power to designate land for the construction of air-fields. If Parliament wished to override s. 26 of the *ARPALAA* by way of federal paramountcy, it would be forced to establish a legislative conflict with each of the Commission's decisions regarding aerodromes, since the doctrine of paramountcy deals with conflict in the exercise of power in the situation where there is overlapping federal and provincial legislation: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11. Parliament would not be free to introduce broad, permissive legislation, should it so choose (and as it has chosen to do). Acceptance of this argument would narrow Parliament's legislative options and impede the exercise of its core jurisdiction. ... It might also result in rival systems of regulation, which would be a "source of uncertainty and endless disputes" (*Bell Canada*, at p. 843, *per* Beetz J.) and a "jurisdictional nightmare" (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 140, *per* Bastarache J.).

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[60] To sum up, the doctrine of interjurisdictional immunity is applicable in this case. The location of aerodromes lies at the core of the federal competence over aeronautics. Section 26 of the Act impinges on this core in a way that impairs this federal power. If s. 26 applied, it would force the federal Parliament to choose

between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do.

[Justice Deschamps wrote dissenting reasons for judgment on the applicability issue, in which LeBel J concurred. She accepted that the siting of private aerodromes falls within the core of federal jurisdiction over aeronautics, but she formulated the "impairment" question to be answered in very different terms than McLachlin CJ. Instead of asking, as McLachlin CJ did, whether application of the provincial legislation would impair the power of Parliament to regulate the establishment of private aerodromes, she asked whether application of that legislation would impair the activity of small-scale aviation. In her view, that way of formulating the question was more consistent with the prior jurisprudence, in particular the manner in which Binnie and LeBel JJ dealt with the impairment issue in *Canadian Western Bank*. Having chosen to formulate the question in this different manner, she went on to decide that, because "the designated agricultural land represents only about 63,000 km², or about 4 percent of the province's territory" (at para 89), permitting s 26 to apply in the circumstances of this case would not impair the activity of small-scale aviation, and therefore concluded that the requested immunity from it should not be granted.]

NOTES AND QUESTIONS

1. Do you agree with Deschamps J that the focus of the impairment inquiry in COPA should have been on the activity falling within the core area of the head of power at issue, the activity of small-scale aviation, rather than on the ability of Parliament to exercise its aeronautics power?
2. Do you think that the new two-step test devised and used by McLachlin CJ in this case represents an improvement in the Supreme Court's approach to the doctrine of interjurisdictional immunity? Should the party seeking to have the doctrine applied be required to show not only that the impugned legislation trenches on a core area of a head of power assigned to the other order of government but also that it does so to a "sufficiently serious" degree? Is the addition of the latter step simply a reflection of the Court's insistence in *Canadian Western Bank* that the impugned legislation must be shown to "impair" rather than "affect" the core? Or does the manner in which the majority went about applying that step—asking whether the impugned provincial legislation impaired the ability of Parliament to exercise its power over aerodromes—suggest that it represents more than that?
3. Bruce Ryder has pointed out that the decision of McLachlin CJ in this case appears to convert what Binnie and LeBel JJ in *Canadian Western Bank* argued was a reason not to apply the doctrine of interjurisdictional immunity—the risk of creating what they termed "legal vacuums," which they viewed as "not desirable" (at para 44)—into the very reason why it should be applied in this case. He noted that it was the fact that, if s 26 were held to be applicable to the establishment of private aerodromes on lands designated agricultural, and the federal government objected to the implications thereof for its jurisdiction over that activity, "[i]nstead of the current permissive regime, Parliament would be obliged to legislate for the specific location of particular aerodromes" (at para 48). In other words, it was the absence of any existing federal legislation in relation to the establishment of such aerodromes—a legal vacuum on the federal side—that led her to conclude that s 26 should not be permitted to apply to that activity, thereby preserving that legal vacuum. How seriously should we now take the concern

about the undesirability of legal vacuums? See Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 565 at 590.

4. How would you analyze COPA through the lens of Simeon's three criteria of choice? Which of those criteria would you see being most relevant: community, functional efficiency, or democracy? And what effect would each of the three criteria have on your thinking about the appropriate outcome?

5. Shortly after COPA was decided, the Supreme Court was asked in *PHS Community Services Society* (the "Insite" case) to apply the doctrine of interjurisdictional immunity to protect a core area of provincial legislative jurisdiction from generally worded, valid federal legislation. The federal legislation, clearly valid under s 91, was the *Controlled Drugs and Substances Act*, SC 1996, c 19 (CDSA), which creates a number of criminal offences relating to the possession, use, and trafficking of harmful drugs and other like substances. The sphere of provincial jurisdiction that the challengers sought to protect was health care, and the specific area of that jurisdiction that was of concern to them was the ability of a provincial government to take a medical rather than a criminal approach to intravenous drug users by creating supervised injection sites. In effect, what the claimants were asking for was a grant to the medical staff and users in Insite, the facility in the Downtown Eastside area of Vancouver at which this medical approach was being taken, of an immunity from the application of the offence provisions of the CDSA.

The Court had no difficulty with the fact that the doctrine of interjurisdictional immunity was being invoked to protect provincial jurisdiction in this case, but it nevertheless rejected the claim. Chief Justice McLachlin, writing for the full Court, affirmed the cautious approach to the doctrine prescribed by *Canadian Western Bank* and then refused to accept that "the delivery of health care" deserved to be characterized as a core area of provincial jurisdiction over health care, providing four reasons for doing so: (1) such a core had never been recognized before; (2) the proposed area had the potential to be very broad; (3) the proposed area was one in which both levels of government have been permitted to legislate; and (4) recognition of the claimed core had the potential to create legal vacuums. Do you find these reasons persuasive? Do you think the claimants might have improved their chances of success if they had defined the proposed core in narrower terms? How might they have done that?

6. There is a long line of cases in which the doctrine of interjurisdictional immunity has been invoked by parties seeking to have it applied to protect core areas of federal jurisdiction over "Indians and Lands Reserved for the Indians," under s 91(24) of the *Constitution Act, 1867*, from generally worded, valid provincial legislation. In some of the more recent of these cases, the claim has been grounded in two assertions: first, that the provincial legislation infringed on one or more of the rights protected by s 35 of the *Constitution Act, 1982*, and, second, that because those rights should be understood to be part of the core of s 91(24), the provincial legislation was encroaching on that core. In *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44](#), excerpted in Chapter 14, Indigenous Peoples and the Constitution, McLachlin CJ, writing for a unanimous Court, suggested that the doctrine of interjurisdictional immunity should no longer be applied in cases of that nature and that they should instead be dealt with directly under s 35. The implication of this suggestion is that valid provincial legislation that would have been ruled inapplicable if the doctrine of interjurisdictional immunity had been available will now be applicable unless it fails the justificatory test that has been established by the Court for infringements of s 35 rights. The Chief Justice justified this change in approach as follows:

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

Chief Justice McLachlin also justified the change in approach on the basis of the "modern articulation of the doctrine of interjurisdictional immunity" in *Canadian Western Bank* and COPA, noting that interjurisdictional immunity, which is "premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments, ... is often at odds with modern reality" (at para 148). Applying the doctrine in such cases would, she said, create "serious practical difficulties" and the potential for legislative vacuums. Do you agree that the doctrine should no longer be applied in cases implicating s 35 rights? Does that not leave open the possibility that more provincial legislation than would have formerly been the case will be applicable to core areas of s 91(24)? (For confirmation that the new approach to interjurisdictional immunity also applies to treaty rights protected under s 35, see *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48](#) at para 53.)

7. For further recent discussion of the doctrine of interjurisdictional immunity, see K Wilkins, "Exclusively Yours: Reconsidering Interjurisdictional Immunity" (2019) 52:2 UBCLR 697.

We end our look at the manner in which the courts interpret the division of powers with excerpts from articles by constitutional scholars Bruce Ryder, Wade Wright, Johanne Poirier, and Jean-François Gaudreault-Desbiens.

Professor Ryder posited two very different general approaches to the resolution of the question regarding how to interpret the division of powers that he says are reflected in the jurisprudence—classical federalism and modern federalism—and described the features of each.

Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations"

(1991) 36:2 McGill LJ 309 at 309-14, 380-81 (footnotes omitted)

In [OPSEU] Chief Justice Dickson remarked that "[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers." This is an accurate description of only part of our constitutional jurisprudence. It may be that, in the post-World War II era, judicial interpretation of the constitution has gradually moved away from a "classical" view of the distribution of powers, that allowed for little overlap and interplay of provincial and federal powers, towards the more flexible "modern" federalism described by the Chief Justice. But this movement, from what I will call the classical paradigm to the modern paradigm in Canadian federalism, has been neither consistent nor steady. Indeed, both approaches have been invoked by the courts at all stages of our history of constitutional judicial review. Nevertheless, the larger trend does emerge from a study of the cases. One can say, at least, that the modern paradigm has replaced the classical paradigm as the dominant approach to the judicial interpretation of the division of powers. . . .

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The classical and modern paradigms represent different judicial approaches to defining "exclusivity" of federal and provincial powers, and thus of preserving provincial autonomy. The classical paradigm is premised on a "strong" understanding of exclusivity: there shall be no overlap or interplay between federal and provincial heads of power. The heads of power in the federal and provincial lists should not be interpreted literally, but should be "mutually modified" in light of the subjects accorded to

the jurisdiction of the other level of government so as to avoid overlapping responsibilities as much as possible. Each level of government must act within its hermetically sealed boxes of jurisdiction, or “watertight compartments” (“compartiments étanches”). Any spillover effects on the other level of government’s jurisdiction will not be tolerated. Such legislative spillover must be contained, either by ruling such laws *ultra vires*, or by “reading them down” so that they remain strictly within the enacting legislature’s jurisdiction. ...

The modern paradigm, on the other hand, is premised on a weaker understanding of exclusivity. Instead of seeking to prohibit as much overlap as possible between provincial and federal powers, the modern approach to exclusivity simply prohibits each level of government from enacting laws whose dominant characteristic (“pith and substance”) is the regulation of a subject matter within the other level of government’s jurisdiction. Exclusivity, on this approach, means the exclusive ability to pass laws that deal predominantly with a subject matter within the enacting government’s catalogue of powers. If a law is in pith and substance within the enacting legislature’s jurisdiction, it will be upheld notwithstanding that it might have spillover effects on the other level of government’s jurisdiction. And if a problem of national or international dimensions is functionally beyond the capacity of a province to regulate effectively, it will be allocated to federal jurisdiction. In these ways, the modern paradigm, to borrow Dickson C.J.’s words, allows for a “fair amount of interplay and indeed overlap between federal and provincial powers.”

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The weakness of the classical paradigm is that in a complex, interdependent world, social problems do not fit so neatly into jurisdictional boxes. Virtually any piece of legislation can be cut down by a holding of *ultra vires* if the classical paradigm is invoked in all its vigour. In addition, the watertight compartments metaphor can give rise to a legislative vacuum by hiving off parts of interconnected phenomena, granting jurisdiction over part to the federal government and part to the provinces. In this way, effective regulation of the whole is left to the unpredictable fate of attempts at inter-governmental cooperation. In sum, the classical paradigm is the course of judicial activism, because it puts more stringent constraints on legislation enacted by both levels of government. And, by creating legislative vacuums, it compromises the principle of exhaustiveness.

The modern paradigm is the course of judicial restraint; it avoids the deregulatory tendencies of the classical paradigm by maximizing the ambit of the legislative powers available to the federal and provincial governments alike. However, the weakness of the modern paradigm is that it can be employed in a manner that compromises provincial autonomy. By allowing legislation to have spillover effects on the other government’s areas of jurisdiction, it creates areas of social life subject to overlapping or concurrent powers. Where overlapping federal and provincial laws come into conflict, the rule of federal paramountcy provides that the federal law prevails, rendering the provincial law inoperative to the extent of the conflict. Thus, the modern paradigm, by extending the areas subject to concurrent powers, extends the potential for federal dominance inherent in the paramountcy rule. Carried to its logical extreme, the modern paradigm would make a mockery of provincial autonomy.

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An analysis of the case law interpreting the constitutional division of powers indicates that the doctrinal techniques of what I have called the classical and modern paradigms have been utilized by the courts at all stages of our constitutional history. Most scholars have associated the use of these paradigms with particular time

periods and courts—the classical paradigm is frequently associated with the pre-World War II Privy Council era, and the modern paradigm with the Supreme Court of Canada's post-war jurisprudence. I have suggested that it is more fruitful to map the use of the two paradigms by reference to differing judicial attitudes to regulation in different areas of social life. The deregulatory bias of the classical paradigm has been applied to legislation that is viewed as interfering with the operation of free markets; the judicial tolerance of the modern paradigm has been applied to legislation perceived to deal with issues of morality or social order . . . These broad tendencies in the doctrinal structure of Canadian federalism can be traced from the early days following Confederation through to the present day.

Most Canadian scholars have been partisans of either the classical or the modern paradigm as the only appropriate approach to defining the meaning of exclusivity in the division of powers. The classical paradigm has been defended by jurists such as Jean Beetz as the best means of preserving an authentic federalism with equally autonomous provincial and federal governments. Others, such as Peter Hogg, have defended the judicial restraint inherent in the modern paradigm as the appropriate interpretive posture of an unaccountable judiciary. I have argued that the task of federal interpretation should not be approached as an either/or choice between the two paradigms. Both the classical and the modern paradigms are legitimate attempts to give real meaning to exclusivity and to the democratic principle of exhaustiveness. Each has an important role to play . . .

More recently, Professor Wade Wright has identified three federalisms:

Wade Wright, "Federalism(s) in the Supreme Court of Canada During the McLachlin Years"

(2018) 86 SCLR (2d) 213 (footnotes omitted)

1. Three Federalisms

(a) Classical Federalism

Let me start with the first paradigm—classical federalism. Its basic features have been described in a large body of scholarship. As its name suggests, it is the “classic” view of the division of powers, and as such, it often serves as the reference point for discussions of the other paradigms.

As a theory of federalism, classical federalism likens the federal and provincial governments to sovereign states, with the exclusive authority to regulate all subjects or “matters” that fall within their jurisdiction under the division of powers. It eschews the overlap or interplay of federal and provincial jurisdiction, unless the text of the Constitution explicitly provides otherwise; rather, it supports confining federal and provincial jurisdiction to what Lord Atkin, writing for the Privy Council, famously called “watertight compartments.” Under the classical federalism paradigm, jurisdiction thus operates both to empower, by enabling one order of government to enact laws in relation to particular subjects, and to disempower, by preventing the other order of government from enacting laws in relation to those same subjects. Jurisdiction is thereby confined to “mutually exclusive and self-contained boxes,” and “each order of government is seen as operating in its own separate sphere, never really overlapping or crossing paths with the other.”

As a theory of federalism, classical federalism takes no position about how jurisdiction is exercised by the two orders of government where it exists. This is left to the political process to decide. If either order of government somehow "strays" beyond its sphere of jurisdiction, exclusive or concurrent, it can and will be "dealt with harshly" by the courts. However, when they operate within their spheres of jurisdiction, the two orders of government can "act with impunity," and need "pay no heed to the harmful consequences of [their] action[s] on [their] neighbours." Thus, "intergovernmental relations [in a classical federal system] are ... 'deliberate' and 'optional,' somewhat along the lines of diplomatic relations between independent states."

What theory of judicial review is associated with classical federalism? The answer is that, under the classical paradigm, the courts are typically cast in the role of "umpires" or "arbiters," and tasked with safeguarding the exclusive jurisdictional allocations emphasized under its associated theory of federalism.

This warrants a bit of unpacking. Take the first point about the role of the courts. Under the classical paradigm, the courts are thought to play an important—indeed essential—role as "umpires" or "arbiters" of the division of powers. At first glimpse, there might appear to be little agreement about what this role entails, but on closer inspection, there are actually key points of agreement. First, as umpires or arbiters, the role of the courts is thought to be to resolve disputes about the division of powers, in the process clarifying and enforcing lines or boundaries defining the scope or limits of federal and provincial jurisdiction. The term division of powers, which is the term that is usually used in discussions of federalism in the legal scholarship in Canada, reflects this basic idea. In addition, as umpires or arbiters, the role that the courts play is central; their word about the scope or limits of federal and provincial jurisdiction is, if not exclusive, then decisive. The political branches may play a role in setting the division of powers, by deciding which initiatives to pursue and how, but in doing so, they must operate within the constitutional constraints that the courts clarify and enforce as umpires or arbiters. Finally, as umpires or arbiters, the courts are expected to ensure that the balance of power between the federal and provincial governments is (relatively) fixed and stable, not (overly) flexible and dynamic. The division of powers (like the rest of the Constitution) may be a "living tree," subject to changes to accommodate new or different circumstances, but it is a living tree with "natural limits."

Take the next point about the theory of federalism that the courts are expected to safeguard as umpires or arbiters. Under the classical paradigm, the central function of the courts, as umpires or arbiters, is unsurprisingly to clarify and enforce the "mutually exclusive spheres of activity" associated with this theory of federalism. This approach manifests, among other ways, in doctrines that privilege jurisdictional exclusivity, like the mutual modification and interjurisdictional immunity doctrines, and a corresponding suspicion of doctrines that allow for jurisdictional overlap, like the double aspect and ancillary powers (or necessarily incidental) doctrines. For the courts, "the classical paradigm is the course of judicial activism, because it puts more stringent constraints on legislation enacted by both [orders] of government."

(b) Modern Federalism

The next paradigm is modern federalism. Its basic features, like classical federalism, have also been outlined in a large body of scholarship. The modern federalism paradigm differs in fundamental ways from the classical federalism paradigm. As a theory of federalism, the core difference is that it tolerates, even celebrates, significant overlap in jurisdiction. As Bruce Ryder notes, "[t]he belief in clear boundaries separating the legitimate spheres of provincial and federal activity is abandoned in favour

of a recognition of interdependence and overlap in federal and provincial spheres of activity."

This has important implications for modern federalism's associated theory of judicial review. Because modern federalism tolerates, or celebrates, overlap in jurisdiction, the role of the courts is more attenuated; it is, accordingly, the "way of judicial restraint." This manifests, among other ways, in an embrace by the courts of the overlap-friendly doctrines that classical federalism views with caution, and a cautious approach to the exclusivity-friendly doctrines that classical federalism privileges. This, in turn, leaves the particular mix of federal and provincial policies more to the political process.

And yet, while the classical and modern paradigms differ, in particular over how much they emphasize jurisdictional exclusivity, they are also similar in important respects. As a theory of federalism, modern federalism also allocates both orders of government a realm of exclusive jurisdiction. It simply defines exclusivity in a narrower way, allowing one order of government to pursue policies that have "incidental" effects on subjects allocated to the other, provided they deal "predominantly" with matters that fall within their jurisdiction. In addition, modern federalism also does not take a strong position about how jurisdiction is exercised where it exists. Here again, this is left to the political process to decide. Finally, as a theory of judicial review, modern federalism still casts the courts in the role of umpire or arbiter. The role of the courts is attenuated, as noted. However, the courts are still called upon to clarify and enforce those jurisdictional limits that remain, and where a conflict arises between overlapping federal and provincial laws, the courts also play a role, applying the federal paramountcy doctrine to resolve the conflict.

(c) Cooperative Federalism

Consider finally the third paradigm—cooperative federalism. It has taken on increased importance in recent years in the McLachlin Court's decisions, but it has not received the same depth of treatment by scholars as the first two paradigms. This is not surprising. Cooperative federalism is not new, inside or outside the courts, but, as I argue below, the prominence that it has been given by the courts, as a guide for judicial decision-making, is new.

What does cooperative federalism entail as a theory of federalism? There is no clear consensus about the answer to this question. However, there does appear to be some level of agreement that cooperative federalism refers, at a minimum, to a federal system in which the two orders of government work out their own exercises (and, perhaps allocations) of jurisdiction in particular regulatory contexts, by invoking a vast network of formal and informal mechanisms and relationships for this purpose. William Lederman, for example, suggested "[t]he essence of co-operative federalism is federal-provincial agreement, whether tacit or explicit, about complementary uses of federal and provincial powers and resources." Similarly, Peter Hogg, in a passage that was recently cited with approval by the Supreme Court, claimed "[t]he essence of cooperative federalism is a network of relationships between the ... central and regional governments," which have led to the development of "mechanisms" that, together, "allow a continuous redistribution of powers and resources without recourse to the courts or the amending process."

As a theory of federalism, cooperative federalism, unlike classical federalism and modern federalism, is not agnostic as to how jurisdiction is exercised (and perhaps allocated as well) in the federal system. It expresses (at least) a preference for cooperative intergovernmental efforts—for "agreement, whether tacit or explicit, about complementary uses of federal and provincial powers and resources." To be sure,

there is an ongoing debate about whether it entails merely permitting and encouraging intergovernmental cooperation, or to some extent actually requires it as well. Some take the former view, others the latter view. And yet, accounts of cooperative federalism seem united in taking a clear(er) position about how jurisdiction is exercised (and, perhaps allocated, as well), favouring cooperative intergovernmental decision-making.

What does cooperative federalism entail as a theory of judicial review? The focus of cooperative federalism as a theory of judicial review is, unsurprisingly, on cooperative intergovernmental decision-making about the exercise (and, perhaps allocation) of jurisdiction. The courts, at a minimum, work to accommodate, reward and encourage intergovernmental cooperation.

As a theory of judicial review, cooperative federalism differs in important ways from the theories of judicial review associated with both classical federalism and modern federalism. First, under the cooperative federalism paradigm, the courts are cast as facilitators, rather than—or in addition to—umpires or arbiters. As facilitators, the courts act as catalysts for intergovernmental cooperation. Second, and relatedly, as facilitators, the line-drawing role that the courts play as umpires or arbiters is de-emphasized; the courts focus more on accommodating, encouraging and rewarding cooperative intergovernmental efforts. Third, and related again, as facilitators, the courts are not granted the exclusive—or, perhaps even the authoritative—word about the division of powers that the classical and modern paradigms grant them as umpires or arbiters. The courts participate in a dynamic, inter-institutional, three-way dialogue about the division of powers—a dialogue in which the courts and the political branches (legislative and executive, federal and provincial) all play an active role. Finally, under a facilitative approach, the balance of power between the federal and provincial governments is less fixed and stable and more dynamic and negotiated (in practice, and perhaps to some extent legally as well), subject more to the political process over time.

NOTES AND QUESTIONS

1. In your view, which taxonomy best serves as a framework within which to consider the use to which the various doctrines that we have just examined have been put over time and in different kinds of cases?

2. For a sophisticated discussion of different conceptions of federalism, drawing in part on comparative constitutional law sources, see J-F Gaudreault-Desbiens & J Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism" in P Oliver, P Macklem & N Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 391. The authors draw a distinction between "dualist" and "intergrated/cooperative" federalism (at 394–95, footnotes omitted):

In dualist federal systems, each order of government enjoys legislative and executive—and often judicial—powers. These powers are likely to be distributed on an exclusive basis, to maximize the autonomy and independence of each order of government. Formal legal norms are adopted in a parallel fashion, unilaterally, by each order of government. The official architecture is thus "compartmentalised," or, perhaps, more tellingly, "pillarized,"—that is, built on vertical columns or "pillars." In this type of system, interaction between federal partners is not an integral part of the overall structure or logic. Rather it takes the form of intergovernmental relations that are more "deliberate" and "optional," somewhat

along the lines of diplomatic relations between independent states. The American, Australian, Brazilian, or Belgian federations largely follow this dualistic logic, and so does Canada.

The “pillarised” form of federal architecture is to be contrasted with systems in which constitutive units implement most of the legislative acts and programmes adopted by central authorities. Such systems—known in Germany, Switzerland or, by analogy, the European Union, for instance, may be described as “administrative,” “executive,” “cooperative,” or “integrated.” In those regimes, cooperation is more “organic” and structural than voluntary. Constitutive units contribute in a far more direct fashion in the adoption of federal norms which they will then have to implement (alongside their own). This form of “intrastate” federalism is, of course, an integral part of officially “administrative” federal regimes. A lesser degree of legislative autonomy is thus somewhat compensated by greater participation. It is worthy of note that there is no empirical evidence suggesting that these official forms of “integrated” systems lead to more actual cooperation than dualist ones. However, cooperation follows different channels, involves distinct institutions, and tends to rest on contrasting conceptions of the role of law in the life of specific federations. Formally “integrated” regimes have been more influenced by European civil law, and are more likely to integrate constitutional rules and principles, legislative frameworks, and judicial oversight of “inter-federal behaviour” than their counterparts with roots in the English common law.

2. Is the “cooperative federalism” referred to by Wright and by the Supreme Court of Canada the same as the “integrated/cooperative federalism” referred to by Professors Gaudreault-Desbiens and Poirier? Would it be helpful to refer instead to “flexible federalism,” as the Supreme Court of Canada has done on a number of occasions more recently? In a recent article, Julien Boudreault rightly pointed out that the Supreme Court has often used the term “cooperative federalism” in recent cases as an “umbrella term,” capturing the dual notions of flexibility and intergovernmental cooperation in a convenient form. Boudreault’s preference is to refer to the intergovernmental aspect as cooperative federalism *stricto sensu*, leaving the flexibility to refer to the aspect most relevant to the constitutional division of powers. (See J Boudreault, “Flexible and Cooperative Federalism: Distinguishing the Two Approaches in the Interpretation and Application of the Division of Powers” (2020) 40 NJCL 1 at 9.) Does this solution help avoid confusion?

For further reading on cooperative federalism, see, for example, J Boudreault, “Flexible and Cooperative Federalism: Distinguishing the Two Approaches in the Interpretation and Application of the Division of Powers” (2020) 40:1 NJCL 1; K Glover, “Structural Cooperative Federalism” (2016) 76 SCLR (2d) 45; WJ Newman, “The Promise and Limits of Cooperative Federalism as a Constitutional Principle” (2016) 76 SCLR (2d) 67; A Pless, “Uncooperative Thoughts About Cooperative Federalism” (2020) 99 SCLR (2d) 135.

CHAPTER NINE

PEACE, ORDER, AND GOOD GOVERNMENT

NOTE: THE HISTORICAL DEVELOPMENT OF THE POGG POWER

This chapter continues the story of the federal peace, order, and good government (POGG) power after the 1930s (a period covered in Chapter 6, The 1930s: The Depression and the New Deal). POGG is generally viewed as having three branches or doctrines: emergency, "new" matters, and national concern. The distinguishing feature of the modern interpretation of the POGG power has been the re-emergence of the national concern doctrine, first introduced by Lord Watson in the *Local Prohibition* case, excerpted in Chapter 4, The Late Nineteenth Century, in a form that allows for federal legislation in situations of national concern apart from emergencies.

The national concern doctrine was given its modern formulation by Viscount Simon in *Ontario (AG) v Canada Temperance Federation*, 1946 CanLII 351, [1946] AC 193 at 5 (UKJCPC):

In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics Case* and the *Radio Case*), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. War and pestilence, no doubt, are instances; so too may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that Province.

In *Canada Temperance Federation*, the doctrine was used to uphold the federal government's 1927 re-enactment of the *Canada Temperance Act*. Viscount Simon reaffirmed (at 6) the validity of *Russell v The Queen* (1882), 7 App Cas 829, 51 LJPC 77 (PC) and also rejected the suggestion that *Russell* was based on a finding that intemperance constituted a national emergency in 1878:

It is to be noticed that the Board in *Snider*'s case nowhere said that *Russell v. The Queen* was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

Viscount Simon also expanded the scope of the POGG power by recognizing the power to legislate to prevent an emergency from occurring (at 7):

To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again.

The national concern doctrine, as set out in *Canada Temperance Federation*, was applied to validate federal legislation in two cases decided by the Supreme Court in the 1950s and 1960s. Both suggested an expansive reading of the doctrine.

In *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292, 1951 CanLII 55, a case involving a challenge to a municipal by-law controlling the location of airports, the majority of the Court referred to the doctrine as supporting exclusive federal legislative jurisdiction with respect to the whole field of aeronautics. (Recall that in the *Canada (AG) v Ontario (AG)*, 1931 CanLII 466, [1932] AC 54 (UKJCPC) [Aeronautics Reference], discussed in Chapter 6, the justification for federal jurisdiction over aeronautics was the treaty power found in s 132 of the *Constitution Act, 1867*. That justification was no longer available because the case involved a treaty signed by Canada itself, rather than by Britain on Canada's behalf.) The Supreme Court of Canada rendered five opinions supporting the result, with substantially similar reasoning. Justice Locke (at 326) offered the following reasons to justify exclusive federal jurisdiction over aeronautics:

There has been since the First World War an immense development in the use of aircraft flying between the various provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity ... is in the hands of a government controlled company, private companies carry on large operations, particularly ... [to] the North The maintenance and extension of this traffic ... is essential to the opening up of the country and the development of the resources of the nation. It [is clear] that the field of aeronautics is one which concerns the country as a whole. It is an activity, which [, borrowing from] Attorney General for Ontario v Canada Temperance Federation, must from its inherent nature be a concern of the Dominion as a whole. ... [It] is not, in my opinion, capable of division in any practical way. ... [By way of example,] it would be intolerable that such a national purpose might be defeated by a rural municipality, the Council of which decided that the noise attendant on the operation of airplanes was objectionable.

In *Munro v National Capital Commission*, [1966] SCR 663, 1966 CanLII 74, the Supreme Court unanimously upheld the *National Capital Act*, RSC 1985, c N-3, on the basis of POGG. The Act created a National Capital Commission to "prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance" (at 668). Munro, whose property in the Township of Gloucester was expropriated under the Act in the course of establishing a green belt outside the City of Ottawa, argued that the federal legislation was a form of planning and zoning legislation similar to that covered by provincial Planning Acts. Justice Cartwright, acknowledging that doctrine adopted by the Court in *Johannesson*, ruled that the development of the National Capital Region under the Act was a "single matter of national concern" (at 671). Justice Cartwright also highlighted the following conclusions made by the trial judge regarding the

legislative history, which anticipate elements of the "provincial inability" test that has become central to the national concern branch of POGG (at 667):

(i) that the making of zoning regulations and the imposition of controls of the use of land situate in any province ... are matters which, generally speaking, come within the classes of subjects assigned to the Legislatures by s. 92 of the *British North America Act*; (ii) that the legislative history ... indicates that Parliament, up to the time of the passing of that Act, contemplated that the "zoning" of the lands comprised in the National Capital Region should be effected by co-operation between the Commission ... and the municipalities ... ; and (iii) that it was only after prolonged and unsuccessful efforts to achieve the desired result by such co-operation that Parliament decided to confer upon the National Capital Commission the powers necessary to enable it to carry out the zoning contemplated in the Master Plan.

In another case, *Jones v AG of New Brunswick*, [1975] 2 SCR 182, 1974 CanLII 164, the opening words of s 91 were relied on to uphold a federal law without mention of the national concern doctrine. That implied, as first suggested in the *Reference re Regulation and Control of Radio Communications*, [1931] SCR 541, 1931 CanLII 83 [Radio Reference] (discussed in Chapter 6) that s 91 can authorize federal legislation in relation to subject matters not explicitly assigned to either level of government. At issue was the constitutionality of the federal *Official Languages Act*, which provided for the equal status of French and English in federal institutions. Chief Justice Laskin, for a unanimous Court, upheld the legislation on the basis that federal institutions are "clearly beyond provincial reach" (at 189), and, as such, fall within the opening words of s 91 because "of the purely residuary character of the legislative power thereby conferred" (at 189).

Notwithstanding the above cases, the reach of the national concern doctrine remained uncertain. In the reference opinion that follows, *Re: Anti-Inflation Act* (excerpted below), the Supreme Court was asked about the constitutionality of federal wage and price controls that applied in areas traditionally within provincial jurisdiction. The Act was drafted in a manner that allowed an argument for its validity under either the national dimensions doctrine or the emergency doctrine. Were it to succeed under the former, there would be a substantial enlargement of federal power over economic regulation. Therefore, the case was seen as a potential turning point in constitutional law.

The leading judgments in the case, those of Laskin and Beetz JJ, are informed by their very different views of Canadian federalism and the interpretation of the division of powers articulated in their respective earlier careers as legal academics. The background and prior writings of each are described by Professor Katherine Swinton in the excerpt that follows.

Katherine E Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years

(Toronto: Carswell, 1990) at 219-25, 240-41, 260-65 (footnotes omitted)

Laskin's Centralist Vision

A study of the approaches to federal–provincial disputes by members of the Supreme Court of Canada in recent years must begin with Bora Laskin. Not only was he a leading academic constitutional lawyer before he joined the judiciary; in his 19 years as a judge, he played a predominant role in decisions on the distribution of powers under the *Constitution Act, 1867* ...

It is often difficult to articulate, with any degree of certainty, the views of a particular judge on a range of federalism issues. Laskin, while prolific in his judicial writing, was highly formal in his judicial style in constitutional cases, obscuring the

policy aspect of his decisions behind a recitation of cases and consideration of precedent. While this style would obscure the views of some judges, the outcomes in the wide range of cases in which Laskin wrote are revealing, as are some of the statements found in his judgments. ... [As well, from 1941 to 1965, he was a professor at either Osgoode Hall Law School or the University of Toronto, and in that period he wrote several articles and case comments, as well as his casebook on constitutional law, which cast additional light on his attitudes towards federalism as well as his views on judging. Obviously, some of the academic's beliefs were reshaped by his judicial experience, but many of his early views on the constitution remained with him throughout his career. ...]

Safeguarding Federal Jurisdiction

Laskin the academic had firm views on the way in which the then *British North America Act* should be interpreted, and these beliefs were later applied in his judgements. His approach invited results favouring a strong central government. For example, he believed that the opening words of section 91, the "peace, order and good government" clause, constituted the "general power," while the enumerated powers in section 91 were illustrative only. This approach had not been adopted by the Privy Council, which had given primacy to the enumerated powers and relegated the opening words to a residuary position. While Laskin disliked the Privy Council approach, he felt that its error would not have been that serious if the Court had properly applied the aspect doctrine, which, in his opinion, it did not. Indeed, he was highly critical of the Privy Council's treatment of the aspect doctrine, which focussed on the subject matter of legislation, allocating particular concrete subjects to the federal or provincial governments as "fields" of law-making. In contrast to this "territorial" or boundary driven approach, Laskin felt that a court should focus on the object or purpose of legislation, asking whether the law had a federal or provincial "aspect," with the result that concrete subjects like the wheat trade, for example, might be regulated by both levels of government—albeit from different aspects as permitted by the classes of law-making powers set out in sections 91 and 92 of the constitution. ...

If we turn from the structure of inquiry to its substance, we find that, in Laskin's opinion, the federal government was the logical institution to deal with important problems, and he decried the results of Privy Council jurisprudence for the following reason:

[H]as provincial autonomy been secured? In terms of positive ability to meet economic and social problems of interprovincial scope, the answer is not. A destructive negative autonomy exists, however, which has as a corollary that the citizens of a province are citizens of the Dominion for certain limited purposes only.

Consistent with this confidence in the efficacy of national regulation, Laskin believed that problems once local in nature could take on a federal aspect, as they became more complex or spilled over provincial borders. He believed that the courts should interpret the constitution so as to recognize this evolutionary potential. Thus, in judicial review under the constitution, a court should take a flexible view of the instrument, interpreting it so as to allow effective governmental responses to important problems of public policy. ...

Beetz's Classical Federalism

... While Laskin espoused a view of federalism that favoured the existence of a strong central government and called for flexibility in the interpretation of the constitution, Beetz seemed to search for principles and rules to confine the exercise of judicial

discretion. Overall, he was much more protective of provincial rights and, as a consequence, cautious about departing from precedents which provided safeguards for provincial autonomy. It would be misleading, however, to describe Beetz in one-dimensional terms—as the Quebec nationalist constantly on guard for the province's interests. His vision of the constitution was indeed guided by a concern for provincial autonomy, a value which he embedded in Canadian traditions and the language of the constitutional document, but his reading of that document was influenced by a classical vision of the federal system, which demanded respect for the autonomy of the federal, as well as the provincial governments in the areas of jurisdiction which the constitution allocated to each. In contrast to the functional approach to interpretation espoused by Laskin (which seemed to lend itself to the expansion of the central power), Beetz preferred a more conceptual approach to the interpretation of the constitution which would preserve exclusive areas of jurisdiction for both levels of government. ...

Beetz the Academic

Like Laskin, Beetz began his career as a professor of law. Educated at the University of Montreal and Oxford, where he studied as a Rhodes Scholar, he returned to teach law at the University of Montreal His academic expertise in constitutional law was enriched by a period of service at the federal level as Assistant Secretary to the federal cabinet and later as Special Counsel to the Prime Minister of Canada for constitutional matters from 1968 through 1971. Two years later he was appointed to the Quebec Court of Appeal and, in 1974, to the Supreme Court of Canada.

Beetz was not a prolific scholar in his professorial days, [but two of his articles reveal] his views on the constitution

A Québécois Point of View

The first article, dealing with the changing attitudes of Quebec towards the constitution, was written in 1965, when Quebec was in the midst of the turmoil of the Quiet Revolution The article discussed issues of constitutional interpretation, as well as Quebec's political agenda in federal–provincial relations over the years

Beetz began with the historical proposition that the *British North America Act* was a document designed to protect the French-speaking minority of Quebec from majority domination in certain areas important to the preservation of the Franco-phone culture—specifically religion, language, laws, and education. ... Once these areas of jurisdiction were designated for provincial governments, it became important, from a Québécois point of view, that the constitution be interpreted in a manner sympathetic to provincial competence. Noting that there are various methods of interpreting legislation, depending on the type of statute and the style of drafting, Beetz characterized the *British North America Act* as a "document paradoxal": its status as a fundamental law, difficult to amend and designed to last indefinitely, suggests the need for a liberal interpretation to allow the document to evolve with changing circumstances, yet the Act was drafted in the technical and detailed manner of a statute to which one would normally give a restrictive interpretation

Beetz felt that the nature and style of the *British North America Act* had an impact on the subsequent interpretation of the document, fostering competing schools of interpretation of sections 91 and 92—the one supportive of the decisions of the Privy Council, because that body treated the opening words of section 91 as residuary and subordinate and gave primacy only to the federal enumerated powers over the provincial powers; the second critical of that institution because of the reduced role for the federal residuary power (and, thus, the circumscription of federal action).

In an interesting footnote, Beetz expressed his personal opinion that the Privy Council's interpretation was correct, given the contradictions of the text. He explained that the federal enumerated powers must be of primary importance in interpretation in order to limit the reach of the provincial powers. ...

While some critics of Beetz's judicial work have described him as mechanistic and unduly conceptual, the charge is unfair if it implies that he had no conception of the creative nature of judging. Beetz, like Laskin, clearly acknowledged that judges have a considerable amount of discretion in interpreting the distribution of powers in the constitution. ...

While many of the cases brought before the Privy Council could have been differently decided, he noted that it has been in Quebec's interest to emphasize the immutability of the constitution, since the Privy Council jurisprudence was so favourable to minority interests. As a result, the Quebec approach to the constitution has emphasized the importance of *stare decisis* and has rejected the functional approach of the realist scholars. ... Instead, in Quebec, there has been a preference for analytical jurisprudence, with concentration on the development of concepts, rather than a functional or relativist approach. Thus, there was a distrust of the "national dimensions" approach to the peace, order and good government clause of section 91, because that doctrine would allow matters traditionally within provincial jurisdiction to take on a national importance warranting federal action. A Québécois would prefer the emergency interpretation of the peace, order, and good government power, because it leads only to a temporary suspension of the constitution, rather than a permanent transfer of power to the federal government based on the importance of the problem to be addressed. ...

Along with the national dimensions power, Québécois were also concerned about the increasing tendency to find concurrent powers between federal and provincial governments, for this seemed inconsistent with the constitution's reference to "exclusivity" of legislative powers. Concurrency seems problematic because it gives a wider zone for the supremacy of federal laws, through the operation of the paramountcy doctrine. ...

Beetz went on to examine Quebec's attitude towards state action under the constitution, commenting on the transformation from a fixation on the parts of the constitution which could protect Quebec culturally and linguistically—the powers over education and civil law—to the use of the constitution to advance Quebec economically. The power to legislate over property and civil rights then becomes important not because it permits the preservation of the civil law of Quebec, but because it gives the province jurisdiction over labour relations, industrial development, transportation, and commerce in general within its territory. Quebec's special debt to the Privy Council for the expansion of the property and civil rights power is acknowledged. ...

The spirit of Quebec in the 1960s described by Beetz is quite familiar, capturing Quebec's nationalism and its government's wariness of federal encroachment on provincial jurisdiction. In this newly activist Quebec state, the Canadian constitution was a problematic document. ... While that process may have been slower in Canada than in other federal countries, the language of the Canadian constitution would allow for much greater centralization without any formal amendment. This could occur through the overruling of past decisions or interpretation of heads of power hitherto little explored. Most obviously, the judges could use existing doctrine to expand federal jurisdiction. ...

Re: Anti-Inflation Act[1976] 2 SCR 373, 1976 CanLII 16

[The *Anti-Inflation Act*, SC 1974-75-76, c 75 established a system of price, profit, and income controls. The Act applied to private sector firms with more than 500 employees, members of designated professions, construction firms with more than 20 employees, and other private sector firms declared to be of strategic importance to the scheme. The Act was also binding on the federal public sector, but applicable to the public sector of each province only if an agreement was made between the federal government and the government of the province.

The long title and preamble of the Act were as follows:

An Act to provide for the restraint of profit margins, prices, dividends and compensation in Canada

WHEREAS the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern;

AND WHEREAS to accomplish such containment and reduction of inflation it is necessary to restrain profit margins, prices, dividends and compensation. ...

The governor in council directed a reference to the Supreme Court of Canada to determine whether the Act was *ultra vires* and whether the Ontario agreement, purporting to make the Act applicable to the Ontario public sector, was valid. Seven judges (the Chief Justice, Judson, Spence, Dickson, Ritchie, Martland, and Pigeon JJ) held that the Act was supportable under the POGG power as emergency or "crisis" legislation, while two (Beetz and de Grandpré JJ) held it was not. The Court divided differently on the question of whether the existence of an emergency was essential to the Act's validity. Five (Ritchie, Martland, Pigeon, Beetz, and de Grandpré JJ) held that it was, rejecting a national dimensions argument; four (Laskin CJ, Judson, Spence, and Dickson JJ) left open the question of whether the legislation was supportable under the national dimensions test.]

LASKIN CJ (Judson, Spence, and Dickson JJ concurring):

The Attorney-General of Canada, having the carriage of the Reference, included in the case (1) the Order of Reference and the annexes thereto; (2) the federal Government's White Paper [that acted as] a prelude to the introduction of ... [the Act]; and (3) the monthly bulletin of Statistics Canada for October 1975 containing, *inter alia*, various consumer price indices Leave was given in the order for directions of April 6, 1976, to other interested parties to file additional materials, and the Canadian Labour Congress included ... an untitled study by Professor Richard G. Lipsey Telegrams from a large number of economists supporting the analysis made by Professor Lipsey were also submitted by the Canadian Labour Congress. The Attorney-General of Canada ... filed in answer a transcript of a speech ... by the Governor of the Bank of Canada The Attorney-General of Ontario filed ... a comment, prepared by the Ontario Office of Economic Policy, ... designed to show the need for national action; and it also submitted a critique of Professor Lipsey's study

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In order to [assess] the extrinsic material it is necessary to examine the ambit of the legislative power under which the *Anti-Inflation Act* was enacted. It is my opinion that only in such a context can the Court be urged, whether through a doctrine of judicial notice or through an adaptation to constitutional purposes of the rules in *Heydon's Case* [that is, the rule that legislation is to be interpreted in light of its

[purpose or the mischief at which it was aimed], to consider extrinsic materials as bearing on the validity of challenged legislation. ... Courts have thought it proper to consider the operation and effect of the legislation as providing a key to its purpose, especially where the allegation is that the legislation [is colourable]. ...

[N]o general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and ... [the answer] must depend on the constitutional issues on which it is sought to adduce such evidence.

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... There is no issue in this case as to the meaning of the terms of the legislation nor, in my opinion, is there any issue as to the object of the legislation. ... [The arguments] turn substantially on whether the social and economic circumstances upon which Parliament can be said to have proceeded in passing the Act were such as to provide support for the Act in the power of Parliament to legislate for the peace, order and good government of Canada. The extrinsic material proffered in this case was directed to this question and may, hence, be properly considered thereon.

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The Attorney-General of Canada, supported by the Attorney-General of Ontario, ... [contended primarily] that the Act ... concerned a matter which went beyond local or private or provincial concern and was of a nature which engaged vital national interests. ... He urged, in the alternative, that there was an economic crisis amounting to an emergency ... sufficient to warrant federal intervention, and, if not an existing peril, there was a reasonable apprehension of an impending one

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... If [the Act] is sustainable as crisis legislation, it becomes unnecessary to consider [whether it relates] to a matter of national concern], and this because, especially in constitutional cases, Courts should not, as a rule, go any farther than is necessary to determine the main issue before them.

The competing arguments on the [emergency] question ... raised four main issues: (1) Did the [form of the] *Anti-Inflation Act* itself belie the federal contention ... ? (2) Is the federal contention assisted by the preamble to the statute? (3) Does the extrinsic evidence ... and other matters of which the Court can take judicial notice ... show that there was a rational basis for the Act as a crisis measure? (4) Is it a tenable argument that [the legislation rose] beyond local or provincial concerns because Parliament could reasonably take the view that it was a necessary measure to fortify action in other [federal] related areas ... ?

[The first issue is] whether the scope of the compulsory application of the *Anti-Inflation Act* [indicates] that the Parliament of Canada did not act through any sense of crisis or urgency in enacting it. I note that the federal public service, a very large public service, is governed by the Act and the Guidelines, [as are] private employers of five hundred or more persons ... , [as well as construction companies] who employ twenty or more persons ... and various [other] professions Again, the Act provides for bringing within the Act and Guidelines [by Order in Council certain other] businesses. ... [T]he coverage is comprehensive indeed in its immediately obligatory provisions

I do not regard the provisions respecting the provincial public sector as an indicator that the Government and Parliament of Canada were not seized with urgency Provincial governmental concern about rising inflation and concurrent unemployment was a matter of public record prior to the inauguration of the programme. ... [Given the scope of the sectors included], I see it as a reasonable policy from the standpoint of administration to allow the Provinces to contract into the programme in respect of the provincial public sector under their own administration Since

the "contracting in" is envisaged on the basis of the federal Guidelines the national character of the programme is underlined.

... [Counsel opposing the legislation raised the issue of] provincial co-operation, ... the proposition being that inflation was too sweeping a subject to be dealt with by a single authority If this is meant to suggest that Parliament cannot act in relation to inflation even in a crisis situation, I must disagree. ... Co-operative federalism may be consequential upon a lack of federal legislative power, but it is not a ground for denying it.

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The Attorney-General of Canada ... emphasized the words [in the preamble] "that the containment and reduction of inflation has become a matter of serious national concern" and as well the following words that "to accomplish such containment and reduction of inflation it is necessary to restrain profit margins, prices, dividends and compensation" (the italicized words were especially emphasized). I do not regard it as telling ... that the very word "emergency" was not used. Forceful language would not carry the day for the Attorney-General of Canada [in the opposite direction]. ... [Note] that ... no preamble at all was included in the legislation challenged in the *Board of Commerce* case.

The preamble in the present case is sufficiently indicative that Parliament was [responding to what in its view was a serious national condition. ...]

This brings me to the third [issue], namely, ... extrinsic evidence and ... judicial notice. ... In considering [extrinsic] material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. ... [T]he extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation.

There is before this Court material from Statistics Canada, ... which, proceeding from a base of 100 in 1971, shows that the purchasing power of the dollar dropped to 0.78 by September, 1974, and to 0.71 in September, 1975. On the same base, the cost of living index rose to 127.9 by September, 1974, and to 141.5 by September, 1975, with food, taken alone, and weighted at 28 per cent of all the items taken into calculation, showing a rise to 147.3 in September, 1974, and 166.6 in September, 1975. These are figures from the Consumer Price Index monitored by Statistics Canada, and I note that Professor Lipsey in his study states that "the measure [of inflation] that is of most direct relevance to the person in the street is the rate of inflation of the CPI." He defines inflation as "a monetary phenomenon in the sense that a rise in the price level is the same thing as a fall in the value of money (i.e., a fall in its purchasing power)." What the Consumer Price Index shows, and Professor Lipsey himself relies on its figures, is that for the first time in many years Canada had a double digit inflation rate for successive years

There have been inflationary periods before in our history but, again referring to Professor Lipsey's study, "the problem of the coexistence of high unemployment and high inflation rates was not, however, encountered before the late 1960's." These twin conditions continued to the time that the Government and Parliament acted in establishing its prices and incomes policy under the *Anti-Inflation Act* and Guidelines, and were the prime reason for the policy.

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There is another consideration that arises from the opposing submissions [It] is based on Professor Lipsey's ... conclusion that the policy adopted in the *Anti-Inflation Act* is not one that can ... be expected to reduce the rate of inflation by more than one to two per cent. The answer to this submission is ... that the wisdom or expediency or likely success of a particular policy expressed in legislation is not subject to judicial

review. Hence, it is not for the Court to say in this case that because the means ... may not be effectual, [they] are beyond the legislative power of Parliament.

I would not exclude the possibility that the means chosen to deal with an alleged evil may be some indicator of whether that evil exists as a foundation for legislation. Professor Lipsey is candid enough to say in his study that whether "a problem is serious enough to be described as a crisis must be partly a matter of judgment." The general question ... is, to use his words, "could an economist say that the Canadian economy faced an economic crisis, or was in a critical situation, in October 1975?" He answers this question in the negative The Court cannot, however, be concluded by the judgment of [even a distinguished] economist ... on a question of [constitutional] validity

In my opinion, this Court would be unjustified in concluding ... that the Parliament of Canada did not have a rational basis for regarding the *Anti-Inflation Act* as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole. That there may have been other periods of crisis in which no similar action was taken is beside the point.

The rationality of the judgment [is] supported by ... the fourth [issue]. The fact that there had been rising inflation at the time federal action was taken, that inflation is regarded as a monetary phenomenon and that monetary policy is admittedly within exclusive federal jurisdiction persuades me that the Parliament of Canada was entitled ... to act as it did from the springboard of its jurisdiction over monetary policy and ... with additional support from its power in relation to the regulation of trade and commerce.

For all the foregoing reasons, I would hold that the *Anti-Inflation Act* is valid legislation for the peace, order and good government of Canada

BEETZ J (de Grandpré J concurring) (dissenting):

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The control and regulation of local trade and of commodity pricing and of profit margins in the provincial sectors have consistently been held to lie, short of a national emergency, within exclusive provincial jurisdiction. ... The same is true generally of the contract of employment, including wages, whether concluded on an individual basis or collectively in the context of labour relations.

The *Anti-Inflation Act*, therefore, and the Guidelines directly and ostensibly interfere with classes of matters ... within exclusive provincial jurisdiction They do not interfere with provincial jurisdiction in an incidental or ancillary way, but in a frontal way and on a large scale. *Prima facie*, the *Anti-Inflation Act* is *pro tanto ultra vires* of the Parliament of Canada which, under s. 91 of the Constitution, cannot make laws in relation to matters "coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

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I

The first submission made by counsel for Canada and for Ontario is that the subject-matter of the *Anti-Inflation Act* is the containment and the reduction of inflation. This subject-matter, it is argued, goes beyond local provincial concern or interest and is from its inherent nature the concern of Canada as a whole and falls within the competence of Parliament as a matter affecting the peace, order and good government of Canada. It was further submitted that the competence of Parliament over

the subject of inflation may be supported by reference to [numerous] heads of s. 91 of the Constitution . . .

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If the first submission is to be accepted, then it must be conceded that the *Anti-Inflation Act* could be compellingly extended to the provincial public sector. Parliament . . . could decide to control and regulate at least the maximum salaries paid to all provincial public servants notwithstanding any provincial appropriations, budgets and laws. Parliament could also regulate wages paid by municipalities, educational institutions, hospitals and other provincial services as well as tuition or other fees charged by some of these institutions for their services. Parliament could occupy the whole field of rent controls. Since in time of inflation there can be a great deal of speculation in certain precious possessions such as land or works of arts, Parliament could move to prevent or control that speculation not only in regulating the trade or the price of those possessions but by any other efficient method reasonably connected with the control of inflation. . . . Parliament could control all inventories in the largest as in the smallest undertakings, industries and trades. Parliament could ration not only food but practically everything else in order to prevent hoarding and unfair profits. One could even go further and argue that since inflation and productivity are greatly interdependent, Parliament could regulate productivity, establish quotas and impose the output of goods or services . . . produce[d] in any given period. Indeed, since practically any activity or lack of activity affects the gross national product, the value of the Canadian dollar and, therefore, inflation, it is difficult to see what would be beyond the reach of Parliament. Furthermore, all those powers would belong to Parliament permanently; only a constitutional amendment could reduce them. Finally, the power to regulate and control inflation as such would belong to Parliament [exclusively].

Such are the constitutional imports of the first submission in terms of the so-called subject matter of inflation.

Its effects on the principles which underlie the distribution of other powers between Parliament and the Legislatures are even more far-reaching assuming there would be much left of the distribution of powers if Parliament has exclusive authority in relation to the "containment and reduction of inflation."

If the first submission is correct, then it could also be said that the promotion of economic growth or the limits to growth or the protection of the environment have become global problems and now constitute subject matters of national concern . . . It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the provincial Legislatures, would disappear not gradually but rapidly.

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This submission is predicated upon the proposition that the subject-matter of the *Anti-Inflation Act*, its pith and substance, is inflation or the containment and reduction of inflation.

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The "containment and reduction of inflation" can be achieved by various means including monetary policies . . . ; and the restraint of profits, prices and wages . . .

I have no reason to doubt that the *Anti-Inflation Act* is part of a more general programme aimed at inflation . . . I am prepared to accept that inflation was the occasion or the reason for its enactment. But I do not agree that inflation is the subject matter of the Act. In order to characterize an enactment, one must look at its operation, at its effects and at the scale of its effects rather than at its ultimate purpose where the purpose is practically all-embracing. If for instance Parliament

is to enact a tax law or a monetary law as a part of an anti-inflation programme no one will think that such laws have ceased to be a tax law or a monetary law They plainly remain and continue to be called a tax law or a monetary law, although they have been enacted by reason of an inflationary situation. ... Similarly, the *Anti-Inflation Act* is, as its preamble states, clearly a law relating to the control of profit margins, prices, dividends and compensation, that is, with respect to the provincial private sector, a law relating to the regulation of local trade, to contract and to property and civil rights in the Provinces, enacted as part of a programme to combat inflation. Property and civil rights in the Provinces are, for the greater part, the pith and substance or the subject matter of the *Anti-Inflation Act*. According to the Constitution, Parliament may fight inflation with the powers put at its disposal by the specific heads enumerated in s. 91 or by such powers as are outside of s. 92. But it cannot, apart from a declaration of national emergency or from a constitutional amendment, fight inflation with powers exclusively reserved to the Provinces, such as the power to make laws in relation to property and civil rights. This is what Parliament has in fact attempted to do in enacting the *Anti-Inflation Act*.

The authorities relied upon by Counsel for Canada and Ontario in support of the first submission are connected with ... the national concern doctrine or national dimension doctrine.

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In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern.

[In the authorities just mentioned] ... [the] new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration ... : if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers (*Parson's case*) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.

The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.

I should add that inflation is a very ancient phenomenon, several thousand years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.

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For those reasons, the first submission fails.

II

The second submission made in support of the validity of the *Anti-Inflation Act* is that the inflationary situation was in October of 1975, and still is such as to constitute a national emergency ... ; that such situation of exceptional necessity justified the enactment of the impugned legislation.

Before I deal with this second submission I should state at the outset that I am prepared to assume the validity of the following propositions:

- the power of Parliament under the national emergency doctrine is not confined to war situations or to situations of transition from war to peace; an emergency of the nature contemplated by the doctrine may arise in peace time;
- inflation may constitute such an emergency;
- Parliament may validly exercise its national emergency powers before an emergency actually occurs; a state of apprehended emergency or crisis suffices to justify Parliament in taking preventive measures including measures to contain and reduce inflation where inflation amounts to state of apprehended crisis.

In order to decide whether the *Anti-Inflation Act* is valid as a national emergency measure, one must first consider the way in which the emergency doctrine operates in the Canadian Constitution; one must find, in the second place whether the *Anti-Inflation Act* was in fact enacted on the basis that it was a measure to deal with a national emergency in the constitutional sense.

In referring to the emergency doctrine, the Judicial Committee has sometimes used expressions which would at first appear to indicate that there is no difference between the national dimension or national concern doctrine and the emergency doctrine

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I disagree with the proposition that the national concern or national dimension doctrine and the emergency doctrine amount to the same. . . [An] emergency does not give [a] matter the same dimensions as the national concern doctrine The national concern doctrine . . . applies in practice as if certain heads such as aeronautics or the development and conservation of the national capital were added to the [powers] enumerated in s. 91 of the Constitution Whenever the national concern theory is applied, the effect is permanent By contrast, the power of Parliament to make laws in a great crisis knows no limits other than those which are dictated by the nature of the crisis. But one of those limits is the temporary nature of the crisis. . . .

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... [Practically speaking, the emergency power] . . . operates so as to give to Parliament . . . concurrent and paramount jurisdiction over matters [normally within] exclusive provincial jurisdiction. To that extent, the exercise of that power amounts to a temporary *pro tanto* amendment of a federal Constitution by the unilateral action of Parliament. The legitimacy of that power is derived from the Constitution: when the security and the continuation of the Constitution and of the nation are at stake, the kind of power commensurate with the situation "is only to be found in that part of the constitution which establishes power in the state as a whole" (Viscount Haldane in the *Fort Frances* case, p. 704).

The extraordinary nature and the constitutional features of the emergency power of Parliament dictate the manner and form in which it should be invoked and exercised. It should not be an ordinary manner and form. At the very least, it cannot be a manner and form which admits of the slightest degree of ambiguity . . . Parliament [must give] an unmistakable signal Such a signal is not conclusive to support the legitimacy of the action of Parliament but its absence is fatal. . . . [The Courts] cannot decide that a suspension is legitimate unless the highly exceptional power to suspend it has been expressly invoked by Parliament If there is no such affirmation, the Constitution receives its normal application. Otherwise, it is the Courts which

are indirectly called upon to proclaim the state of emergency whereas it is essential that this be done by a politically responsible body.

We have not been referred to a single judicial decision, and I know of none, ratifying the exercise by Parliament of its national emergency power where the constitutional foundation for the exercise of that power had not been given clear utterance to. And, apart from judicial decisions, I know of no precedent where it could be said that Parliament had attempted to exercise such an extraordinary power by way of suggestion or innuendo.

The use of the national emergency power enables Parliament to override provincial laws in potentially every field: it must be explicit.

This is not to say that Parliament is bound to use ritual words. Words such as "emergency" are not necessarily required and they may indeed be used in a non-constitutional sense since Parliament can enact emergency or urgent legislation in fields *prima facie* coming within its normal authority. ...

... What is required from Parliament ... , is an indication, I would even say a proclamation, in the title, the preamble or the text of the instrument, which cannot possibly leave any doubt The statutes of Canada and the Canada Gazette contain several examples of laws, proclamations and Orders in Council which leave room for no [such] doubt Those dealing with wartime or post-war conditions usually present no difficulty

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The *Anti-Inflation Act* fails in my opinion to pass the test of explicitness required to signal that it has been enacted pursuant to the national emergency power of Parliament.

The preamble has been much relied upon:

WHEREAS the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern;

AND WHEREAS to accomplish such containment and reduction of inflation it is necessary to restrain profit margins, prices, dividends and compensation;

The words "a matter of serious national concern" have been emphasized.
I remain unimpressed.

The death penalty is a matter of national concern. So is abortion. So is the killing or maiming of innumerable people by impaired drivers. So is the traffic in narcotics and drugs. ... I fail to see how the adding of the word "serious" can convey the meaning that Parliament has decided to embark upon an exercise of its extraordinary emergency power.

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There is nothing in the rest of the Act and in the Guidelines to show that they have been passed to deal with a national emergency. There is much, on the other hand, ... which is inconsistent with the nature of a global war launched on inflation considered as a great emergency. It would not be within our province to judge the efficacy and wisdom of the legislation if it were truly enacted to deal with an extraordinary crisis but its lack of comprehensiveness may be indicative of its ordinary character.

[Beetz J reviewed the various exemptions under the Act and the optional application to the provincial public sector by provincial consent.]

It may be argued that those exemptions and options were put into the Act and the Guidelines in order to make their administration lighter and easier or as a matter of federal–provincial comity. Still, a situation of national emergency does not, at first sight, lend itself to opting in and opting out formulae nor to large scale exemptions.

We have been invited to go outside the Act and the Guidelines and consider extrinsic evidence and take judicial notice of facts of public knowledge.

It is a fact for instance that provincial Governments were seriously concerned about rising inflation and that eight of the ten Provinces have entered into agreements with the Government of Canada for the application of the federal guidelines. But I cannot regard that concern and these agreements as a recognition that Parliament was acting under its national emergency power when it enacted the *Anti-Inflation Act*. Only Parliament, or under a law of Parliament, the Government of Canada, can assume responsibility for declaring a state of national emergency; it would be delicate and probably unwarranted for the Courts to count Provinces and to evaluate the degree of provincial support in such a matter. ...

We were provided with a wealth of extrinsic material [expected to] enable us to make a finding of fact as to whether or not inflation had reached a[n emergency] level or as to whether or not there was a rational basis for Parliament to [so] judge . . . I do not reach that point, of course, since I hold the view that Parliament did not rely upon its extraordinary power. It seems to me, however, . . . [that] it is not improper for us to read Hansard A perusal of the debates reveals that between October 14, 1975, when the policy statement was tabled . . . and the third reading and the passing of the Bill in the Senate on December 10, 1975, the question was raised repeatedly . . . as to what was the constitutional foundation of the Bill and as to whether it was not necessary expressly to declare a state of emergency in order to insure its constitutionality. The replies vary but slightly; their general tenor is to the effect that Parliament has jurisdiction to pass the bill as drafted under the peace, order and good government power—which is rather unrevealing—in addition to other specific federal powers enumerated in s. 91 of the Constitution.

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... [Those statements] reinforce my opinion that the *Anti-Inflation Act* was enacted in this form because it was believed, erroneously, that Parliament had the ordinary power to enact it under the national concern or national dimension doctrine Parliament did not purport to enact it under the [emergency power].

The *Anti-Inflation Act* is in my opinion *ultra vires* of Parliament in so far at least as it applies to the provincial private sector; but severability having not been pleaded by counsel for Canada, I would declare the Act *ultra vires* of Parliament in whole.

[Justice Ritchie, with Martland and Pigeon JJ concurring, agreed with Beetz J that the national concern doctrine could not apply here. He went on to find that the legislation was justified under the national emergency doctrine, relying on the Act's preamble and the government's White Paper to show that Parliament was motivated "by a sense of urgent necessity created by highly exceptional circumstances" (at 439). In his view, the opponents of the legislation had failed to show by "very clear evidence that an emergency had not arisen when the statute was enacted" (at 439).]

NOTE: THE ANTI-INFLATION CASE AND EXTRINSIC EVIDENCE

One significant aspect of the *Anti-Inflation* case was the introduction and use of extrinsic evidence. Indeed, Peter Hogg has commented:

The *Anti-Inflation Reference* constitutes a clear precedent for the admission of social-science briefs in constitutional cases where legislative facts are in issue. Despite the court's silence on this aspect of the decision, it may prove in the long run to be the most influential point of the case.

See Peter Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 UTLJ 386 at 404.

The Supreme Court of Canada elaborated on its approach to extrinsic evidence in constitutional cases in *Re Residential Tenancies Act*, [1981] 1 SCR 714, 1981 CanLII 24. Dickson J, writing for the Court, explained (at 723):

Generally speaking, for the purpose of constitutional characterization of an Act we should not deny ourselves such assistance as Royal Commission reports or Law Reform Commission reports underlying and forming the basis of the legislation under study, may afford. The weight to be given such reports is, of course, an entirely different matter. They may carry great, little, or no weight, but at least they should, in my view, generally be admitted as an aid in determining the social and economic conditions under which the Act was enacted. ... The mischief at which the Act was directed, the background against which the legislation was enacted and institutional framework in which the Act is to operate are all logically relevant.

The remainder of the *Residential Tenancies* case is found in Chapter 13, The Role of the Judiciary.

In *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297, 1984 CanLII 17, the Supreme Court of Canada clarified (at 318) that

in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well.

In that case, the Supreme Court determined that *The Upper Churchill Water Rights Reversion Act*, 1980 (Nfld), c 40, had been enacted for an unconstitutional purpose. The Act sought to "provide for the reversion to the province of unencumbered ownership and control in relation to certain water with the province" (s 3). The background to the Act was a long-term contract entered into between Hydro Quebec and the Churchill Falls (Labrador) Corporation Limited (CFLCo) on 15 May 1969 whereby the latter agreed to sell the former nearly all of the power produced at Churchill Falls for a term of 40 years. The contract was renewable at Hydro Quebec's option for an additional 25 years. Newfoundland argued that the Act fell within its jurisdiction under s 92(13) to regulate intraprovincial contracts. The Supreme Court of Canada found that the legislation was *ultra vires*, on the basis that Hydro Quebec's right to the delivery of power from Churchill Falls was situate in Quebec, and the Act had been enacted for the colourable purpose of interfering with an extra-provincial contractual interest.

In *Reference re Upper Churchill Water Rights Reversion Act*, the Supreme Court declined to admit as extrinsic evidence speeches made in the Newfoundland Legislative Assembly at the time of the enactment of the impugned law, on the basis that they could not be said to represent the intent of the legislature. However, the restriction on Hansard evidence was lifted by the Supreme Court of Canada in *R v Morgentaler*, [1993] 3 SCR 463 at 484-85, 1993 CanLII 74:

The main criticism of [legislative debates and speeches] has been that [they] cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background

and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. ... I would adopt the following passage from [Peter W Hogg, *Constitutional Law of Canada*, 3rd ed (Toronto: Carswell, 1992)], as an accurate summary of the state of the law on this point (at pp. 15-14 and 15-15):

In determining the “purpose” of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the “mischief”) which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. ... The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose [Footnotes omitted.]

The remainder of the *Morgentaler* decision, in which the Court relied extensively on evidence from Hansard, is found in Chapter 8, Interpreting the Division of Powers.

Morgentaler referred to the criticism that Hansard evidence could not represent legislative intent. In Westminster parliamentary democracies—such as Canada’s—this concern is arguably mitigated by the conventions of responsible government and cabinet solidarity, and strong norms of party discipline. When governments command the support of legislative majorities and introduce legislation, Hansard evidence on the part of government ministers and members is likely to cohere around the purpose of the legislation.

However, how should courts approach Hansard evidence where the legislation was proposed by a private member and was opposed by the government and where party discipline is relaxed? This is the situation which arose in *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, where the Supreme Court upheld the constitutionality of ss 1-7 of the *Genetic Non-Discrimination Act*, SC 2017, c 3 (at para 7), pursuant to which

individuals and corporations cannot force individuals to take genetic tests or disclose genetic test results and cannot use individuals’ test results without their written consent in the areas of contracting and the provision of goods and services.

The Supreme Court divided on the pith and substance of the legislation, and this disagreement turned on competing views of the Hansard evidence. Justice Karakatsanis (Abella and Martin JJ concurring) held that the Hansard evidence revealed that the purpose of the law was to combat genetic discrimination, which posed a risk to several public interests—autonomy, privacy, equality, and public health—whose protection fell within the scope of the federal criminal law power, s 91(27). Justice Moldaver (Côté J concurring) held, on the contrary, that the Hansard evidence showed that the purpose was to protect health, which fell within federal jurisdiction under s 91(27). Justice Kassier (Wagner CJ, Brown and Rowe JJ concurring) dissented, and held that the Hansard evidence led to the conclusion that pith and substance was to regulate contracts of insurance and employment in order to create incentives to take genetic tests.

There were two unusual features to the legislative process surrounding the enactment of the *Genetic Non-Discrimination Act*. First, the bill was introduced in the Senate, not the House of Commons. As a consequence, as Karakatsanis J recognized, “the Court does not have the benefit of statements made by or on behalf of the minister sponsoring the bill” (at para 40). Second, the government opposed the bill but did not impose party discipline on its backbenchers, a sufficient number of whom voted for the bill in the House of Commons to adopt it. Indeed, the Attorney General of Canada took the position that the *Genetic Non-Discrimination*

Act was *ultra vires* Parliament. In these circumstances, should the Supreme Court have taken a different approach to the Hansard evidence?

NOTE: EMERGENCY LEGISLATION AFTER THE ANTI-INFLATION REFERENCE

The federal Parliament enacted new legislation to deal with national emergencies in 1988: see the *Emergencies Act*, RSC 1985, c 22 (4th Supp), enacted by SC 1988, c 29. The following note contains a brief description of its contents.

The statute defines a "national emergency" as

3. ... an urgent and critical situation of a temporary nature that
 - (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
 - (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

The law contains provisions dealing with different types of emergencies, including public welfare, public order, international, and war emergencies. Of special interest to us are the public welfare emergencies (including those caused by real or imminent fires, floods, disease, accident, or pollution amounting to a national emergency). While the federal Cabinet (governor in council) can declare an emergency, the declaration must concisely describe the state of affairs constituting the emergency, and it must be confirmed by Parliament. As well, the declaration cannot be made without prior consultation with affected provincial governments and an agreement by the provincial Cabinet that the province is unable to deal with the situation. Thus, the legislation seems to reflect Beetz J's concern about "signals" in *Anti-Inflation*. For a more detailed review of the legislation, see Peter Rosenthal, "The New Emergencies Act: Four Times the War Measures Act" (1991) 20 *Man LJ* 563.

After reading this summary, do you think that the courts would interfere with a declaration of a public welfare emergency in relation to a matter within provincial jurisdiction?

The question of whether Parliament should enact new emergency legislation arose in the COVID-19 pandemic. As Carissima Mathen explains (Carissima Mathen, "Resisting the Siren's Call: Emergency Powers, Federalism, and Public Policy" in Colleen M Flood, Vanessa MacDonnell, Sophie Thériault, Sridhar Venkatapuram & Jane Philpott, eds, *Vulnerable: The Law, Policy & Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 115 at 119):

The pandemic has profoundly affected all areas of social and economic life; and revealed cracks in the country's health and social welfare systems. Under the division of powers, provinces have exclusive authority over "property and civil rights" and "all matters of a merely local or private nature"—in other words, over those aspects of life most at risk from the virus. But, spurred in part by the different levels of provincial success in combatting COVID-19, the federal government has faced repeated calls to intervene.

Mathen provides three examples of areas of provincial jurisdiction where there were calls for federal legislative intervention in response to COVID-19: the regulation of long-term care homes, which were ravaged by the virus; enacting a moratorium on all residential and commercial evictions and a national regime of rent control and/or temporarily suspending the obligation to pay rent; and creating a national system for testing. However, she urges a careful weighing of the benefits and drawbacks of any new federal emergency legislation (at 123-26):

Benefits: Consistency, Capacity, and Reassurance

There is no question that the COVID-19 pandemic represents a previously unimaginable threat to national well-being. It is not surprising that many would look to the federal government for

leadership. To the extent that such leadership was expressed through emergency legislation, it could provide the following benefits.

First, federal emergency laws might bring a welcome measure of *consistency*. Instituting nationwide policies around COVID-19 testing, for example, would address confusion over the criteria by which persons are able to access it. Such consistency might be especially prized when the need to track the course of a disease is constant among subnational units. The aim would be to scale up to the best practices available. The same can be said about economic security: vulnerable persons ought not to receive varying relief simply because of their province of residence.

Second, to the extent that the federal order has greater *capacity*, emergency legislation might be a logical tool to wield it. Current levels of need, especially economic, are far beyond the fiscal envelope of most provinces. The sheer cost of such things as reforming long-term care or protecting renters is likely to deter provincial action. While the federal government's resources are not unlimited, it is the country's largest repository of wealth, as well as the greatest generator of revenue.

At the same time, however, it might appear irresponsible for the government to simply transfer funds to the provinces to meet needs as they see fit. Recent programs have been delayed by federal–provincial negotiation over mechanics and details. Passing emergency legislation would provide an immediate framework by which the necessary supports could be supplied.

Finally, an emergency law has an enormous signalling function. In rallying public sentiment or conveying a situation's gravity, such a law has few rivals. When examined closely, the calls for federal intervention can be understood as demands for *reassurance*. COVID-19 has dealt Canada a profound emotional shock. Emergency legislation could increase public confidence that national institutions are fully seized of the issue and are devoting all possible resources to dealing with it.

Drawbacks: Operational Obstacles and Push-Back

While emergency federal legislation can be beneficial, it does have drawbacks and risks. While they do not apply equally to the laws mooted above, they merit serious consideration.

Intuitively, a uniform response should be more coordinated and, therefore, effective. But the nature of a crisis can pose *operational obstacles*, at least two of which are relevant here. First, COVID-19 has not had the same effect across the country. That cuts against the kind of top-down approach that the federal order is best suited to impose. Certainly, it would be counterproductive to roll out a public health response independent of provincial and municipal authorities. Arguably, the actors closest to the relevant populations are best able to both assess relevant needs and vulnerability, and deliver the necessary services.

A second obstacle is that the very nature of the division of powers spurs the different orders of government to develop specialized competencies. For example, the ability of the Canada Revenue Agency to design and distribute the CERB to some seven million Canadians in just a few weeks is directly related to the expertise it has developed under the federal taxation power. Conversely, provinces have been delivering health care and ordering private relationships for over a century. It would take considerable time for the federal government to create comparable systems. Indeed, an ongoing emergency may be the worst time to attempt such a transformation.

The differential expertise is compounded by the fact that emergency powers are temporary. Sometimes, that will be sufficient, as with, say, a short-term scheme for rent relief or nationwide testing. Other problems require more durable solutions. The pandemic has highlighted long-standing issues of social inequality and political powerlessness. While seniors, for example, may have more acute needs because of COVID-19, those needs predate and will long outlast the virus. That does not, necessarily, argue against short-term

relief. But Parliament cannot address such vulnerabilities on an ongoing basis. Absent a constitutional amendment, as was done for old age pensions, Parliament cannot federalize long-term care homes or their workers. The fact that such control will eventually cede to the provinces is an important factor in assessing the utility of intervention. That factor is only heightened when one considers the second risk of emergency legislation.

That risk is the likelihood of provincial *push-back*. The federal–provincial relationship rarely runs smoothly. The depth of current regional divisions is evident in the makeup of the current Parliament [in which] the governing Liberal caucus has no elected MPs from Saskatchewan or Alberta.

The emergency branch could inflame existing tensions and create new ones. The early days of the pandemic were marked by striking levels of federal–provincial cooperation. But politics inevitably returns. COVID-19 demands a high degree of collaboration among federal, provincial, and municipal actors. The federal government bears a particular responsibility to ensure a functional relationship with provinces. To be sure, when provincial failures imperil the country, or certain of its citizens, the federal government should intervene. But it cannot afford to appear dismissive or cavalier about provincial jurisdiction. It is no accident that the current *Emergencies Act* requires extensive consultation with provincial governments. While not a constitutional imperative, it creates a political expectation of cooperation, around which the federal order must tread carefully.

The title of this chapter invokes the siren: a mythological creature with powerful, ceaseless attraction. In *The Odyssey*, Ulysses bound himself to the mast of his ship to resist her call, even as he was forced to navigate close to it. Even when they must be contemplated, emergency powers demand similar restraint. In the current pandemic, the emergency branch may enable decisive action to mitigate staggering social and personal costs. But absent provincial buy-in, such action risks significant national friction that could threaten the cooperation required to vanquish COVID-19.

NOTE: THE NATIONAL CONCERN DOCTRINE FROM THE ANTI-INFLATION REFERENCE TO THE GREENHOUSE GAS POLLUTION PRICING ACT REFERENCES

The national concern doctrine emerged again in *R v Hauser*, [1979] 1 SCR 984, 1979 CanLII 13, summarized by Le Dain J in *R v Crown Zellberbach Canada Ltd*, [1988] 1 SCR 401, 1988 CanLII 63 as follows:

[29] In *Hauser*, a majority of the Court (Martland, Ritchie, Pigeon and Beetz J.J.) held that the constitutional validity of the *Narcotic Control Act* rested on the peace, order and good government power of Parliament rather than on its jurisdiction with respect to criminal law. Pigeon J., who delivered the judgment of the majority, said that the principal consideration in support of this view was that the abuse of narcotic drugs, with which the Act dealt, was a new problem which did not exist at the time of Confederation, and that since it did not come within matters of a merely local or private nature in the province it fell within the "general residual power" in the same manner as aeronautics and radio.

The doctrine was also at issue in *Schneider v The Queen*, [1982] 2 SCR 112, 1982 CanLII 26 and was summarized by Le Dain J in *Crown Zellerbach* in the following way:

[31] In *Schneider*, in which the Court unanimously held that the *Heroin Treatment Act* of British Columbia was *intra vires*, Dickson J. (as he then was), with whom Martland, Ritchie, Beetz, McIntyre, Chouinard and Lamer JJ. concurred, indicated, with particular reference to the national concern doctrine and what has come to be known as the "provincial inability" test, why he was of the view that the treatment of heroin dependency, as distinct from the traffic in

narcotic drugs, was not a matter falling within the federal peace, order and good government power. He referred to the problem of heroin dependency as follows at pp. 131-32 [edited]:

It is largely a local or provincial problem and not one which has become a matter of national concern. ...

There is no material before the Court leading one to conclude that the problem of heroin dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way. It is not a problem which "is beyond the power of the provinces to deal with" (Professor Gibson (1976-77), 7 Man. L.J. 15, at p. 33). Failure by one province to provide treatment facilities will not endanger the interests of another province. The subject is not one which "has attained such dimensions as to affect the body politic of the Dominion" (*In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, at p. 77). It is not something that "goes beyond local provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case)" per Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] AC 193, at p. 205. ... Nor can it be said, on the record, that heroin addiction has reached a state of emergency as will ground federal competence under residual power.

I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction.

Prior to *References Re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11](#), the leading modern case on the national concern doctrine was *Crown Zellerbach*. Justice Le Dain delivered the majority judgment. He set out the facts:

[12] The respondent [i.e., Crown Zellerbach] carries on logging operations on Vancouver Island in connection with its forest products business in British Columbia and maintains a log dump on a water lot leased from the provincial Crown for the purpose of log booming and storage in Beaver Cove, off Johnstone Strait, on the northeast side of Vancouver Island. The waters of Beaver Cove are inter fauces terrae, or as put in the stated case, "Beaver Cove is of such size that a person standing on the shoreline of either side of Beaver Cove can easily and reasonably discern between shore and shore of Beaver Cove." On August 16 and 17, 1980 the respondent, using an 80-foot crane operating from a moored scow, dredged woodwaste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove and deposited it in the deeper waters of the cove approximately 60 to 80 feet seaward of where the woodwaste had been dredged. The purpose of the dredging and dumping was to allow a new A-frame structure for log dumping to be floated on a barge to the shoreline for installation there and to give clearance for the dumping of bundled logs from the A-frame structure into the waters of the log dump area. The woodwaste consisted of waterlogged logging debris such as bark, wood and slabs. There is no evidence of any dispersal of the woodwaste or any effect on navigation or marine life. At the relevant time the only permit held by the respondent under the Act was one issued on or about July 28, 1980, effective until July 25, 1981, to dump at a site in Johnstone Strait some 2.2 nautical miles from the place where the woodwaste was dumped.

Crown Zellerbach was charged under the *Ocean Dumping Control Act*, SC 1974-75-76, c 55, which prohibits the dumping of substances at "sea" accept in accordance with the terms and conditions of a permit. The Act defines "sea" to include provincial marine waters—such as Beaver Cove—which falls under provincial jurisdiction. In defence to the charge, *Crown Zellerbach* challenged the constitutionality of the Act in its application to provincial marine waters, on federalism grounds.

Justice Le Dain delivered the majority judgment and rejected the constitutional challenge. He began by characterizing the purpose of the legislation:

[3] The general purpose of the *Ocean Dumping Control Act* is to regulate the dumping of substances at sea in order to prevent various kinds of harm to the marine environment. The Act would appear to have been enacted in fulfillment of Canada's obligations under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, which was signed by Canada on December 29, 1972. That is not expressly stated in the Act, but there are several references to the Convention in the Act

[4] The concerns of the Act are reflected in the nature of the prohibited and restricted substances in Schedules I and II and in the factors to be taken into account by the Minister of the Environment in granting permits to dump, which are set out in ss. 9 and 10 of the Act and in Schedule III. What these provisions indicate is that the Act is concerned with marine pollution and its effect on marine life, human health and the amenities of the marine environment. There is also reference to the effect of dumping on navigation and shipping and other legitimate uses of the sea.

Justice Le Dain then explained the precise nature of the constitutional issues at stake:

[16] ... The respondent concedes, as it must, that Parliament has jurisdiction to regulate dumping in waters lying outside the territorial limits of any province. It also concedes that Parliament has jurisdiction to ... prevent pollution of those waters that is harmful to fisheries It further concedes, in view of the opinion expressed in this Court in *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 SCR 477, that Parliament has jurisdiction to regulate the dumping in provincial waters of substances that can be shown to cause pollution in extra-provincial waters. What the respondent challenges is federal jurisdiction to control the dumping in provincial waters of substances that are not shown to have a pollutant effect in extra-provincial waters. ... The respondent submits that in so far as s. 4(1) of the Act can only be read as purporting to apply to such dumping it is ultra vires and, alternatively, that it should be read, if possible, so as not to apply to such dumping. In either case the appeal must fail. The Attorney General of British Columbia, ... and with whom the Attorney General of Quebec agreed, made a similar submission that s. 4(1) should be read down

[17] In this Court ... [the Attorney General of Canada's] principal submission in this court was that the control of dumping in provincial marine waters, for the reasons indicated in the Act, was part of a single matter of national concern or dimension which fell within the federal peace, order and good government power. He characterized this matter as the prevention of ocean or marine pollution.

[18] ... In my opinion, despite this apparent scope, the Act, viewed as a whole, may be properly characterized as directed to the control or regulation of marine pollution, in so far as that may be relevant to the question of legislative jurisdiction. The chosen and perhaps only effective, regulatory model makes it necessary, in order to prevent marine pollution, to prohibit the dumping of any substance without a permit. ... The Act is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment. The Minister and not the person proposing to do the dumping must be the judge of this There is no suggestion that the Act purports to authorize the prohibition of dumping without regard to perceived adverse effect or the likelihood of such effect on the marine environment. The nature of the marine environment and its protection from adverse effect from dumping is a complex matter which must be left to expert judgment.

Justice Le Dain then turned to the national concern doctrine, and gave the following summary:

[33] From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

Justice Le Dain explained the fourth factor, which he referred to as the "provincial inability" test. He first quoted with approval from an article by Dale Gibson ("Measuring 'National Dimensions'" (1976) 7 Man LJ 15) as providing "the most satisfactory rationale of the cases in which the national concern doctrine of the peace, order and good government power has been applied as a basis of federal jurisdiction":

[34] ... As expounded by Professor Gibson, the test would appear to involve a limited or qualified application of federal jurisdiction. As put by Professor Gibson at pp. 34-35, "By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the [POGG] clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control "pollution price-wars" would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non-co-operation of another province or provinces." To similar effect, he said in his conclusion at p. 36: "Having regard to the residual nature of the power, it is the writer's thesis that "national dimensions" are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involve either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the "national dimension" concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk."

Justice Le Dain also relied on Peter Hogg's formulation of the provincial inability test:

[35] As expressed by Professor Hogg in the first and second editions of his *Constitutional Law of Canada*, the "provincial inability" test would appear to be adopted simply as a reason for finding that a particular matter is one of national concern falling within the peace, order and good government power: that provincial failure to deal effectively with the intra-provincial

aspects of the matter could have an adverse effect on extra-provincial interests. In this sense, the "provincial inability" test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment. The "provincial inability" test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

Justice LeDain then applied the national concern doctrine to uphold the application of the *Ocean Dumping Control Act* to provincial marine waters:

[37] Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as whole. The question is whether the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters. The *Ocean Dumping Control Act* reflects a distinction between the pollution of salt water and the pollution of fresh water. The question, as I conceive it, is whether that distinction is sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter falling within the national concern doctrine of the peace, order and good government power.

[38] Marine pollution by the dumping of substances is clearly treated by the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter as a distinct and separate form of water pollution . . . This impression is reinforced by . . . The Review of the Health of the Oceans (UNESCO 1982) (hereinafter referred to as the "U.N. Report"), which forms part of the materials placed before the Court in the argument. It is to be noted, however, that, unlike the *Ocean Dumping Control Act*, the Convention does not require regulation of pollution by the dumping of waste in the internal marine waters of a state. Article III, para. 3, of the Convention defines the "sea" as "all marine waters other than the internal waters of the States." . . . The limitation of the undertaking in the Convention, presumably for reasons of state policy, . . . cannot, in my opinion, obscure the obviously close relationship, which is emphasized in the UN Report, between pollution in coastal waters . . . and pollution in the territorial sea. Moreover, there is much force, in my opinion, in the appellant's contention that the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty . . . This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances.

[39] There remains the question whether the pollution of marine waters by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping to meet the requirement of singleness or indivisibility. In many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow, and this is noted by the U.N. Report, but that report, as I have suggested, emphasizes that marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution. Moreover, the distinction between salt water and fresh water as limiting the application of the *Ocean Dumping Control Act* meets the consideration emphasized by a majority of this Court in the *Anti-Inflation Act* reference—that in order for a matter to qualify as one of national concern falling within the federal peace, order and good

government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.

Justice La Forest wrote a dissenting opinion. In his view, the POGG power could only justify federal legislation to control marine pollution in two circumstances: (1) an emergency (which did not exist), and (2) in relation to marine waters lying outside provincial jurisdiction (which fell under federal jurisdiction under the "gap" branch of POGG—i.e., the federal residual power). He explained:

[59] In legislating under its general power for the control of pollution in areas of the ocean falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. It may take steps to prevent activities in a province ... that pollute or have the potential to pollute the sea outside the province. Indeed, the exercise of such jurisdiction, it would seem to me, is not limited to coastal and internal waters but extends to the control of deposits in fresh water that have the effect of polluting outside a province. Reference may be made here to *Interprovincial Co-operatives Ltd. v. The Queen*, ... where a majority of this Court upheld the view that the federal Parliament had exclusive legislative jurisdiction to deal with a problem that resulted from the depositing of a pollutant in a river in one province that had injurious effects in another province. This is but an application of the doctrine of national dimensions triggering the operation of the peace, order and good government clause.

[60] It should require no demonstration that water moves in hydrologic cycles and that effective pollution control requires regulating pollution at its source. That source may, in fact, be situated outside the waters themselves. ... Given the way substances seep into the ground and the movement of surface and ground waters into rivers and ultimately into the sea, this can potentially cover a very large area. Indeed, since the pollution of the ocean in an important measure results from aerial pollution rather than from substances deposited in waters, similar regulations could be made in respect of substances that so pollute the air as to cause damage to the ocean or generally outside the provinces. ...

Justice La Forest also explained that s 91(27) was a source of federal jurisdiction in relation to environmental protection (anticipating *R v Hydro-Québec*, discussed above and in Chapter 11, Criminal Law and Procedure):

[61] The power above described can be complemented by provisions made pursuant to the criminal law power. ... The combination of the criminal law power with its power to control pollution that has extra-provincial dimensions gives the federal Parliament very wide scope to control ocean pollution. ... [A] combination of the general federal legislative power and the criminal power could go a long way towards prohibiting the pollution of internal waters as well as those in territorial waters and the high seas.

Justice La Forest then explained why marine pollution was not, in his view, a matter of national concern:

[64] However widely one interprets the federal power to control ocean pollution along the preceding line of analysis, it will not serve to support the provision impugned here, one that ... is a blanket prohibition against depositing any substance in waters without regard to its nature or amount, and one moreover where there is [no attempt to link the proscribed conduct to actual or potential harm] to what is sought to be protected. ... [T]here is no evidence to indicate that the full range of activities caught by the provision cause the harm sought to be prevented. ... Here, Parliament may undoubtedly prohibit the dumping of anything into federal waters, but unless a more comprehensive theory for applying the national dimensions doctrine can be found, prohibitions against dumping substances into provincial waters must be linked to some federal power. ...

• • •

[72] ... I shall ... attempt to look at it in terms of the qualities or attributes that are said to mark the subjects that have been held to fall within the peace, order and good government clause as being matters of national concern. Such a subject, it has been said, must be marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In my view, ocean pollution fails to meet this test for a variety of reasons. In addition to those applicable to environmental pollution generally, the following specific difficulties may be noted. First of all, marine waters are not wholly bounded by the coast; in many areas, they extend upstream into rivers for many miles. ... Apart from this, the line between salt and fresh water cannot be demarcated clearly In any event, it is not so much the waters, whether fresh or salt, with which we are concerned, but their pollution. And the pollution of marine water is contributed to by the vast amounts of effluents that are poured or seep into fresh waters everywhere Nor is the pollution of the ocean confined to pollution emanating from substances deposited in water. In important respects, the pollution of the sea results from emissions into the air, which are then transported over many miles and deposited into the sea I cannot, therefore, see ocean pollution as a sufficiently discrete subject upon which to found the kind of legislative power sought here. It is an attempt to create a federal pollution control power on unclear geographical grounds and limited to part only of the causes of ocean pollution. Such a power then simply amounts to a truncated federal pollution control power only partially effective to meet its supposed necessary purpose, unless of course one is willing to extend it to pollution emanating from fresh water and the air, when for reasons already given such an extension could completely swallow up provincial power, no link being necessary to establish the federal purpose.

[73] This leads me to another factor ... : [the] impact on provincial legislative power. Here, it must be remembered that ... the [legislative] provision virtually prevents a province from dealing with certain of its own public property without federal consent. A wide variety of activities along the coast or in the adjoining sea involves the deposit of some substances in the sea. In fact, where large cities like Vancouver are situated by the sea, this has substantial relevance to recreational, industrial and municipal concerns of all kinds. As a matter of fact, the most polluted areas of the sea adjoin the coast; see U.N. Report, op. cit., at pp. 3-4. Among the major causes of this are various types of construction, such as hotels and harbours, the development of mineral resources and recreational activities (*id.*, at p. 3). These are matters of immediate concern to the province. They necessarily affect activities over which the provinces have exercised some kind of jurisdiction over the years. Whether or not the "newness" of the subject is a necessary criterion for inventing new areas of jurisdiction under the peace, order and good government clause, it is certainly a relevant consideration if it means removing from the provinces areas of jurisdiction which they previously exercised. As I mentioned, pollution, including coastal pollution, is no new phenomenon, and neither are many of the kinds of activities that result in pollution.

[74] A further relevant matter, it is said, is the effect on extra-provincial interests of a provincial failure to deal effectively with the control of intra-provincial aspects of the matter. I have some difficulty following all the implications of this, but taking it at face value, we are dealing here with a situation where, as we saw earlier, Parliament has extensive powers to deal with conditions that lead to ocean pollution wherever they occur. The difficulty with the impugned provision is that it seeks to deal with activities that cannot be demonstrated either to pollute or to have a reasonable potential of polluting the ocean. The prohibition applies to an inert substance regarding which there is no proof that it either moves or pollutes. The prohibition in fact would apply to the moving of rock from one area of provincial property to another. I cannot accept that the federal Parliament has such wide legislative power over local matters having local import taking place on provincially owned property.

One factor influencing the majority's finding that marine pollution is a matter of national dimension was the presence of international regulation of the problem. Does this suggest an indirect relaxation of the constraints on federal jurisdiction imposed by the *Labour Conventions* case, discussed in Chapter 6?

Do you agree with Le Dain J's conclusion that marine pollution is sufficiently indivisible to constitute a matter of national concern? Consider the views expressed by Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 UBC L Rev 353 at 360-66 (footnotes omitted):

[A]lthough Justice Le Dain asserts that a matter must be both functionally and conceptually indivisible to be of a national dimension, his own application of the test is limited to an examination of the first dimension of indivisibility. By emphasizing functional indivisibility, he seems to forget that the purpose of the national interest doctrine is not to confer [on] Parliament a property right over a particular matter, but rather a power to regulate in relation to such a matter. In *Crown Zellerbach*, the Court had to decide whether marine pollution was a matter of national interest. Justice Le Dain concluded that it was, based on the fact that it was difficult to ascertain "by visual observation the boundary between the territorial sea and the internal marine waters of a state," and because marine pollution "... has its own characteristics and scientific considerations that distinguish it from fresh water pollution." Justice Le Dain limited his inquiry to the functional, if not the physical, dimension of the indivisibility criterion. However, as correctly underlined by the dissenting Justice La Forest, "it is not so much the waters, whether fresh or salt, with which we are concerned, but their pollution." Justice La Forest had previously emphasized that "... effective pollution control requires regulating pollution at its source." In other words, a conceptual approach to indivisibility was required, as Parliament had claimed the exclusive power to regulate the sources of marine pollution

Had Justice Le Dain conducted a careful analysis of the legislative means necessary to regulate the wide range of polluting activities, he would have recognized that treating marine pollution as a matter of national interest would greatly affect provincial spheres of enumerated powers. Indeed, the exclusive authority to regulate the sources of marine pollution is a *carte blanche* to regulate every conceivable activity known to humankind, be they inter- or intra-provincial in nature. ...

However, this interpretation is most erroneous. The conceptual indivisibility test must be applied using the approach of Justice Beetz in *Anti-Inflation*; that is, to the matter said to be of national interest (tobacco use), and not to the legislative means employed to ensure its regulation (control of advertising). In other words, the conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power. Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its "... exclusive jurisdiction of a plenary nature to legislate in relation to that matter," Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt. ...

[In addition,] Justice Le Dain's functional test is extremely obscure. Recall that in order to determine the existence of indivisibility, one must "consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter." Is Justice Le Dain referring to political incapacity, political unwillingness, or legal inability to deal with a problem? ...

Notwithstanding the problems described above, the most troubling aspect of Justice Le Dain's test is that it gives the impression that Canada's federal system was designed to achieve functional efficiency to the exclusion of other normative concerns. Functional efficiency, though important, has never been the sole normative concern of our federal regime. In reality,

Canadian federalism has been much more preoccupied with establishing a just and coherent balance between the legitimate demands of both national and regional communities. ...

Justice Le Dain's functional approach, with its obviously centralist slant, is impervious to this need for diversity. By unduly favouring federal exclusivity to the detriment of federal/provincial concurrency, Justice Le Dain also puts into jeopardy federalism's capacity to promote "... democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to th[e] diversity [of the component parts of Confederation]." Moreover, by placing the interests of the national community before those of the regions, Justice Le Dain's centralist approach could very well hamper, in certain circumstances, Quebec's ability to exercise "... the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote [its] language and culture."

Sujit Choudhry, by contrast, defended the provincial inability test and the holding in *Crown Zellerbach ("Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy"* (2002) 52:3 *UTLJ* 163 at 227, 236–38):

[T]he provincial inability test reflects the Dickson court's central contribution, and its major legacy, to the enduring problem of legal federalism. The basic intuition underlying the test is that the federal government can act only in those circumstances in which the provinces are unable to act. Although the Court provided little in the way of theoretical explanation to justify this principle, the test is consistent with at least the following account of the nature of the Canadian political community. Canada consists not of one political community but, rather, of a multiplicity of political communities, which often disagree on questions of public policy but which nevertheless have come together and have created common institutions with the power to act on matters of common interest. To the question of when matters are of common interest, the answer provided by the Dickson court is those subject-matters where the provinces are unable to act alone—that is, when pursuing their self-interest requires them to act together. On this conception, the Canadian federation is imagined as a scheme for mutual advantage. In my view, this is a rather impoverished vision of the Canadian political community; indeed, I have argued elsewhere that Canada is a community of fate, bound together not simply by convenience and self-interest but also through shared accomplishments and history that can sustain rather thick bonds of social solidarity. But, assuming that federalism is a scheme of mutual advantage, the provincial inability test provides a rational way to allocate jurisdiction between the provinces and the federal government.

But what does the provincial inability test mean? ...

"Externality" is a term used by economists to describe situations in which an entity (a person, a corporation) does not bear all of the costs, or receive all of the benefits, of decisions they take. In cases of negative externalities, some or all of the costs of a decision are borne by another entity; in cases of positive externalities, some or all of the benefits of a decision are received by another party. The basic idea behind an externality is that the disjunction between the entity that makes a decision and the entities that bear the costs or receive the benefits of a decision means that that decision is made differently than it would be where the costs and benefits were strictly private. In cases of negative externalities, because costs can be shifted onto other entities, an entity may engage in more of an externality-causing activity than they otherwise would. The opposite is true for positive externalities.

Although externalities are often used to describe the decisions of, and the incentives operating on, private economic actors, they can also be used to examine the decisions of governments. Governments can make decisions that impose costs on other governments. In a federation, a province can externalize the costs of its public policies onto other provinces, or onto the federal government. A case study of the former can be found in *Interprovincial Co-Operatives Ltd. v. Dryden Chemicals Ltd.* [[1976] 1 SCR 477, 1975 CanLII 212]. In that case, two companies, one operating in Saskatchewan, the other in Ontario, operated chlor-alkali plants

close to rivers that flow into Manitoba. The allegation was that both companies discharged mercury into these rivers, which then carried the mercury into Manitoba, where it was ingested by fish. According to the Manitoba government, the mercury ultimately had a negative impact upon the commercial fishery by rendering fish unfit for human consumption.

... *Crown Zellerbach* ... clearly contemplated that this kind of scenario would count as an example of provincial inability. But, on further reflection, we find that "provincial inability" is a bit of a misnomer. Consider the legal position of Manitoba. Because of the territorial limits on provincial jurisdiction, Manitoba lacked the legal power to regulate mercury discharges in waters outside its borders. Manitoba, therefore, was clearly unable to regulate pollution that harmed interests within the province. As the Court said, it was "impossible to hold that ... Manitoba can ... require the shutting down of plants erected and operated in another province." But no one seriously doubted that Ontario and Saskatchewan possessed jurisdiction to regulate the mercury discharges; the operative assumption throughout the judgment was that mercury discharges were legal under Ontario and Saskatchewan law. At most, we can say that those provinces were not unable but merely *unwilling* to regulate these discharges.

In sum, the most that can be said is that the affected province, Manitoba, was unable, but not that no province was able, to regulate mercury discharges. There was no provincial inability as such. Nonetheless, in *Crown Zellerbach* ... the Court considered that this scenario warranted shifting jurisdiction to the federal government. And, indeed, this was the holding of the plurality (*per* Ritchie J) in *Interprovincial Co-operatives*. Why did the Court reach this conclusion? One obvious solution would have been a negotiated or cooperative arrangement whereby Saskatchewan and Ontario regulated industries within their borders for Manitoba's benefit. The Court must have reasoned that because of the incentives at play, there were reasons to doubt that bilateral or multilateral bargains to address inter-provincial spillovers would be easy to achieve. If so, federal jurisdiction under the national dimensions doctrine was premised on the risk of inter-provincial non-cooperation. And this is exactly what Gibson said, in passages quoted with approval by Le Dain J in *Crown Zellerbach*.

During the three decades between *Crown Zellerbach* and the *References re Greenhouse Gas Pollution Pricing Act*, the Supreme Court did not once uphold federal legislation on the basis of the national concern branch.

In *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110, the Supreme Court held that the environment, and environmental control, lacked the requisite distinctiveness to be matters of national concern. The Court held (SCR at 67-68) that

the exercise of legislative power, as it affects ... the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities. ...

The provinces may similarly act in relation to the environment under any legislative power in s. 92. Legislation in relation to local works or undertakings, for example, will often take into account environmental concerns.

R v Hydro-Québec, [1997] 3 SCR 213, 1997 CanLII 318, involved a challenge to part II of the *Canadian Environmental Protection Act*, RSC 1985, c 16 (4th Supp), which provided for comprehensive "life-cycle" regulation of toxic substances. A majority of the Supreme Court, per La Forest J, upheld the Act as a valid exercise of the federal criminal law power, finding it "unnecessary to deal with the national concern doctrine, which inevitably raises profound issues respecting the federal structure of our Constitution which do not arise with anything

like the same intensity in relation to the criminal law power" (at para 110). Chief Justice Lamer and Iacobucci J, dissenting, held that the Act could not be supported under the criminal law power. They added that the Act also failed the test of "singleness, distinctiveness and indivisibility" required by *Crown Zellerbach* because it was not confined to a narrow range of toxic chemical substances such as PCBs that have a severely harmful effect on human health and the environment and whose pollutant effects are diffuse and persist in the environment, but potentially covered a broader range of harmful substances whose effects may be temporary and more local in nature. An extract from *Hydro-Québec* appears in Chapter 11, Criminal Law and Procedure.

The Supreme Court of Canada revisited the POGG clause in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 1993 CanLII 72. At issue was the proper jurisdiction—federal or Ontario—to issue a certificate for collective bargaining for employees at Ontario Hydro's nuclear electrical generating stations. In other words, could the federal government regulate nuclear energy under the POGG power? A majority of the Court (4–3) held that the *Canada Labour Code*, RSC 1985, c L-2 applied to workers employed on or in connection with those nuclear facilities. The sources of federal jurisdiction were the declaratory power in s 92(10)(c) and the POGG clause.

With respect to POGG, La Forest J (L'Heureux-Dubé and Gonthier JJ concurring) stated (at 379–80):

There can surely be no doubt that the production, use and application of atomic energy constitute a matter of national concern. It is predominantly extraprovincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power . . . No one seriously disputed this assertion, and my colleagues both agree that this is so. The view of the Attorney-General of Canada is supported by authority in the lower courts [citations omitted]. . . The strategic and security aspects of nuclear power in relation to national defence and the catastrophe and near catastrophe associated with its peaceful use and development at Chernobyl and Two Mile Island, bespeak its national character and uniqueness.

The appellants [argue] that the distinct aspects over which atomic energy rises to the national level are those concerned with health and safety. But this very argument is self-defeating. With the inherent potential dangers associated with nuclear fission, industrial safety—indeed the safety of people hundreds of miles from a nuclear facility—is necessarily dependent on the personnel who operate the facility. A strike, and indeed mere carelessness, could invite disaster. As the Attorney General of Canada put it: "The whole purpose of federal regulation of nuclear electrical generating plants would be frustrated if Parliament could not govern the standards and conditions of employment of the individuals who operate the plant, both for their own safety, and for that of the general public."

In *R v Malmo-Levine; R v Caine*, 2003 SCC 74, the Court dealt with the issue of the validity of the prohibition of possession of marijuana in what was then the *Narcotic Control Act*, SC 1960–61, c 35 [NCA]. Recall that in *R v Hauser*, [1979] 1 SCR 984, 1979 CanLII 13, a majority of the Court upheld the NCA as a valid exercise of the national concern branch of the POGG power. In *Malmo-Levine*, the Court revisited that issue and concluded that the prohibition on marijuana possession was a valid exercise of the criminal law power, making it unnecessary to consider POGG. Justices Gonthier and Binnie (who attracted the support of all members of the Court on the division of powers issue) wrote:

[71] The Attorney General of Canada contends that the control of narcotics is a legislative subject matter that "goes beyond local or provincial concern and must, from its inherent nature, be the concern of the Dominion as a whole." He puts his position as follows:

The importation, manufacture, distribution, and use of psychoactive substances are matters . . . which can only be dealt with on an integrated national basis. Additionally, the

international aspects are such that these matters cannot be effectively addressed at the local level.

[72] We do not exclude the possibility that the NCA might be justifiable under the "national concern" branch on the rationale adopted in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at p. 432, where we held that concerted action amongst provincial and federal entities, each acting within their respective spheres of legislative jurisdiction, was essential to deal with Canada's international obligations regarding the environment. In our view, however, the Court should decline in this case to revisit Parliament's residual authority to deal with drugs in general (or marihuana in particular) under the POGG power. If, as is presently one of the options under consideration, Parliament removes marihuana entirely from the criminal law framework, Parliament's continuing legislative authority to deal with marihuana use on a purely regulatory basis might well be questioned. The Court would undoubtedly have more ample legislative facts and submissions in such a case than we have in this appeal. Our conclusion that the present prohibition against the use of marihuana can be supported under the criminal law power makes it unnecessary to deal with the Attorney General's alternative position under the POGG power, and we leave this question open for another day.

In 2004, Parliament enacted the *Assisted Human Reproduction Act*, SC 2004, c 2, which asserted federal control over a series of technologies and activities related to assisted reproduction. Although some parts of the Act involving fairly clear prohibitions backed by criminal penalties could be easily sustained under the criminal law power, the bulk of the Act involved extensive regulatory control over many aspects of assisted reproduction, including medical procedures and research. There was speculation that the federal government would have to rely on the national concern branch of the POGG power to uphold the legislation on the basis that uniform national standards were required to govern this area. However, in defending—unsuccessfully—a constitutional challenge to the legislation, the federal government relied on only the criminal law power: see *Reference re Assisted Human Reproduction Act*, [2010 SCC 61](#), excerpted in Chapter 11. Why do you think the federal government might have been unwilling even to raise the POGG argument? Was it a hopeless argument?

The major modern case on the national concern doctrine is *References re Greenhouse Gas Pollution Pricing Act*. The Supreme Court heard appeals from three provincial references (Saskatchewan, Ontario, and Alberta) concerning the validity of the federal law. Each provincial court of appeal rendered a split opinion: Saskatchewan and Ontario siding with the federal government, Alberta with the provinces. In the following excerpt, Sujit Choudhry describes the federal legislation and the constitutional politics surrounding this milestone moment.

Sujit Choudhry, "Constitutional Law and the Politics of Carbon Pricing in Canada"

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(citations and tables omitted).

The Greenhouse Gas Pollution Pricing Act

The origins of the *Greenhouse Gas Pollution Pricing Act* (GGPPA) lie in federal-provincial-territorial negotiations over how to meet Canada's obligations under the Paris Agreement, which began almost immediately after the agreement was signed. These negotiations led to the Vancouver Declaration on Clean Growth and Climate Change on March 3, 2016. Canada's First Ministers agreed to "[i]mplement GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30%

reduction below 2005 levels of emissions.” The Vancouver Declaration also established the Working Group on Carbon Pricing Mechanisms, which unanimously reported that “putting a price on emissions is an efficient and cost-effective way to create incentives to reduce their production as well as their consumption.”

Relying on the working group’s report, Prime Minister Trudeau announced the Pan-Canadian Approach to Pricing Carbon Pollution in Parliament on October 3, 2016. It introduced the concepts of the benchmark and the backstop. Both the benchmark and the backstop were also included in the Pan-Canadian Framework on Clean Growth and Climate Change, which was signed by the federal government, the territories and eight provinces (not Manitoba and Saskatchewan) on December 9, 2016. Manitoba joined the Pan-Canadian Framework on February 23, 2018. At that stage, Saskatchewan was the only province that had declined to do so.

The GGPPA was introduced in the House of Commons on March 27, 2018, and received royal assent on June 21, 2018. It contains the backstop and the benchmark. The backstop and the benchmark are functionally related: jurisdictions that do not meet the benchmark are subject to the backstop without their consent, by the exercise of discretion under the GGPPA. In addition, jurisdictions may opt into the backstop. The imposition of the backstop is at the heart of the provinces’ constitutional objections.

The backstop has two components: fuel charges and a cap-and-trade system for large industrial emitters. Fuel charges apply to all fuel delivered or used within a province or imported into the province from elsewhere in Canada or abroad. The price per tonne of GHG emissions is set at \$20 per tonne for 2019; the GGPPA sets out the specific fuels to which it attaches a price and a unit price for each. Charges are paid by producers, distributors and importers of fuel; it is anticipated they will pass these charges on to consumers. Fuel charges (net of refunds, rebates or remittances) are remitted to the federal government, which returns them to jurisdictions and/or persons or institutions within those jurisdictions. In jurisdictions where the backstop is imposed, the federal government returns 90 percent of the net fuel charges to individuals in the form of the Climate Action Incentive Payment; the remaining 10 percent is transferred to the Climate Action Incentive Fund, to fund GHG reduction investments by institutions in the MUSH sector (municipalities, universities, schools and hospitals), SMEs (small and medium-sized enterprises) and nonprofit organizations.

The GGPPA terms the cap-and-trade scheme the Output-Based Pricing System (OBPS). Regulations for the OBPS component of the backstop enumerate 38 different kinds of industrial activity and 135 industry-specific activities that are subject to the OBPS. The OBPS applies to designated facilities that are not subject to the fuel charge in backstop provinces and operates to set a cap on total emissions for each facility based on a performance level of approximately 80 to 95 percent for most sectors. Facilities that emit below their cap receive a credit; facilities that exceed their limit must pay for their emissions through credits and/or a “charge payment” to the federal government. The GGPPA authorizes the federal government to create a market for these credits. While the federal government has not yet established a trading system, it recently released an options paper for public comment as a first step in doing so. ...

The Political Strategy Behind The Greenhouse Gas Reference

The GGPPA’s constitutionality was challenged by some provincial governments from its inception. Saskatchewan, which declined to sign the Pan-Canadian Framework, launched its constitutional challenge on April 19, 2018—before the GGPPA had even received second reading in the House of Commons. Alberta and Ontario launched

their court cases immediately after elections brought to power Conservative governments opposed to the federal carbon pricing scheme. The Conservatives won Ontario's July 2018 election, and the government launched that province's constitutional challenge on August 1, 2018. Alberta followed the same pattern: the Conservatives were elected in April 2019 on a pledge to withdraw Alberta from the Pan-Canadian Framework, and the province launched its constitutional challenge on June 20, 2019.

Alberta, Ontario and Saskatchewan brought their constitutional challenges directly to their respective courts of appeal through a legal procedure known as a reference [also discussed in Chapter 13: The Role of the Judiciary]. In most constitutional cases, private parties raise constitutional challenges when objecting to the law's application to them, on real facts, in trial courts that make findings of fact and law; the losing party can appeal the decision to a higher court and, ultimately, the Supreme Court of Canada. Canadian governments have a second option, which is to refer questions of law to their respective appellate courts: provincial and territorial courts of appeal for the provinces and territories (and in British Columbia, the provincial superior court), and the Supreme Court for the federal government. Unlike a standard constitutional challenge, a reference proceeding is traditionally non-adversarial: the court's ruling is advisory and nonbinding. In practice, reference proceedings function largely like adversarial proceedings, with other governments and entities intervening in the case. Moreover, governments treat reference decisions as binding.

References offer certain attractions for governments. Proceedings before appellate courts are relatively brief compared with lower court proceedings, principally because there is no lengthy fact-finding process; rather, evidence is adduced in the form of a record filed with the court. A case can reach the Supreme Court much more quickly: the federal government can send a reference there directly, and provinces have an automatic right of appeal from their courts of appeal. Governments can craft reference questions carefully to shape the litigation.

For decades, provincial governments of all political stripes have used references to resolve jurisdictional disputes with the federal government, across a wide variety of policy areas. There have been provincial references on constitutional amendment procedures: for example, the *Patriation Reference* (1980) and the *Quebec Veto Reference* (1982). A number of provincial references have addressed areas of public policy where there is concurrent jurisdiction or shared responsibility, such as agricultural marketing in *Re Agricultural Products Marketing Act* (1978), criminal justice in the *Firearms Reference* (2000), economic policy in the *Anti-Inflation Reference* (1976), natural resources in the *Exported Natural Gas Reference* (1982) and taxation in the *GST Reference* (1992). Provinces have initiated references in areas of public policy where constitutional jurisdiction was unclear, such as the continental shelf in *Reference re: Mineral and Other Natural Resources of the Continental Shelf* (1994), new reproductive technologies in *Reference re Assisted Human Reproduction Act* (2010), parental leave in the *Employment Insurance Reference* (2005) and shared-cost programs in *Reference re Canada Assistance Plan* (1991).

Provincial governments have also used references in connection with intergovernmental disputes to pursue policy objectives. While the provincial goal is sometimes to veto a federal policy (the *Firearms Reference* is an example), in other cases it is to drive the federal government back to the negotiating table, with increased provincial leverage from a victory in court. Governments can bargain around allocations of constitutional jurisdiction in order to achieve shared goals.

What are the strategic goals of the provinces challenging the constitutionality of the GGPPA? Alberta, Ontario and Saskatchewan launched constitutional challenges against the GGPPA but have been joined by two more provinces—Manitoba and New Brunswick—in opposing federal carbon pricing. New Brunswick considered launching

its own constitutional challenge but decided not to. Instead, it intervened on the side of Ontario and Saskatchewan in their respective references. Alberta, Manitoba, New Brunswick, Ontario and Quebec have intervened on the side of Saskatchewan in its appeal to the Supreme Court ...

It is possible that the constitutional challenges to the GGPPA are part of a larger strategy: namely, the development of a provincial-territorial coalition in favour of the extraction and processing of fossil fuels, the building of infrastructure (such as pipelines) to deliver them and the shipping of these products to foreign markets. In other words, we might be witnessing the rise of a “carbon economy coalition” that is opposed to significantly reducing the role of fossil fuels in the Canadian economy and, by extension, is committed to limiting the reduction of GHG emissions. As part of this larger strategy, the constitutional challenges to the GGPPA might aim to veto federal carbon pricing policy.

However, this coalition of provincial and territorial governments is unstable. The reason is the wide variation among jurisdictions in per capita GHG emissions. As of 2017, Canada's per capita emissions were 19.5 tonnes. Ontario's and New Brunswick's were below this figure; the Northwest Territories had per capita emissions that were 38 percent higher. Alberta and Saskatchewan had significantly higher numbers—indeed, they have among the highest per capita GHG emissions of any jurisdiction in the world.

These sharp divergences reflect different underlying economic realities. The coalition brings together jurisdictions with carbon-intensive economies (Alberta, Saskatchewan, Northwest Territories) with jurisdictions that have less carbon-intensive economies (Manitoba, New Brunswick, Ontario). Consequently, as a matter of politics, their reasons for opposing charges on GHG emissions are different.

For jurisdictions with less carbon-intensive economies, the principal political concern is the possible impact on consumer prices for gasoline, electricity and home heating. For jurisdictions with more carbon-intensive economies, the concern is much more fundamental: carbon pricing poses an enormous challenge to the very structure of their economies, which are closely tied to fossil fuel production—especially Alberta and Saskatchewan.

• • •

There is nevertheless evidence that the GGPPA is being implemented asymmetrically in terms of the scope of GHG-emitting activities that is covered, even though the public case for the benchmark is the need for national consistency.

Based on 2015 emissions data, Dobson, Winter and Boyd estimate that the backstop would apply to 78 percent of Canada-wide GHG emissions (approximately 44 percent consisting of the fuel charge and approximately 35 percent, the OBPS) and that the federal benchmark would apply to 72 percent of these emissions. The federal benchmark is therefore lower than the federal backstop. Dobson, Winter and Boyd also compare the application of the backstop with the plan in each approved province and the federal benchmark as applied in each province, ... [and] make three key observations: (a) the benchmark varies by jurisdiction because of variations in the structure of provincial economies; (b) the carbon pricing programs in Nova Scotia, Prince Edward Island and Newfoundland and Labrador have been approved by the federal government even though they fall short of the benchmark in terms of the scope of GHG-emitting activities covered; and (c) the backstop for those three provinces is equal to or slightly higher than the benchmark, such that the gap between the approved provincial plan and the backstop is even greater than the gap between the plan and the benchmark. The programs in Nova Scotia, Prince Edward Island and Newfoundland and Labrador likely do not meet the benchmark because

of exemptions that narrow their scope: aviation and marine fuels (Nova Scotia) and home heating fuels (Prince Edward Island, Newfoundland and Labrador).

The most likely explanation for why asymmetry has been achieved through variations in scope, but not price, is political economy. Price is visible to the public and relatively easy to benchmark, creating stronger political incentives toward uniform pricing. By contrast, scope can be highly technical and opaque, creating weaker political incentives for uniformity and providing the space for intergovernmental negotiations that may result in asymmetry.

For the less carbon-intensive jurisdictions of Manitoba, New Brunswick and Ontario, their likely goal is the flexible interpretation of the GGPPA, especially since their GHG emissions are below the Canada-wide average, to ease any potential burden on consumers. Their support of constitutional challenges is probably a way to mobilize supporters and to articulate demands against the federal government. Winning would be valuable, but the mere fact of participating in a court challenge has political benefits.

For the producer jurisdictions of Alberta and Saskatchewan, the strategic value of a Supreme Court win would be different. For them, the asymmetric application of the GGPPA through intergovernmental negotiation would be very difficult. Moreover, the imposition of the backstop could require significant structural adjustments. It is likely that Alberta and Saskatchewan's shared goal is a much greater degree of asymmetry than the federal government could accept. The strategic value of a Supreme Court judgment finding that the GGPPA is unconstitutional would be to give these provinces leverage to renegotiate Canada's whole approach to GHG emissions reductions, because the federal government's Plan B—the imposition of a carbon tax—is subject to a provincial immunity that shields Crown property and agencies, including utilities, sharply reducing its effectiveness

References Re Greenhouse Gas Pollution Pricing Act

2021 SCC 11

WAGNER CJ (Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ concurring):

B. Characterization of the GGPPA

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[57] In this case, the judges [and parties] have proposed [three] formulations of the GGPPA's pith and substance ... : (1) a broad formulation [relating to] the regulation of GHG emissions; (2) a national standards-based formulation ... to reduce GHG [i.e., greenhouse gas] emissions; and (3) a national standards pricing-based formulation ... to establish minimum national standards of GHG price stringency to reduce GHG emissions. I would adopt a national standards pricing-based formulation of the pith and substance of the GGPPA. In my view, the true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency

(a) Intrinsic Evidence

[58] This Court has frequently used a statute's title as a tool for the purposes of characterization ... In the case at bar, the statute is titled "Greenhouse Gas Pollution Pricing Act." Its long title is "*An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts.*" Both of these

titles confirm that the purpose of the GGPPA is more precise than the regulation of GHG emissions. As the long title makes clear, the true subject matter of the GGPPA is not just “*to mitigate climate change*,” but to do so “*through the pan-Canadian application of pricing mechanisms*” to a broad set of greenhouse gas emission sources.” The short title also makes it clear that the GGPPA is concerned not simply with regulating GHG emissions, but with pricing them, as the statute is titled the “*Greenhouse Gas Pollution Pricing Act*.” ...

[59] Likewise, the preamble of the GGPPA confirms that its subject matter is national GHG pricing. In general, preambles are useful in constitutional litigation in order to illustrate the “mischief” the legislation is designed to cure and the goals Parliament sought to achieve

[60] It is clear from reading the preamble as a whole that the focus of the GGPPA is on national GHG pricing. The preamble begins with a review of the contribution of GHG emissions to global climate change, of the impact of climate change on—and the risks it poses to—Canada and Canadians (at paras. 1–5), and of the international commitments made by Canada in the *UNFCCC* and the *Paris Agreement* to reduce GHG emissions (paras. 6–8). It then focuses on establishing a minimum national standards GHG pricing scheme. It identifies GHG pricing as “a core element” of the *Pan-Canadian Framework* (at para. 10), and recognizes that climate change requires immediate collective action to promote behavioural change which leads to increased energy efficiency (paras. 9 and 11). After that, pricing mechanisms are commented on at length (at paras. 12–16): in particular, it is noted that some provinces are developing or have implemented GHG pricing systems (at para. 14), but that the absence of such systems or a lack of stringency in some provincial GHG pricing systems could contribute to significant harm to the environment and to human health (para. 15). The preamble concludes with a statement that a national GHG pricing scheme is accordingly necessary in order to ensure that, taking provincial pricing systems into account, “greenhouse gas emissions pricing applies broadly in Canada”: para. 16.

[61] Furthermore, the “mischief” the GGPPA is intended to address is clearly identified in the preamble: the profound nationwide harm associated with a purely intraprovincial approach to regulating GHG emissions. ... In Parliament’s eyes, the relevant mischief is not GHG emissions generally, but rather the effects of the failure of some provinces to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the GGPPA establishes minimum national standards for GHG pricing that apply across Canada, setting a GHG pricing “floor” across the country.

(b) Extrinsic Evidence

[62] ... [T]he extrinsic evidence confirms that the main thrust of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions.

[63] First, it can be seen from the events leading up to the enactment of the GGPPA ... that GHG pricing is a distinct portion of the field of governmental responses to climate change. In the *Paris Agreement*, states made general international commitments to reduce GHG emissions. They are not required to adopt GHG pricing systems; rather, they are free to choose their preferred means. Immediately after the adoption of the *Paris Agreement*, however, the First Ministers endorsed the *Vancouver Declaration*, in which they ... committed to adopting “a broad range of domestic measures, *including carbon pricing mechanisms*” in order to reduce

GHG emissions: at p. 3 (emphasis added). Moreover, the signers of the *Vancouver Declaration* clearly recognized carbon pricing as a distinct aspect of the field of governmental responses to climate change by establishing a working group on carbon pricing mechanisms

[64] In its final report, the Working Group identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and advocated for broad-based carbon pricing mechanisms across Canada that would give each province and territory flexibility on instrument choice. The federal government then endorsed this recommendation

[65] ... [T]he federal government's intention was ... to establish minimum national standards of GHG price stringency for GHG emissions ... without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. ... [T]he extrinsic evidence of the lead-up to the enactment of the GGPPA reveals a process of federal–provincial–territorial cooperation

[66] ... [I]t can also be seen from the legislative debates leading up to the GGPPA that the focus of the statute was not broadly on regulating GHG emissions or establishing minimum national standards to reduce GHG emissions, but was, rather, on establishing minimum national standards of GHG price stringency. ...

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(c) Legal Effects

[70] ... In my view, the legal effects of the GGPPA confirm that its focus is on national GHG pricing and confirm its essentially backstop nature.

[71] In jurisdictions where Parts 1 and 2 of the GGPPA are applied, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. ... Significantly, the GGPPA does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor does it tell industries how they are to operate Instead, all the GGPPA does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. ... The GGPPA does not represent an attempt to occupy other areas

[72] Moreover, because the GGPPA operates as a backstop ... the GHG pricing mechanism described in Parts 1 and 2 of the GGPPA will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. ...

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(d) Practical Effects

[78] In my view, the evidence of practical effects in the case at bar is not particularly helpful for characterizing the GGPPA. Given the dearth of such evidence, it would be unwise to attempt to predict the economic consequences of the GGPPA. It is, moreover, not for the Court to assess how effective the GGPPA is at reducing GHG emissions

[79] Nonetheless, it should be noted that the evidence of practical effects to date is consistent with the principle of flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the GGPPA is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent. The federal backstop GHG pricing regime in Parts 1 and 2 of the GGPPA does not have a legal effect to the extent that there is a provincial system of comparable stringency in place, whatever its design. ...

(e) Conclusion on Pith and Substance

[80] For the foregoing reasons, I conclude that the true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions. ...

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C. Classification of the GGPPA

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(2) Clarifying the National Concern Doctrine

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[111] ... [T]here is significant uncertainty regarding ... the national concern doctrine. ... This case presents an opportunity to clarify these issues.

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[113] Throughout my analysis on these issues, I will be relying in part on this Court's trade and commerce jurisprudence, and in particular on *2011 Securities Reference* and *2018 Securities Reference*. As the Court has observed, the national concern doctrine and the trade and commerce power pose similar challenges to federalism. In both contexts, the Court has interpreted the federal power narrowly to ensure that it does not overwhelm provincial jurisdiction and undermine the federal–provincial division of powers However, my citing these cases should not be taken as an invitation to conflate the two powers. ...

(a) "Matter" of National Concern

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[119] Therefore, the matter to consider in this national concern analysis is establishing minimum national standards of GHG price stringency to reduce GHG emissions. I agree with the majority of the Court of Appeal for Saskatchewan that stringency in this context is not limited to the charge per unit of GHG emissions. It encompasses the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies and the authority to implement regulatory schemes that are necessary in order to implement such a charge: para. 139.

(b) Exclusive Federal Jurisdiction Based on the National Concern Doctrine

[120] There is no doubt that a finding that a matter is of national concern confers exclusive jurisdiction over that matter on Parliament. ... However, the nature and consequences of this exclusive federal jurisdiction is contested by the parties in this case and requires clarification. Understanding the consequences of the recognition of a new matter of national concern is critical in order to properly undertake the scale of impact analysis at the third step of the national concern test.

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[125] A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine "recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply

[126] In my view, the double aspect doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine, but whether or not it does apply will vary from case to case. ...

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[129] The double aspect doctrine takes on particular significance where, as in the case at bar, Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation—in this case by imposing GHG pricing—but the federal law is paramount.

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[131] Beetz J.'s caution about the double aspect doctrine [in *Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749, 1988 CanLII 81] thus applies with particular force where Canada asserts jurisdiction over a matter that involves a minimum national standard. ... The court must be satisfied that Canada in fact has a "compelling interest" in enacting legal rules over the federal aspect of the activity at issue and that the "multiplicity of aspects is real and not merely nominal"

(3) National Concern Test

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(a) Threshold Question

[142] Courts must approach ... the national concern doctrine with great caution. The analysis therefore begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole

[143] ... Although this inquiry was not identified as a distinct step of the analysis in *Crown Zellerbach*, it ... ensures that the national concern doctrine cannot be invoked too lightly [It] is an appropriate, incremental development in the law to ensure that federal power under the national concern doctrine is properly constrained.

[144] If Canada discharges this burden, the analysis proceeds. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is "important"; it operates to limit the application of the national concern doctrine.

(b) Singleness, Distinctiveness and Indivisibility

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[147] ... [T]he proposed federal matter must be specific and readily identifiable, [as well as] qualitatively different from matters of provincial concern. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern—the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction

[148] One key consideration ... is whether [the matter] is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects. The case law demonstrates that this inquiry is central to the national concern doctrine. The finding that marine pollution is extraprovincial and international ... was critical [in *Crown Zellerbach*]. ... By contrast, in *Hydro-Québec*, [it was] concluded that the fact that the statute regulated substances whose effects were entirely intraprovincial and localized was a barrier to its recognition as a matter of national concern. However, they accepted that ... toxic substances that originate in

a particular province may nonetheless be predominantly extraprovincial and international in character if the substances in question have serious effects that can cross provincial boundaries . . .

[149] [T]he existence of [international] treaty obligations is not determinative of federal jurisdiction: . . . Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers . . . [However, d]epending on their content, [treaties] may help to show that a matter has an extra-provincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern.

[150] Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters . . . The federal legislative role must be distinct from and not duplicative of that of the provinces. Once again, the Court's trade and commerce jurisprudence is helpful in this regard. The Court's opinions with respect to securities regulation show that a regulatory field with an international or extraprovincial dimension can also have local features. While there are aspects of securities regulation that are national in character and have genuine national goals, much of this sphere is primarily focused on local concerns related to investor protection and market fairness: *2011 Securities Reference*, at paras. 115 and 124-28; *2018 Securities Reference*, at paras. 105-6. As the *2011 Securities Reference* and the *2018 Securities Reference* confirm, federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

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[152] I will now turn to the second principle[,] . . . provincial inability to deal with the matter. . . . The starting point for this analysis should be the provincial inability test expressed through the fourth and fifth indicia discussed in [the trade and commerce case of] *General Motors*, at p. 662: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. . . . [B]oth of these factors are required.

[153] But there is a third factor . . . : a province's failure to deal with the matter must have grave extraprovincial consequences. . . .

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[155] The requirement of grave extraprovincial consequences sets a high bar . . . This requirement can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs . . . is clearly insufficient . . . Moreover, as I noted above, the onus is on Canada to establish that provincial inability is made out, and evidence is required, "for the questions of provincial inability and the harm that flows therefrom are both factual in part" . . .

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(c) Scale of Impact

[160] At the final step of the national concern test, Canada must show that the proposed matter has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" . . .

[161] The purpose of the scale of impact analysis is to prevent federal overreach: S. Choudhry, *Constitutional Law and the Politics of Carbon Pricing in Canada* (2019), IRPP Study 74, at p. 15; *2011 Securities Reference*, at para. 61. . . In accordance with

this purpose, at this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

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(4) Application to the GGPPA

(a) Threshold Question

[167] Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. ... All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world

[168] That being said, the matter at issue here is not the regulation of GHG emissions generally, ... [but] whether establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of national concern.

[169] The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. [Here, Wagner CJ revisited the history of federal–provincial cooperation.]

[170] Furthermore, there is a broad [international] consensus ... that carbon pricing is a critical measure for the reduction of GHG emissions. ...

[171] In summary, ... establishing minimum national standards of GHG price stringency to reduce GHG emissions ... readily passes the threshold test and warrants consideration as a possible matter of national concern.

(b) Singleness, Distinctiveness and Indivisibility

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[173] Given that the matter at issue is establishing minimum national standards of GHG price stringency to reduce GHGs, it is important to begin by observing that these gases are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global warming potential of the gases (see Sch. 3 of the GGPPA). Moreover, GHG emissions are predominantly extraprovincial and international in their character and implications. ... GHG emissions are precisely the type of diffuse and persistent substances with serious deleterious extraprovincial effects that the dissent in *Hydro-Québec* suggested might appropriately be regulated on the basis of the national concern doctrine: para. 76. ...

[174] The international response to GHG emissions over the past three decades confirms this. [The Chief Justice reviews a number of international documents and agreements.]

[175] ... [T]he regulatory mechanism of GHG pricing is a specific, and limited, one. ... GHG pricing does not amount to the regulation of GHG emissions generally. It is also different in kind from regulatory mechanisms that do not involve pricing, such as sector-specific initiatives concerning electricity, buildings, transportation, industry, forestry, agriculture and waste.

[176] Minimum national standards of GHG price stringency, which are implemented in this case by means of the backstop architecture of the GGPPA, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. The 2011 Securities Reference and 2018 Securities Reference illustrate this

point. The proposed legislation at issue in the *2011 Securities Reference* did not have a distinctly national focus; it ran afoul of the division of powers by replicating existing provincial schemes: para. 116. However, the Court held that “[l]egislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada’s financial markets might well relate to trade as a whole” and could be a matter of national importance to which the federal general trade and commerce power applies: para. 114. This was the approach the federal government took in the proposed legislation at issue in the *2018 Securities Reference*. ... Rather than displacing provincial securities legislation by ensuring the day-to-day regulation of securities trading, it sought to complement provincial legislation by addressing national economic objectives: para. 96.

[177] The backstop approach taken in the GGPPA is analogous to the approach taken in the proposed legislation that was at issue in the *2018 Securities Reference* It does so on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems.

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[179] The GGPPA is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing. While it is true that the administrative pricing mechanism set out in the GGPPA is detailed, it can apply only to provinces that fail to meet the federal stringency standard. Thus, the GGPPA’s fundamental role is a distinctly federal one Even if the GGPPA were to apply so as to supplement an insufficiently stringent provincial pricing scheme, the prior existence of similar provincial legislation is not, as this Court confirmed in the *2018 Securities Reference*, a constitutional bar to federal legislation that pursues a qualitatively different national concern

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[181] The second principle ... is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. I find that provincial inability is established in this case.

[182] First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. ... In the instant case, while the provinces could choose to cooperatively establish a uniform carbon pricing scheme, doing so would not assure a sustained approach to minimum national standards of GHG price stringency to reduce GHG emissions: the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal standard—a national GHG pricing floor—that applies in all provinces and territories at all times.

[183] Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. It is true that a cooperative scheme might continue to exist if one province withdrew from it, but the issue here is whether it would be successful. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province’s failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage.

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[185] ... It is true that their withdrawal from the *Pan-Canadian Framework* does not mean that Saskatchewan, Ontario and Alberta will necessarily fail to reduce their GHG emissions. But when provinces that are collectively responsible for more than two thirds of Canada’s total GHG emissions opt out of a cooperative scheme, this illustrates the stark limitations of a non-binding cooperative approach.

[186] What is more, any province's refusal to implement a sufficiently stringent GHG pricing mechanism could undermine GHG pricing everywhere in Canada because of the risk of carbon leakage. Carbon leakage is a phenomenon by which businesses in sectors with high levels of carbon emissions relocate to jurisdictions with less stringent carbon pricing policies . . . Thus, provincial cooperation may not result in national emissions reductions, as businesses could simply relocate to non-cooperating provinces, leaving Canada's net emissions unchanged and people across Canada vulnerable to the consequences of those emissions.

[187] Third, a province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests. . . [E]very province's GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life.

[188] Furthermore, I reject the notion that because climate change is "an inherently global problem," each individual province's GHG emissions cause no "measurable harm" or do not have "tangible impacts on other provinces" . . . Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.

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[190] While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" . . . This weighs in favour of a finding of provincial inability. . . [A] provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations—it does not—but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case.

[191] . . . [I]n the absence of a federal law binding the provinces, there is nothing whatsoever to protect individual provinces or the country as a whole from the consequences of one province's decision, in exercising its authority, to take insufficient action to control GHGs, or to take no steps at all. In short, federal action is indispensable, and GHG pricing in particular is an integral aspect of any scheme to reduce GHG emissions.

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[194] The analogy between this case and *Crown Zellerbach* is clear. Le Dain J. emphasized the international character of marine pollution; GHG emissions represent a truly global pollution problem that demands a coordinated international response. Le Dain J. focused on the unique scientific characteristics of marine pollution that distinguish it from fresh water pollution; GHG emissions, like marine pollution, are a precisely identifiable form of pollution that can readily be scientifically distinguished from other atmospheric pollutants.

[195] But the case for finding that the matter is of national concern is even stronger here than in *Crown Zellerbach* . . . First, in the case at bar, there is uncontested evidence of grave extraprovincial harm as a result of one province's failure to cooperate. . . Second, the proposed federal matter in the instant case relates only to the risk of

non-cooperation that gives rise to this threat of grievous extraprovincial harm. In other words, this matter would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

(c) Scale of Impact

[196] I conclude that, while it is true that finding that the federal government has jurisdiction over this matter will have a clear impact on provincial autonomy, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that fall under provincial heads of power will be limited and will ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level.

[197] I accept that finding that this matter is one of national concern has a clear impact on provincial jurisdiction. It leads to the recognition of a previously unidentified area of double aspect in which the federal law is paramount. Provinces can regulate GHG pricing from a local perspective (e.g., under ss. 92(13) and (16) and 92A), but legislation enacted on the basis of these provincial powers would apply concurrently in a field also occupied by a paramount federal law that establishes minimum standards of GHG price stringency. There is a clear impact on provincial autonomy. Provincial governments and their residents may well wish to pursue GHG pricing standards lower than those set by the federal government in order to protect the vitality of local industries, or may wish to choose policies that do not involve GHG pricing.

[198] However, I am persuaded that there is a real, and not merely nominal, federal perspective on the fact situation of GHG pricing: Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing. This is manifestly not the "same aspect of the same matter." On the contrary, the compelling federal interest is in doing precisely—and only—what the provinces cannot do: protect themselves from the risk of grave harm if some provinces were to adopt insufficiently stringent GHG pricing standards. Moreover, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[199] First, the matter's impact on the provinces' freedom to legislate is minimal. It is important to mention that the issue in this case is not the freedom of the provinces and territories to legislate in relation to GHG emissions generally. Here, the matter is limited to GHG pricing of GHG emissions—a narrow and specific regulatory mechanism. Any legislation that related to non-carbon pricing forms of GHG regulation—legislation with respect to roadways, building codes, public transit and home heating, for example—would not fall under the matter of national concern.

[200] Nor is the freedom of the provinces and territories to legislate in relation to all methods of pricing GHG emissions at issue. ... Under the GGPPA, provinces and territories are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency. If a province wants to exceed the federal standards, it is free to do so If a province fails to meet the minimum national standards, the GGPPA imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency The federal matter thus deals with GHG pricing stringency in a way that relates only to the risk of non-cooperation and the attendant risk of grave extraprovincial harm and has the ascertainable and reasonable limits required by *Crown Zellerbach* so as to ensure that provincial jurisdiction is not eroded more than necessary.

[201] Second, the matter's impact on areas of provincial life that would generally fall under provincial heads of power is also limited. Although the identified matter of national concern could arguably apply to types of fuel and to industries to which the GGPPA does not apply at present, that matter is, crucially, restricted to standards for GHG pricing stringency. ... Indeed, the federal power recognized in this case is significantly less intrusive than the one at issue in *Crown Zellerbach*, in which, as La Forest J. noted, the effect of finding that the federal government has jurisdiction over ocean pollution caused by the dumping of waste was to "virtually prevent[t] a province from dealing with certain of its own public property without federal consent"

[202] Nor does the federal "supervisory" jurisdiction of the GGPPA increase the matter's scale of impact on provincial jurisdiction. ... The Governor in Council does not have an unfettered discretion to determine whether a provincial GHG pricing system is desirable, but is confined to determining whether it meets results-based standards.

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[204] Indeed, the design of the GGPPA to ensure provincial flexibility is consistent with the *2018 Securities Reference*. In that case, the proposed law also involved a "supervisory" aspect, given that the federal regulator's intervention was contingent upon there being a risk that "slips through the cracks" of a provincial scheme that posed a threat to the Canadian economy: para. 92. The Court found that this feature weighed in favour of constitutionality, because the statute was a "carefully tailored" response to "this provincial incapacity"

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[206] On the whole, I am of the view that the scale of impact of this matter of national concern on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution. ... [I]t is necessary to consider the interests that would be harmed—owing to irreversible consequences for the environment, for human health and safety and for the economy—if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.

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BROWN J (dissenting):

A. Characterization

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[322] I observe at the outset that, when Parliament seeks to permanently and exclusively regulate a matter of national concern, one would expect the Attorney General of Canada to have a single, clear, and consistent position about just what he thinks Parliament was doing. More particularly, he should be able to readily—and, again, consistently—identify the narrow and distinct matter that the legislation in question addresses. That has not occurred here. Instead, the Attorney General has offered up a vast array of shifting arguments

[323] To assuage these suspicions, the Attorney General of Canada acknowledges that his approach has "evolved," having been "informed" along the way "by the characterizations of [the] courts below" (R.F., at para. 61). So where has this "evolution" brought him? Before this Court, it has at last brought him to the revelation that the Act's dominant subject matter is "establishing minimum national standards integral to reducing nationwide GHG emissions" (para. 56 (emphasis deleted)).

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[326] The principal difficulty with these submissions is the invocation of “minimum national standards.” It adds nothing to the pith and substance of a matter, which is directed *not* to the fact of a *standard*, but to the *subject matter* to which the standard is to be applied. In other words, identifying “minimum national standards” as part of the dominant subject matter begs the very question which the characterization analysis seeks to answer: minimum national standards of *what*?

[327] “Minimum national standards” is a *nothing*. It is an *artifice*—or, as the Attorney General of Alberta puts it, a rhetorical “sleight of hand” ... Only federally enacted standards can be both “national” (in the sense that only federal legislation can apply nationwide, while provincial legislative authority cannot extend beyond its borders) and a “minimum” (since, if a provincial standard is different from a corresponding federal standard, the operation of paramountcy ensures that the federal standard will prevail). In the result, using “minimum” and “national” to describe the Act’s pith and substance is empty and misleading.

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[337] The difficulty with many of the submissions ... is that they attempt to characterize the pith and substance of the Act as if Parts 1 and 2 were each doing the same thing in the same way. ... While Part 1 of the Act increases the cost of producing, delivering, using, or importing fuels that produce GHG emissions (which is expected to be passed on to consumers through an increase in the ultimate retail cost of those fuels), Part 2 does something quite different: it increases the cost of certain industrial activities by charging large facilities for producing GHG emissions over prescribed limits based on their particular industry and production processes. Part 2 also alleviates the impact of carbon pricing on *some* industries, but *not all*: the OBPS covers only the emissions-intensive trade-exposed industries that carry out an activity that the federal Cabinet chooses to list in the regulations. Picking winners and losers in this way is the stuff of industrial policy, not carbon price stringency.

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[340] It follows from the foregoing that the pith and substance of Parts 1 and 2 of the Act ought to be characterized separately. And it also follows from the foregoing that the pith and substance of Part 1 of the Act is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 of the Act is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

B. Classification

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(1) Provincial Jurisdiction

[342] It must be remembered that the Act’s entire scheme is *premised* on the provinces *having* jurisdiction to do precisely what Parliament has presumed to do in the Act—that is, to impose carbon pricing through a comparable scheme.

[343] ... Indeed, as I have explained, the Act operates as a backstop, operating only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet.

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[346] Part 2 of the Act, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 of the Act—with its emphasis on heavy industrial emitters, trade exposure, and international competitiveness—is s. 92A. This head of

power gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation, and management of non-renewable natural resources in the province

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(2) The National Concern Branch of POGG

(a) Defining the Matter of National Concern

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[370] ... Defining a matter of national concern that encompasses *both* the reduction of GHG emissions by raising the cost of fuel (Part 1) and the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) requires broad strokes. The legislative means employed by Parts 1 and 2 are mutually distinct ... sharing only a purpose: the reduction of GHG emissions. This ... [tends] to support the identification of the matter said to be of national concern as the purpose of the Act: *the reduction of GHG emissions*. The only remaining question, then, is whether the reduction of GHG emissions satisfies the test stated in *Crown Zellerbach* for a valid national concern.

(b) Singleness, Distinctiveness and Indivisibility

[371] "The reduction of GHG emissions" does not meet the requirements of *Crown Zellerbach*. This would be so, even if it were appropriate to consider each of the pith and substance of Parts 1 and 2 as proposed matters of national concern, since the reduction of GHG emissions by raising the cost of fuel (Part 1) and by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) each fail to meet the requirement of distinctiveness. Neither of these matters is distinct from matters falling under provincial jurisdiction under s. 92. ...

(i) The Pith and Substance of Each Part Is Not Distinct

[372] Here again, the backstop model of the Act is of significance. The principal difficulty ... is illustrated by the very quality of the scheme that Parliament has legislated. Through the Act, Parliament encourages provinces to enact substantially *the same* scheme to serve *the same* regulatory purpose of altering behaviour. Again, this demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority

[373] Proponents of the Act urge us to find that, even if the Act and provincially legislated GHG pricing schemes address the same matter, they each address different aspects of that matter. This argument rests on the applicability of the double aspect doctrine, whose application here the majority not only accepts but describes as *inevitable* whenever minimum national standards are employed (Chief Justice's reasons, at paras. 125-31). But the majority is simply wrong—the double aspect doctrine has no application here.

[374] The double aspect doctrine arose because "some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 30). ... Whether the doctrine applies to the national concern doctrine of POGG is a question of some controversy, given this Court's statement in *Crown Zellerbach* that Parliament acquires "exclusive jurisdiction of a plenary nature to legislate in relation to" the matter of national concern (p. 433; see, for instance, *Lacombe*, at paras. 26-27). Assuming without deciding, however, that the double

aspect doctrine may, in some instances, apply to matters of national concern recognized as such under POGG, it has no application here.

[375] As the provinces clearly have jurisdiction to establish standards of GHG price stringency in the province, this leaves as the only difference between the federal aspect and the provincial aspect "minimum national standards." Obviously, adopting "minimum national standards" as part of the matter of national concern allows the majority to invoke the double aspect doctrine, since it has defined the matter in terms of something (enacting "national standards") which, as a practical matter, only Parliament could possibly do. And just as obviously, when the matter is defined in terms of something only Parliament could possibly do, whatever it is that the provinces are doing must be something different. This reasoning, however, could easily be applied to create federal "aspects" of all sorts of matters falling within provincial jurisdiction. Indeed, the majority suggests just that, acknowledging that whenever the device of "minimum national standards" is used, a double aspect "will inevitably result" (para. 129).

[376] The device of minimum national standards, combined with the double aspect doctrine, artificially meets many aspects of the *Crown Zellerbach* test, as diluted by the majority. ...

[377] It is, however, this simple. While the double aspect doctrine "allows for the concurrent application of both federal and provincial legislation, ... it does not create concurrent jurisdiction" (*2011 Securities Reference*, at para. 66 (underlining added)). ...

[378] The Attorney General of Quebec offers a particularly compelling and constitutionally sound encapsulation of the problem The Attorney General of Quebec –no stranger to carbon pricing and legislative action to mitigate climate change—says that the proposed matter does not contemplate two aspects of the same matter; rather, it contemplates the same aspect of the same matter. And because the provinces may legislate in this area only where such legislation meets the criteria unilaterally set by the federal government, defining the matter so as to artificially conjure a double aspect effectively amounts to a *transfer of jurisdiction* from the provinces to the federal government. ...

(ii) "The Reduction of GHG Emissions" Is Not Single or Indivisible

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[380] ... While aspects of "the reduction of GHG emissions" may be distinct from matters falling under s. 92, as a matter of national concern it still fails to meet the *Crown Zellerbach* requirements of singleness and indivisibility. In *Crown Zellerbach*, it was "not simply the possibility or likelihood of the movement of pollutants across [the boundary between the territorial sea and the internal marine waters of a state]," but "the difficulty of ascertaining by visual observation" that boundary that meant uniform legislative treatment was required for marine pollution (p. 437). This proposition could not be clearer. The matter was indivisible in that case not because pollutants might cross an invisible boundary; rather, the matter was indivisible because of the difficulty of knowing the source and physical location (federal territorial seas vs. provincial inland waters) of the pollution at any given time, and therefore whose regulatory and penal provisions might apply.

[381] Here, however, the territorial jurisdiction from which GHG emissions are emitted is readily identifiable. The matter is divisible, because whenever fuel is purchased, or an industrial activity is undertaken, no question arises as to physical location and, therefore, no difficulty arises in identifying whose jurisdiction might

apply. ... The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern.

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[383] Of course, uniform legislative treatment in the area of GHG emissions reduction might be *desirable* But the desirability of uniform treatment is hardly the marker of a matter of national concern. ... While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is *precisely* what this Court held was insufficient to meet the requirement of indivisibility in *Crown Zellerbach*....

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[385] Obviously, uniform legislative treatment might be desirable in that it could alleviate concerns about carbon leakage. But, and again as the Court of Appeal of Alberta observed, the evidence on this record of the harms of interprovincial carbon leakage is equivocal at best.

• • •

(c) Scale of Impact

[387] Even were the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is completely irreconcilable with the division of powers.

[388] The power to legislate to reduce GHG emissions effectively authorizes an array of regulations, "the boundaries of [which] are limited only by the imagination" (Sask. C.A. reasons, at para. 128). It extends to the regulation of any activity that requires carbon-based fuel, including manufacturing, mining, agriculture, and transportation. ... As Huscroft J.A. recognized, in dissent, the power to create minimum standards for GHG emissions could potentially authorize minimum standards related to home heating and cooling, public transit, road design and use, fuel efficiency, manufacturing and farming prices (Ont. C.A. reasons, at para. 237).

[389] Unlike previously recognized matters of national concern, ... the power to legislate to reduce GHG emissions has the potential to undo Canada's division of powers. It is in this respect comparable to the broad topics of environmental regulation and inflation, which this Court has expressly refused to recognize as independent legislative subjects.

[390] In an attempt to minimize the scale of impact on provincial jurisdiction, the Attorney General of British Columbia reminds us that the Act does not forbid any activity, but only increases the cost of certain activities.

[391] The majority adopts this line of argument ... (para. 57).

[392] This view ignores two problems. First, "just paying money" is an odd way of describing the impact of a law. The goal of the financial charges—"just paying money"—is to influence behaviour, in this case both consumer and industrial. And that is precisely the point.

• • •

[394] The second problem ... is that the Constitution does not require provinces to happily accept a severe intrusion on their jurisdiction under POGG simply because Parliament could have passed a *criminal* law. Likewise, an intrusion into provincial jurisdiction is no less severe simply because it leaves the provinces with authority to enact *more* stringent regulatory requirements. This argument misses the point of the division of powers analysis The Constitution Act, 1867 does not permit federal overreach as long as it preserves provincial autonomy to the greatest extent possible. It sets out spheres of exclusive jurisdiction. It divides powers—exclusive powers—between

Parliament and the provincial legislatures. And within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act—or not act—as they see fit, not as *long* as they do so in a manner that finds approval at the federal Cabinet table . . .

• • •

[451] But the real problem with my colleagues' scale of impact analysis is their significant understatement of the intrusion into provincial jurisdiction effected by the Act. . . [T]he federal benchmark is *not static*, and can be set to an increasingly stringent level so as to correspondingly narrow provincial jurisdiction in the field. It is only by ignoring such things that the majority is able to claim that the federal power that it recognizes here is "significantly less intrusive than [that recognized] in *Crown Zellerbach*" (para. 201).

[452] More fundamentally, . . . the majority puts its thumb heavily on the federal side of the scale—by legitimating as a national concern the device of "minimum national standards" on matters of importance that otherwise fall within provincial jurisdiction, and by insisting that doing so still preserves provincial autonomy (as *long* as it is exercised in accordance with federal priorities). Parliament now knows how to ensure that the balance will always tip its way, whenever provinces choose to exercise their legislative authority in a way that impedes the federal agenda.

• • •

ROWE J. (dissenting):

[457] The national concern doctrine is a residual power of last resort. I have come to this view through a close reading of *R. v. Crown Zellerbach Canada Ltd.*, 1988 CanLII 63 (SCC), [1988] 1 S.C.R. 401, and the cases that preceded it. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the "Peace, Order, and good Government" ("POGG") power cannot be the basis for the constitutionality of the [GGPPA].

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III. The National Concern Doctrine

A. Singleness, Distinctiveness, Indivisibility

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[540] Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. . . The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize "important" matters that can be legislated upon by the provinces or by both orders of government.

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B. Provincial Inability

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(1) Extra-Provincial Effects Are Relevant to, But Not Determinative of, Provincial Inability

[554] . . . "[E]xtra-provincial effects," on their own, are insufficient to satisfy the "provincial inability" test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem.

• • •

[556] Clearly, some extra-provincial effects are compatible with provincial jurisdiction, considering that, under the federal structure, provinces can adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction . . . If the pith and substance of provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity . . . Given the potential displacement of provincial authority, courts should have a "strong empirical base" for concluding that the extra-provincial effects are such that the matter is beyond the powers of the provinces to deal with on their own or in tandem . . .

[557] Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. . . Moreover, since the possibility of one or more provinces not cooperating is always hypothetically present, such lax criteria would be ineffective protection for provincial jurisdiction . . . In certain fields, the *Constitution Act, 1867*, places diversity and the right to provincial difference above uniformity. This is not a defect of our Constitution, it is a strength.

(2) Provincial Inability Is Relevant to, But Not Determinative of, "Singleness, Distinctiveness and Indivisibility"

[558] Second, the residual role of the national concern doctrine explains why Le Dain J. in *Crown Zellerbach* indicated that the "provincial inability" test is only a "factor" to evaluate whether a subject matter has the required singleness, distinctiveness and indivisibility.

[559] Many matters are "beyond the power of the provinces to deal with" but do not meet the requirements of singleness, distinctiveness and indivisibility, and are therefore not matters of national concern. Obviously, matters that fall squarely within federal jurisdiction are one example (i.e. currency and coinage, the postal service, etc.). This is also the case when matters are mere divisible aggregates that span provincial and federal jurisdiction . . . For instance, there is no denying that the containment of inflation is "beyond the power of the provinces to deal with," since it involves measures that fall squarely under federal jurisdiction, such as central banking measures relating to the rate of interest (*Anti-Inflation*, at p. 452). This does not mean that the containment of inflation has the required singleness and indivisibility to qualify as a matter of national concern since it can be divided and distributed to both orders of government. Since there is no constitutional gap, there is no need for the national concern doctrine to be applied such that the entire matter comes under federal jurisdiction.

[560] Provincial inability is no more than Le Dain J. says it is in *Crown Zellerbach*: an indicium of "singleness, distinctiveness and indivisibility." . . . In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void—if the federal Parliament did not have jurisdiction over such a matter, no one would.

C. Scale of Impact

[561] When determining if a matter can pass muster as a subject matter falling under POGG, the final step is to consider whether it has "a scale of impact on

provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (*Crown Zellerbach*, at p. 432). ... This stage of the test should therefore be understood as a "check" or "litmus test," rather than as an independent requirement. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers (*Anti-Inflation*, at p. 444).

[562] This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does not ask whether the importance of the proposed new federal power outweighs the infringement on provincial jurisdiction. ... Important matters can and should be dealt with by the provinces. Further, assessing importance requires courts to assess the desirability of certain policies, something which is not their role.

[563] Rather, the notion of scale of impact on the fundamental distribution of powers is a manifestation of the principle of federalism.

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[566] Although the modern conception of federalism is flexible and accommodates overlapping jurisdiction, courts must be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or "matter" may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective . . .

• • •

[569] Moreover, the double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. ... The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy.

• • •

[572] The Chief Justice also takes issue with my account of the national concern test. I agree that our understandings of POGG are fundamentally different. Mine is that POGG confers residual authority, by which I mean authority to legislate in relation to only those matters which would otherwise fall into a jurisdictional vacuum. As such, it can only be the basis of jurisdiction for matters that do not come within heads of power listed in ss. 91 and 92, and cannot be divided between them. ...

[573] Therein lies the conceptual difference that the Chief Justice highlights. In his framework, POGG is a primary source of authority conferred on Parliament in relation to "matters of inherent national concern" (para. 139). Moreover, it is a source of authority that can be used to deal with federal "aspects" of matters under enumerated powers within the exclusive jurisdiction of provincial legislatures. Thus, he states at para. 130: "... where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount."

[574] By means of "minimum national standards," a federal aspect is generated, and this federal aspect can be used as a basis to supervise provinces in the exercise of their authority. This is not residual authority. It is the antithesis of residual authority, as it would operate to encroach on jurisdiction conferred on the provinces. Most respectfully, I disagree.

• • •

[594] In conclusion, ... for the reasons of my colleague Brown J., [I] conclude that Parliament did not have jurisdiction to enact the Act under its general residual power.

NOTES AND QUESTIONS

1. Justice Côté wrote dissenting reasons, and would have advised that the *Greenhouse Gas Pollution Act*, SC 2018, c 12, s 186 [GGPPA] is unconstitutional for delegating excessive power to the Governor in Council:

[224] Although delegation of legislative power is not inherently problematic, as discretion provides flexibility and makes it possible to overcome the practical difficulties associated with amending provisions and enacting regulations at the legislative level, when an Act endows a select few with the power to re-write, and thus reengineer, a law which affects virtually every aspect of individuals' daily lives and provincial industrial, economic, and municipal activities, it goes too far.

The core of her objection was to ss 166(2), 166(4), and 192 of the GGPPA, which confer on the Governor in Council the power to amend parts of the GGPPA. Her decision would introduce a nondelegation doctrine into Canadian constitutional law and prohibit legislatures from delegating the power to amend primary legislation to the executive through what are known in the Commonwealth as Henry VIII clauses. This name derives from the *Statute of Proclamations 1539*, which granted to the king the power to make proclamations having the force of legislation. Henry VIII clauses have come under harsh criticism in the United Kingdom because they enable the executive to determine the statutory boundaries of its own authority: House of Lords Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (20 November 2018) at 18–20. Justice Côté rooted the nondelegation doctrine, at the federal level, in two sources: s 17 of the *Constitution Act, 1867*, which confers legislative authority on Parliament, and the unwritten constitutional principles of parliamentary sovereignty, the rule of law, and the separation of powers. Chief Justice Wagner countered that "the constitutionality of Henry VIII clauses is settled law" (at para 87), as a consequence of the decision in *Re George Edwin Gray*, [57 SCR 150, 1918 CanLII 533](#).

In *Re Gray*, the relevant provision read: "The Governor-in-Council shall have power to do and authorize such acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or advisable for the security, defence, peace, order and welfare of Canada" (at 156). Is this a Henry VIII clause?

2. An important point of disagreement between Wagner CJ, on one hand, and Brown and Rowe JJ, on the other, is whether the double aspect doctrine is applicable to POGG. The majority held that, under certain circumstances, the doctrine does apply to POGG, whereas the dissenting judges disagreed. Do you agree with the concerns that the dissent raises? How does the majority respond to these concerns?

3. An important move in *References re Greenhouse Gas Pricing Act* is to link the jurisprudence under the general regulation of trade branch of s 91(2) with the national concern branch of POGG, in relation to the provincial inability test. Sujit Choudhry made this proposal in an article that appeared prior to the Supreme Court's hearing ("Constitutional Law and the Politics of Carbon Pricing in Canada" (2019) 74 Institute for Research in Public Policy Study 1 at 19–23). Choudhry also argued that the Supreme Court should determine that GHG emissions pose a "systemic risk," and that the federal government had jurisdiction over systemic risks, whether of an economic or environmental nature:

[In the *Interprovincial Cooperatives* case, the Supreme Court held that] the national dimensions branch of the POGG power is really about whether provinces should bear the risk that other provinces would be unwilling to make regulatory choices to avoid negative extraprovincial externalities.

The issue is why those circumstances should warrant expanding federal jurisdiction, especially since an obvious alternative would have been a cooperative solution whereby

Saskatchewan and Ontario regulated industries in their borders for Manitoba's benefit. In parallel fashion, provincial-territorial or federal–provincial–territorial agreements may be an alternative to the GGPPA. Indeed, the GGPPA itself contemplates a scenario in which every province and territory satisfies the benchmark and the backstop does not apply—in essence, a federal–provincial–territorial agreement. ...

• • •

The constitutional question is whether GHG emissions pose a systemic risk—and hence fall under federal jurisdiction. The federal government's argument would have to run as follows. If global temperatures rise beyond a certain level, a tipping point will be reached, leading to an uncontrollable cascade of events. GHGs would be released into the atmosphere at an ever-accelerating rate, which would fuel a self-reinforcing feedback loop that, once commenced, would be impossible for humanity to arrest, and that would make the planet uninhabitable. This is a "domino effect" of the kind referred to by the Supreme Court in *Reference re Securities Act*.

In *Reference re Securities Act*, the Court stated that "[b]y definition" systemic "risks can be evasive of provincial boundaries and usual methods of control." In other words, systemic risks transcend jurisdictional boundaries. In that case, the systemic risk was economic, and the boundaries were interprovincial. In the case of GHG emissions and climate change, the systemic risk is environmental, and the boundaries are international.

Should the Supreme Court have adopted the notion of systemic risk in *References re Greenhouse Gas Pollution Pricing Act*? How would the dissent have responded?

4. For other views published prior to the hearing *References re Greenhouse Gas Pollution Pricing Act*, see Nathalie J Chalifour, Peter Oliver & Taylor Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the Greenhouse Gas Pollution Pricing Act Appeals" (2020) 40 NJCL 153; Dwight Newman "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82 Sask L Rev 187.

5. Jean Leclair has written extensively on the distribution of legislative authority as it pertains to environmental issues: see Jean Leclair, "*L'étendue du pouvoir constitutionnel des provinces et de l'État central en matière d'évaluation des incidences environnementales au Canada*" (1995) 21 Queen's LJ 37; Jean Leclair, "*Aperçu des virtualités de la compétence fédérale en matière de droit criminel dans le contexte de la protection de l'environnement*" (1996) 27 RGD 137; Jean Leclair, "The Supreme Court, the Environment, and the Construction of National Identity" (1998) 4 R études const/Rev Const Stud 372.

6. Some have suggested that the national concern doctrine is similar to the doctrine of subsidiarity in the European Union. According to that doctrine, in federal states, powers should be distributed between the centre and the regions according to the principle that decisions should be made at the lowest level of government that is reasonably possible. More specifically, art 3b of the 1992 *Maastricht Treaty*, 7 February 1992, 1992 OJ (C191) 1, 31 ILM 253 states that outside its areas of exclusive competence,

the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Not surprisingly, there is debate as to whether the term "sufficiently achieved" focuses only on the issue of inability on the part of lower levels of government, or includes consideration of the efficacy of action by that level as well. This debate occurs overwhelmingly in the political rather than the judicial sphere.

Many in Europe see subsidiarity as a brake on the process of federalization that preserves the sovereignty of the member states. Is it appropriate to invoke the doctrine of subsidiarity within Canada to guide the interpretation of the national concern doctrine? In several recent

decisions, the Supreme Court of Canada has made reference to the principle of subsidiarity, albeit not in the context of the POGG power: see *Canadian Western Bank v Alberta*, [2007 SCC 22](#), excerpted in Chapter 8, Interpreting the Division of Powers (in the discussion of interjurisdictional immunity) and *Reference re Assisted Human Reproduction Act*, [2010 SCC 61](#), excerpted in Chapter 11 (in the discussion of the criminal law power; see also the discussion of subsidiarity in the notes following this case). For further reading, see Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 SCLR (2d) 601; Hugo Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23 Const Forum Const 20; Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21.

7. It is interesting to contrast Canadian federal power to address matters of international concern with the federal power in Australia. The Australian Constitution gives explicit legislative jurisdiction over "external affairs" to the federal Parliament: see *Commonwealth of Australia Constitution Act*, 1900, s 51 (xxix), and the High Court of Australia has interpreted this aspect of the division of powers expansively. The two leading cases on this issue concern land-use conflicts between, on the one hand, the proposed natural resource projects of state governments and, on the other, the Commonwealth of Australia's commitments to preserve certain lands under the *United Nations Convention for the Protection of the World Cultural and Natural Heritage*, 1037 UNTS 151 (adopted 16 November 1975, entered into force 17 December 1975). In *Commonwealth of Australia v Tasmania* (1983), 158 CLR 1, 46 ALR 625 (HCA) (the *Tasmanian Dam* case), the High Court upheld a federal statute prohibiting the state of Tasmania from constructing a hydroelectric dam that would have threatened lands listed on the United Nations World Heritage List. A majority of the Court held that s 51 (xxix) confers on the federal government the legislative authority to implement any treaty obligation irrespective of whether it possesses a traditionally "international" subject matter.

This decision was followed in *Queensland v Commonwealth of Australia* (1989), 167 CLR 232, 86 ALR 519 (HCA), in which the state of Queensland challenged a federal proclamation prohibiting forestry operations in a World Heritage rain forest area. Writing for the majority, Mason CJ stated (at 525 ALR):

The existence of Australia's international duty is determined by the inclusion of the property in the World Heritage List consequent on Australia's nomination of the property for inclusion in the List, for the listing of the property determines its status for the international community. There is no suggestion of bad faith either in the nomination or in the listing. As the inclusion of the property in the List is conclusive of its status in the eyes of the international community, it is conclusive of Australia's international duty to protect and conserve it. Its inclusion is therefore conclusive of the constitutional support for the proclamation of 15 December 1988 and of the satisfaction of paras (b), (c) and (d) of s 6(2).

For further reading on the constitutional law of international agreements in Australia, see Cheryl Saunders, "Articles of Faith or Lucky Breaks?" (1995) 17 Sydney L Rev 150.

CHAPTER TEN

FEDERALISM AND THE ECONOMY

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I. INTRODUCTION

This chapter examines federalism and the economy through two main lenses: the legislative powers of the federal and provincial governments to regulate the behaviour of economic actors and the constitutional architecture of the Canadian common market.

During the first half of the 20th century, as we have seen, the division of powers presented an almost insurmountable obstacle to efforts by the federal government to regulate economic activity. Many attempts to enact federal economic legislation foundered, in particular, on the extremely narrow interpretation given by the Judicial Committee of the Privy Council (JCPC) to s 91(2)—the federal power to regulate trade and commerce. (A number of these cases were discussed in Chapter 4, *The Late Nineteenth Century: The Courts Set an Initial Course*; Chapter 5, *The Early Twentieth Century: Beginnings of Economic Regulation*; and Chapter 6, *The 1930s: The Depression and the New Deal*.) By the end of the JCPC’s tenure, what the legislative jurisdiction under s 91(2) *did not include* was quite clear (for example, the regulation of particular industries). It was far from clear, by contrast, what the jurisdiction under s 91(2) *did include* because so few federal laws had been determined to be valid.

In this chapter, we examine how the scope of s 91(2) has evolved under the Supreme Court of Canada. In a nutshell, that Court, while maintaining the JCPC’s settled position that s 91(2) does not permit Parliament to regulate particular lines of business, has upheld federal laws of two types: those which, in pith and substance, regulate interprovincial or international trade and those meeting certain criteria allowing them to be classified as laws for the “general regulation of trade.”

Beyond allocating powers between the federal and provincial governments to intervene in the economy and regulate the behaviour of economic actors, Canada’s constitution also

contains certain features of a common market—a form of economic integration in which barriers to trade within an area are eliminated. In this chapter, we shall examine three aspects of the Canadian common market: the interpretation of s 121, which provides that goods produced in a province shall be “admitted free into each of the other Provinces”; the limits on provincial authority to impede the free movement of goods, arising because of the exclusive federal power to regulate trade and commerce under s 91(2); and the constitutional provisions concerning the interprovincial mobility of people.

The chapter ends with readings dealing with the jurisdiction over natural resources in Canada. Long a source of conflict within the Canadian federation, the question of control over natural resources has several constitutional facets, including the Crown’s ownership of the resources and the sources and extent of each level of government’s legislative jurisdiction to regulate resource development.

II. LEGISLATIVE POWERS REGULATE ECONOMIC ACTIVITY

A. OVERVIEW

Economic activity—the production, distribution, and consumption of goods and services—takes place within a framework of laws. These laws recognize property rights and enable individuals and businesses to acquire and dispose of those rights through, among other things, contractual relations with others. The legal framework of economic activity also includes regulatory laws; these laws may impose affirmative or negative requirements on an activity or even subject an activity to licensing, for a variety of aims, including harm prevention, fairness, and the reduction of transaction costs. The laws at issue in *Citizens Insurance Co of Canada v Parsons* (1881), 7 App Cas 96, [1881-5] All ER Rep 1179 (UKJCPC); *Canada (AG) v Alberta (AG)*, [1921 CanLII 399](#), [\[1922\] 1 AC 191 \(UKJCPC\)](#) [Reference re the Board of Commerce Act]; and *Canada (AG) v Ontario (AG)*, [1937 CanLII 362](#), [\[1937\] AC 326 \(UKJCPC\)](#) [Labour Conventions], are examples of regulatory laws that we encountered during our study of the Judicial Committee’s case law. From these and other cases, we can see that, as a basic principle, the provinces’ legislative jurisdiction over “property and civil rights in the Province” (s 92(13)) provides them with the authority to regulate economic activity, including transactions, taking place within the province.

Several federal heads of jurisdiction are, of course, also relevant to the regulation of the economy, most obviously the power to legislate in relation to the regulation of trade and commerce (s 91(2)). The modern approach to s 91(2) can be traced back to *Citizens Insurance*. While the outcome of the case turned on the Judicial Committee’s holding that the federal trade and commerce power does not include the power to regulate “particular trades,” Sir Montague Smith observed, in *obiter dicta*, that the scope of the power would include “political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that [it] would include general regulation of trade affecting the whole Dominion” (at 1186). Today, in line with Smith’s suggestion, it is understood that s 91(2) authorizes Parliament to enact laws which, in pith and substance, regulate international or interprovincial trade; or which meet certain criteria allowing them to be characterized as laws for the “general regulation of trade.”

Although our focus in discussing modern federalism doctrine relating to the economy is on s 91(2) (and, more specifically, the relationship between ss 91(2) and 92(13)), it is important to remember that several other heads of power are also relevant to the regulation of the economy. For example, the criminal law power (s 91(27)), discussed in Chapter 11, Criminal Law and Procedure, can be used to regulate the behaviour of economic actors. In addition, the federal government has authority over monetary policy through its jurisdiction over (among other things) banking, currency, interest, and legal tender (ss 91(14), (15), (19), (20)).

Section 91 also includes some classes of subjects that appear to be carveouts from the broader concept of "property and civil rights," conferring upon Parliament the authority to regulate a specific industry (e.g., banking, s 91(15)) or a specific area of commercial law (e.g., bankruptcy and insolvency, s 91(21)). Both levels of government can and do seek to influence economic behaviour through taxation (ss 91(3), 92(2)).

B. INTERNATIONAL AND INTERPROVINCIAL TRADE

The Queen v Klassen

1959 CanLII 438, 20 DLR (2d) 406 (Man CA)

[This case arose as a prosecution under the *Canadian Wheat Board Act*, RSC 1952, c 44. Section 16(1) prohibited delivery of grain to a grain elevator contrary to the provisions of the Act. Grain could be delivered to an elevator only by its producer, and the quantity of each delivery was to be entered by the elevator operator in the producer's "delivery permit book." The total quantity of grain delivered by a producer in a given year could not exceed the quota established by the Canada Wheat Board for delivery by that producer to that elevator. These detailed recordings were the mechanism by which a quota system was enforced to maintain an orderly international trade in grain. Section 45 of the *Canadian Wheat Board Act* declared that any elevator and many other of the buildings used in the grain trade, including feed mills, were "works for the general advantage of Canada" pursuant to ss 92(10)(c) and 91(29) of the *British North America Act* (BNA Act).]

Klassen, a resident of the village of Grunthal, Manitoba and manager and operator of a feed mill (an elevator under the Act) in the town was charged with failing to record a delivery of 296 bushels of wheat delivered to him by Leppky of the Village of Niverville, Manitoba. Klassen had purchased the wheat from Leppky and used it as an ingredient in prepared feeds, which he sold to farmers and feeders in his immediate neighbourhood. Klassen's operation was located ten miles from the nearest railroad; he bought and processed the grain, and then delivered it to its purchaser by truck. It was found as a fact at trial that "the accused has not at any time been engaged in interprovincial or export trade personally, nor so far as the accused is aware have the products of the said mill been used in the interprovincial or export trade" (at para 2).

Klassen was convicted at trial and appealed to the Manitoba Court of Appeal. On appeal, he argued that s 45 of the *Canadian Wheat Board Act*, which declared all elevators and other buildings used in the grain trade to be works to the general advantage of Canada, was *ultra vires* in respect to his feed mill.

The appeal was dismissed, and leave to appeal to the Supreme Court of Canada was denied.]

ADAMSON CJM:

[Adamson CJM thought that Klassen had conceded the validity of s 16 in his factum, and that it was, therefore, unnecessary to consider s 45. Nonetheless, he made the following comments (at 410-11) about s 16.]

The appellant is in the grain, feed and mill business. He "has not been at any time in interprovincial or export trade personally" but cannot say that some of his products have not been exported. It is clear that if the appellant is to be allowed to purchase wheat without complying with the provisions of s. 16(2) of the Act the quota system

and the orderly marketing of grain is to that extent rendered ineffective. Moreover, so far as the facts show, the appellant could (though he has not done so) ship his products out of the province and this would be a contravention of the Act. It is evident that s. 16 of the Act is necessary and incidental in the control of the export of grain. Section 16(2) and s. 45 of the Act are simply the machinery by which the policy and general purposes and provisions of the Act are administered and enforced.

TRITSCHLER JA (Schultz JA concurring):

[Although s 45 was not considered, s 16 was, in the following terms.]

There is no doubt that Part II "affects" property and civil rights in the provinces. It is a serious interference with the intraprovincial business of (among others) the owners of grain and the operators of flour, feed and seed-cleaning mills.

But this interference of Part II may be justified if it is necessarily incidental to the other provisions of the Act dealing with the interprovincial and export trade in grain.

I think that since *Murphy v. C.P.R.* [[1958] SCR 626, 1958 CanLII 1], it has been settled that the principal purposes of the Act, i.e., the interprovincial and export marketing of certain grains by the Board and the regulation of interprovincial and export trade in such grains is legislation in relation to the regulation of trade and commerce. ...

Our inquiry must, therefore, be whether the questioned interference of Part II is necessarily incidental or ancillary to (in aid of) effective legislation in respect of the general marketing scheme set up for certain grains by the Act.

... [S]crutinizing the Act in its entirety to determine the true nature and character of the controls of Part II and what it is that the Legislature is really doing, I am of the opinion that Part II is not an attempt by Parliament to interfere with or control the business of flour, feed and seed mills within the provinces as an end in itself but that the interference with property and civil rights which results under Part II is incidental and ancillary to the achievement of the purpose of the Act, the pith and substance of which is the provision of an export market for surplus grains, a matter which has undoubtedly assumed a national importance.

The "quota" controls which are established by Part II, and which are the real subject-matter under appeal, have several objects. They regulate the intake of grain into all channels of the marketing system so that currently marketable grains can be received when needed and grain for which there is no present market kept out of the system. The saleable grain must be at the right place at the right time. If the channels become clogged with unmarketable grains the scheme set up by the Act would become unworkable. This necessary interference with the right of individuals to deliver and receive grain into the marketing system must be made to fall as evenly as possible on all and justice demands that delivery opportunity be rationed as equitably as is possible among producers. The scheme ensures this.

But the opponents of the scheme object that these considerations cease to be valid when applied to mills which are turning grains into flour, feed and seed in purely intraprovincial transactions and particularly so where the mill has little or even no storage space. How, it is argued, can such transactions clog the channels of the marketing system? This submission ignores the other but equally essential feature of the controls, the equitable rationing of delivery opportunity and the ensuring that as nearly as may be all producers whose freedom to trade is interfered with by the scheme will get the same price at the same time for the like kind and quantity of grain. If a producer might sell a portion of his crop to a mill for flour, feed or seed and not have it noted on his permit book he would be able to deliver to the other channels of the marketing system grain up to his quota and thus achieve an advantage over less fortunate producers who were not able to get their grains into the local

flour, feed and seed outlets. Equality of delivery opportunity is a basic feature of the scheme. As was said by Rand J. in the *Murphy* case, *supra*, "The Act operates on the individual by keeping him in effect in a queue." If this be disturbed then, whether or not the channels of the system are clogged, injustice must result and the public acceptance of the scheme endangered. The quotas allowed are not, as was submitted by counsel for the appellant, "for interprovincial and export purposes" but they fix the quantity of grain a producer may deliver into the market system anywhere. It must be kept in mind that the board which is bound to market for producers certain grains in interprovincial and export trade is itself a prospective seller to all in the milling trades. As agent for the producer the board may find itself in competition with its own principal (the producer) and on that ground also controls are justified as ancillary to the scheme. In respect of grains which the board does not sell as agent for the producers—rye and flaxseed—then if storage and transport considerations were not affected the board would doubtless give permission for such grain to enter ordinary trade channels.

It is admitted that the appellant personally has not been engaged in interprovincial or export trade and that so far as he is aware the products of his mill have not been used in such trade. No one can say that the products of his mill will not be so used. If intraprovincial transactions are beyond the control of the Act so far as he is concerned so should they be in respect of every other miller, but there are obvious difficulties about letting into the marketing system even grains which can be proved to have an intraprovincial destination. This also would make the system unworkable. In short, it seems impractical if not impossible to draw distinctions between the appellant and all other handlers (or at least millers) of grain in respect of intraprovincial transactions.

Appellant's counsel has placed his greatest emphasis on the fact that appellant operates his feed mill in a purely local and provincial manner and does not engage in interprovincial or export trade. This is not relevant if it appears, as I think it does, that the Act is not legislation "in relation to" property and civil rights but is legislation which in pith and substance is in relation to trade and commerce and merely "affects" property and civil rights incidentally.

Appeal dismissed.

NOTE: MURPHY V CPR

Murphy v CPR, [1958] SCR 626, 1958 CanLII 1, referred to in *Klassen*, involved a BC farmer who went to Manitoba and purchased some grain. When he tried to ship it to British Columbia, the railway refused the shipment on the ground that it was prohibited by s 32 of the *Canadian Wheat Board Act*, which gave the Canada Wheat Board the exclusive power, subject to exceptions created by regulation, to export grain or to transport it or cause it to be transported interprovincially. Murphy argued that the Act was *ultra vires* because it interfered with property and civil rights in the province. The Court found that s 32 and the Act as a whole were valid legislation in relation to the regulation of trade and commerce. On the issue of interference with s 92(13), Locke J, writing for five members of the Court, stated (at 632-33):

[T]he fact that of necessity [the Act] interferes with property and civil rights in the province of the nature referred to in head 13 of s. 92 is immaterial. For reasons which have been stated in a great number of cases decided in the Judicial Committee as well as in this Court, it has been decided that if a given subject-matter falls within any class of subjects enumerated in s. 91 it cannot be treated as covered by any of those in s. 92. ... It is, of course, obvious that it would be impossible for Parliament to fully exercise the exclusive jurisdiction assigned to it

by head 2 and many others of the heads of s. 91 without interfering with property and civil rights in some or all of the provinces. ...

It is contended for the appellant that the power to regulate trade and commerce under head 2 does not enable Parliament to regulate a particular trade, but this is too broad a statement. The result of the cases in the Judicial Committee dealing with this question appear to me to be most clearly summarized in the judgment of Lord Atkin in *Shannon v. Lower Mainland Dairy Products Board* [1938] CanLII 250, [1938] AC 708 at 719], where it was said:

It is now well settled that [s 91(2)] does not give the powers to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province.

The *Canadian Wheat Board Act* controls and regulates not one trade or business but several, including the activities of the producer, the railroads, the elevators and flour and feed mills and, except to a very minor extent, these activities are directed to the export of grain or grain products from the province, activities which the province itself is powerless to control.

Bora Laskin, "Note on The Queen v Klassen"

(1959) 37 Can Bar Rev 630 (footnotes omitted)

The story of the trade and commerce power, traced with some bitterness by O'Connor in his *Report to the Senate on the British North America Act* (1945), 27 *Journal of Comparative Legislation* (3rd) 24, is in my view, the saddest legacy of Privy Council adjudication. ...

What, it may properly be asked, were the defects of Privy Council interpretation of section 91(2)? The major one was its consistent refusal to look at an economic or social problem as a whole, and its correlative *a priori* assumption that every problem of trade regulation necessarily had its national and its local aspects which constitutionally had to be separated regardless of resulting violence to a legislative scheme. Strangely enough, this attitude was not reflected or manifested in the transportation cases or in communication issues in general. But when it came to trade or to marketing, federal regulation (according to the Privy Council) could begin only at the point of interprovincial or export movement, and certainly not at the point of production or harvesting. Arguments of functional connection or integration, if made, were rejected.

... This, however, was the very approach which was used in the *Klassen* case and which undergirds its importance.

... In [*King v Eastern Terminal Elevator Co*, [1925] SCR 434, 1925 CanLII 82, excerpted in Chapter 5, The Early Twentieth Century: The Beginnings of Economic Regulation] Duff J spurned, as a "lurking fallacy" the argument in favour of federal power that (to quote his words) "because in large part the grain trade is an export trade you can regulate it locally in order to give effect to your policy in relation to the regulation of that part of it which is export." The learned judge went on to say, somewhat illogically in my submission, that "obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is seventy percent, of the whole, it must be equally operative when that percentage is only thirty." This is surely a *non-sequitur*, unless one rests on an arbitrary constitutional determination that the local and national market in any product can never be dealt with by a central scheme of regulation. The *Klassen* case has now given a direct rebuff to the proposition advanced by Duff J, and, in so doing, it has

taken the line long ago adopted in the United States in dealing with similar marketing problems and exemplified by the judgment of the Supreme Court of the United States in *United States v. Wrightwood Dairy Co.* (1942), 62 SCt. 523 and in *Wickard v. Filburn* (1942), 63 SCt. 82, 317 US 111. In the *Wrightwood* case, the court said that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." In the *Wickard* case, in upholding federal regulation of the production of wheat even though intended for home consumption by the producer, the court remarked, in words which are apt to the situation in the *Klassen* case, that "it can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Homegrown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."

It is a fitting characterization of the *Klassen* case to declare, in paraphrase of another sentence in the *Wickard* case, that it has recognized that "questions of the power of Parliament are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon the regulation of trade and commerce." Not only are "mechanical applications of legal formulas no longer feasible" if the *Klassen* case survives, but we will have to withdraw Idington J's portrait of the federal trade and commerce power as "the old forlorn hope, so many times tried unsuccessfully."

Caloil Inc v Attorney General Canada

[1971] SCR 543, 1970 CanLII 194

[In 1970, in order to enforce its energy policy, the federal government passed regulations that prevented oil importers from transporting any gasoline across a line running north-south through Ontario and Quebec. The government's aim was to provide a market for western Canadian oil west of the line, and to restrict the sale of imported oil to the eastern half of Canada. When Caloil lost its licence for having violated this provision, it obtained a ruling from the courts that the regulations were unconstitutional, as they invaded provincial jurisdiction over "property and civil rights." Rather than appeal this decision, the federal government passed new legislation and again denied the company a licence. The amended *National Energy Board Part VI Regulations* read:

20(1) In this section and section 21 "consumption" means the placing of oil in tanks connected to an internal combustion engine for purposes of operating such engine.

(2) Where the Board is of the opinion that importation of oil that is the subject of an application for a licence to import into Canada will be consistent with the development and utilization of Canadian indigenous oil resources, it may issue a licence to import oil for consumption in the area of Canada specified therein, in such quantities, at such times and at such points of entry into Canada as it may consider appropriate.

(3) Any licence issued by the Board pursuant to subsection (2) may be issued on the condition that the oil to be imported will be consumed in the area of Canada specified in the licence.

(4) Where the Board is not reasonably satisfied that the consumption of oil to be imported will be in the area of Canada specified in the application for a licence and that the terms of the licence to be issued will be complied with, it shall not issue a licence.

This action was challenged, but the Supreme Court held the law to be *intra vires*. Justice Pigeon delivered the main judgment in a unanimous decision. The earlier case was distinguished on the ground that the new regulations were implicitly limited in scope to imported oil, while the previous ones applied to "any gasoline." Therefore, the new law was a valid regulation of international trade. The following was said about the propriety of schemes regulating such trade affecting local property rights.]

PIGEON J (Fauteux CJ, Abbott, Martland, Judson, Ritchie, Hall, Spence, and Laskin JJ concurring):

In the present case, subs. 2 of s. 20(2) of the Regulations clearly shows that the policy intended to be implemented by the impugned enactment is a control of the imports of a given commodity to foster the development and utilization of Canadian oil resources. The restriction on the distribution of the imported product to a defined area is intended to reserve the market in other areas for the benefit of products from other Provinces of Canada. Therefore, the true character of the enactment appears to be an incident in the administration of an extra-provincial marketing scheme as in *Murphy v. C.P.R.* Under the circumstances, the interference with local trade restricted as it is to an imported commodity, is an integral part of the control of imports in the furtherance of an extra-provincial trade policy and cannot be termed "an unwarranted invasion of provincial jurisdiction."

• • •

Appeal dismissed.

NOTE: THE IMPOSITION OF NATIONAL STANDARDS THROUGH THE REGULATION OF INTERNATIONAL AND INTERPROVINCIAL TRADE

In *Murphy* and *Caloil*, the relevant federal legislation prohibited the international or interprovincial shipment of a product, subject to exceptions defined in federal regulations and/or to a requirement of federal licensing. Subsequently, Parliament has used its authority to regulate international or interprovincial trade as a basis for imposing national product or marketing standards. For example, the *Energy Efficiency Act*, SC 1992, c 36, s 4(1) provides:

No dealer shall, for the purpose of sale or lease, ship an energy-using product from one province to another province, or import an energy-using product into Canada, unless

- (a) the product complies with the energy efficiency standard [prescribed by the regulations]; and
- (b) the product or its package is labelled in accordance with the regulations, if any.

See also *Manganese-Based Fuel Additives Act*, SC 1997, c 11, s 4; *Motor Vehicle Fuel Consumption Standards Act*, RSC 1985, c M-9, s 6(1).

Moreover, in *Caloil* and *Klassen*, the regulation by Parliament of an activity taking place solely within a province was upheld because it was incidental to a scheme for the regulation of international or interprovincial trade. There are limits, however, to this authority of Parliament to impose product or marketing standards on intraprovincial transactions, as illustrated

by *Dominion Stores Ltd v R*, [1980] 1 SCR 844, 1979 CanLII 57, in which the Supreme Court held that federal grading standards for the sale of agricultural products within a province were not incidental to the regulation of interprovincial trade in those products.

NOTE: DOMINION STORES LTD V R

Dominion Stores Ltd was charged under the *Canada Agricultural Products Standards Act* [CAPSA] with selling bruised Spartan apples under the trade name "Canada Extra Fancy." The bruised apples, produced in Ontario and sold within the city of Toronto, did not meet the quality standards for use of that grade name as required by federal law. The statutory backdrop to the case was complicated by the fact that Dominion Stores was charged under a part of the CAPSA that was voluntary. The mandatory provisions of CAPSA applied only to agricultural products that moved in interprovincial and international trade. Wholly intraprovincial sales could be caught by the law only if the seller voluntarily chose to use the trade name. As Dominion Stores chose to sell apples within Ontario graded "Canada Extra Fancy," they were caught by the voluntary provisions and so had to satisfy federal standards. The further complication for the Court was that the federal law mirrored the requirements of an existing Ontario law, the *Farm Products and Grades and Sales Act*, which set mandatory grading standards for intraprovincial sales. The Court was closely divided, ruling 5–4 that the federal law was *ultra vires*.

Justice Estey (Martland, Pigeon, Beetz, Estey, and Pratte JJ concurring) wrote for the majority:

Under the interpretation placed upon s. 91(2) of the *B.N.A. Act* ... , the power of Parliament with reference to the regulation of trade and commerce is limited to trade in the international and interprovincial sense and Parliament is not empowered thereby to regulate local trade simply as a part of a scheme for the regulation of international and interprovincial trade (at 845). ...

• • •

Consequently, ... I approach the issue raised in this appeal on the basis that the Parliament of Canada may not, in the guise of regulating trade and commerce, reach into the fields allocated to the provinces by s. 92(13) and (16) and regulate trading transactions occurring entirely within the provinces. In actual fact the provinces and Parliament taking the lead from the Privy Council marketing decision of 1937, *supra*, have adopted cooperative and complementary schemes for the marketing of natural products (at 855).

A key factor in the reasoning was Estey J's view that it was preferable that only provincial law regulate intraprovincial sales. Otherwise, "the wasteful overlapping or doubledecking of administration or enforcement" (at 864) would surely defeat

the constitutional plan designed and constructed in the *British North America Act* and as evolved through the decisions of the Privy Council

The federal statute seeks to add another consequence to the same action already proscribed under the Ontario Act. It is said that the result is simply that if the retailer affixes to the apples the "extra fancy" grade identification, he is to be prosecuted under the federal statute (assuming quality does not match the prescribed standards), but if he does not affix the label, he is to be prosecuted under the provincial Act. To that result, my strong preference is for the simple solution that Part I of the federal statute is inapplicable to the local trade here in question, and hence the charge, if any, must be laid under the provincial statute (at 864–65).

The majority judgment distinguished an earlier decision of the Privy Council in *Ontario (AG) v Canada (AG)*, 1937 CanLII 366, [1937] AC 405 (UKJCPC) [Canada Standard], discussed briefly in Chapter 6, The 1930s: The Depression and the New Deal. The board there upheld a

federally created national trademark called "Canada Standard." Use of the trademark was voluntary, but any user was required to conform to federal product standards. Justice Estey held that there was no comparable statutory scheme in place in that case (at 861):

Marketing schemes affecting as they do the process of marketing as such, are in no way comparable in fact or in law with a program for the creation of a property right in the form of a trade mark coupled with a truly voluntary scheme for licensing the users of that trade mark.

Somewhat surprisingly, Estey J ended his judgment with a comment to the effect that the interpretation of s 91(2) on which he had relied, based on Privy Council decisions, might not be the correct description of the federal power, and suggested that the Court on a future occasion might have the opportunity to deal with the interlocking of federal and provincial powers with respect to the local marketing of articles of commerce that have entered the interprovincial and international stream.

Chief Justice Laskin (Ritchie, Dickson, and McIntyre JJ concurring) dissented and would have upheld the federal standard. It was quite logical, to the dissenting justices (at 852), that

the Parliament of Canada, having enacted compulsory grading requirements for agricultural products moving in export and interprovincial trade, should complement those provisions by giving an opportunity to dealers in such products to avail themselves, if they so wished, of the same grade prescriptions for local transactions. It could be a convenience for them and for consumers as well.

NOTE: THE COMMERCE CLAUSE OF THE US CONSTITUTION

Unlike s 91(2) of the *Constitution Act, 1867*, which refers broadly to "the regulation of trade and commerce," the analogous federal power under the US Constitution is textually limited to "[the regulation of] Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Art I §8). Despite its narrower textual scope, the so-called Commerce Clause has been given a generous interpretation by the US Supreme Court, and Laurence Tribe has referred to the Clause as "the chief source of congressional regulatory power" (*American Constitutional Law*, 3rd ed, vol I (Foundation Press, 2000) at 808).

The US Supreme Court has held that the federal commerce power extends to the regulation of the use of "channels" and "instrumentalities" of interstate commerce (for example, roads and railways), as well as activities, though taking place within a state, that "substantially affect interstate commerce" (*US v Morrison*, 529 US 598 at 609, 120 S Ct 1740 (2000)). An illustration of the breadth of the latter concept is *Katzenbach v McClung*, 379 US 294, 85 S Ct 377 (1964), in which the Court upheld Title II of the federal Civil Rights Act of 1964, which (like the human rights codes enacted by the Canadian provinces and territories) prohibits discrimination in various settings, including the provision of services to the public. In rejecting a challenge brought against the legislation by the owner of a small restaurant, the Court stated that the legislator could rationally conclude that "racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce" (at para 30).

In fact, because there is no equivalent in the US Constitution to Canada's s 91(27), much US federal criminal law depends on the Commerce Clause. For instance, in *Gonzales v Raich*, 545 US 1, 125 S Ct 2195 (2005), the Court upheld a federal prohibition against the local cultivation and use of cannabis, on the basis that the local activity has a "substantial effect on supply and demand in the national market" for the commodity (at 17).

In 2012, the Supreme Court considered a challenge to the *Affordable Care Act* (often called "Obamacare"): *National Federation of Independent Business v Sebelius*, 567 US 519, 132 S Ct 2566 (2012). The Act requires citizens to purchase health insurance from the private market. Congress justified the law, in part, based on the Commerce Clause. A majority of the Court rejected that argument, reasoning that whereas the "power to regulate commerce

presupposes the existence of commercial activity to be regulated" (Slip opinion at 18), the Act seeks instead to "compel individuals not engaged in commerce to purchase an unwanted product" (Slip opinion at 18). Chief Justice John Roberts worried that recognizing such a use of the Commerce Clause "would open a new and potentially vast domain to congressional authority" (at 20). (The Chief Justice was part of a separate majority that went on to uphold most of the law as a valid exercise of Congress' taxing power.)

C. GENERAL REGULATION OF TRADE

Katherine E Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years

(Toronto: Carswell, 1990) at 141-44 (footnotes omitted)

[Professor Swinton begins by noting that doctrinal developments with respect to the trade and commerce power, such as the expansion of the necessarily incidental doctrine in *Caloil*, still required that goods move across provincial borders. These developments thus provided no support for federal regulation of economic problems where such flow did not exist, or where a court believed that the regulation of intra-provincial activity was not necessary to the effective regulation of interprovincial or international trade.]

As a result, the case law on the trade and commerce power, fixing on the inter-provincial or international flow of goods, would not support federal government efforts to regulate problems because of their detrimental impact on national economic health. To permit such action by the federal government, it was necessary to develop another approach to the interpretation of the federal and provincial heads of power, and this seemed to emerge with a new doctrinal development in 1976, when the Supreme Court made reference to the federal government's authority over the "general regulation of trade." That doctrine had its origins in *Citizens' Insurance v. Parsons*, where the Privy Council stated that Parliament might have jurisdiction over "general regulation of trade."

For many years, this strand of doctrine was of minimal assistance to federal regulators—invoked only in 1914, in *John Deere Plow Co.* [1914 CanLII 603, [1915] AC 330], to support federal regulation of the activities of federally incorporated companies, and twenty years later in the Privy Council's judgment upholding the *Dominion Trade and Industry Act, 1935*. That Act provided for voluntary use of a national trademark, the Canada Standard, when the user of the mark complied with standards for a product established under the federal legislation. After these cases, the general regulation of trade doctrine fell into disuse until Laskin CJ attempted to revive it in *Macdonald v. Vapor Canada* [[1977] 2 SCR 134, 1976 CanLII 181], a case involving the validity of a section of the *Trade Marks Act* permitting a civil cause of action by an individual harmed by a "business practice contrary to honest industrial or commercial usage in Canada." While Laskin CJ made extensive reference to the general regulation of trade doctrine, he held it inapplicable in this case because of the private enforcement of the legislation, the lack of any regulatory scheme under public supervision, and the close similarity between the statutory remedy and common law and civil law remedies coming under provincial jurisdiction. All these factors militated against a finding that the section dealt with "general" regulation of trade.

Macdonald did, however, open the door to permit a new justification for federal regulation of economic matters, and the doctrine of general regulation of trade surfaced in several cases following *Macdonald*, and finally was used by the Court to uphold federal competition legislation in 1989. There is an explanation for the Court's initial reluctance to apply the test, which lies in the tension between the general regulation of trade doctrine and the dominant mode of analysis in trade and commerce cases, which emphasizes the need for an interprovincial or international flow of products in order to justify federal regulation of local transactions intertwined with the cross-border flow. The general regulation of trade doctrine does not preclude federal regulation of intraprovincial transactions—provided that there is a sufficiently important national interest to warrant such regulation. However, a judge who looks at a federal scheme from the traditional perspective under the trade and commerce power will be concerned if he or she sees extensive federal regulation of intraprovincial transactions such as contract terms or production standards. Yet if the general regulation of trade doctrine is to be applied, the traditional approach must be discarded, for the court must look beyond the stage at which the regulation is imposed. Instead, the inquiry must be directed to whether the federal measure regulates a national economic problem of interest to the whole country, even if it does so at the stage of production or retailing in a province.

The general regulation of trade test requires the judge to make controversial and difficult decisions about the importance of the national interest at stake and the impact of federal regulation on provincial autonomy in the economic sphere. Indeed, the general regulation of trade doctrine confronts the courts with difficulties similar to those under the national dimensions test of the peace, order and good government clause, since the judges must find some criteria of national interest which leave room for provincial regulation of economic problems, even when those problems are duplicated in more than one province. While the old intra/interprovincial distinction was not altogether satisfactory because it hampered federal initiatives, it had the advantage of clearly recognizing a zone for provincial autonomy in economic regulation. As well, it avoided the problem of judicial balancing of national and provincial interests on a case by case basis in the search for the "national concerns" underlying particular federal measures. Instead, the Court could focus on whether the particular measure under attack dealt with interprovincial or intraprovincial trade—an inquiry that appeared more objective and fact-based than the value-laden inquiry under the general regulation of trade test.

NOTE: LABATT BREWERIES OF CANADA LTD V ATTORNEY GENERAL OF CANADA

The federal *Food and Drugs Act*, RSC 1970, c F-27 regulated the content of a variety of food and drug products. Section 6 of the Act provided:

6. Where a standard has been prescribed for a food, no person shall label, package, sell, or advertise any article in such a manner that it is likely to be mistaken for such food, unless the article complies with the prescribed standard.

The standards were prescribed by regulations passed pursuant to the legislation. At issue in *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914, 1979 CanLII 190 were regulations prescribing minimum and maximum alcohol content for beer marketed as "light beer." Labatt Breweries marketed "Special Lite Beer," which exceeded the maximum allowable alcohol content. Labatt challenged the validity of the Act and regulations. The

federal government sought to justify the law under the trade and commerce power, and in addition relied on its criminal law and POGG powers.

The Court split 6–3, finding the Act and regulations, in so far as they applied to malt liquors and light beer, *ultra vires*. With respect to the trade and commerce power, Estey J (Martland, Dickson, Pratte, and Beetz JJ concurring) held that the first branch of *Parsons*, giving the federal government power over interprovincial and foreign trade, was not applicable because the impugned regulation was concerned with production and local sale (at 939):

The impugned regulations in and under the *Food and Drugs Act* are not concerned with the control and guidance of the flow of articles of commerce through the distribution channels, but rather with the production and local sale of the specified products of the brewing industry. There is no demonstration by the proponent of these isolated provisions in the *Food and Drugs Act* and its regulations of any interprovincial aspect of this industry. The labels in the record reveal that the appellant produces these beverages in all provinces but Quebec and Prince Edward Island. From the nature of the beverage, it is apparent, without demonstration, that transportation to distant markets would be expensive, and hence the local nature of the production operation.

Nor could federal authority be justified as an exercise of the second branch of *Parsons*, the general trade power. In setting out the scope of this power, Estey J stated (at 940–41):

What clearly is not of general national concern is the regulation of a single trade or industry. ... [I]t is clear that neither national ownership of a trade or undertaking or even national advertising of its products will alone suffice to authorize the imposition of federal trade and commerce legislation.

The impugned provisions, wrote Estey J, were concerned “with the production process of a *single industry*” (emphasis added) that was “substantially local in character” (at 943). The *Food and Drugs Act*, although it covered a substantial portion of Canadian economic activity, was seen as a scheme regulating “one industry or trade at a time, by a varying array of regulations or trade codes applicable to each individual sector” and thus was not, in the result, “a regulation of trade and commerce in the sweeping general sense contemplated in the *Citizens Insurance case*” (at 944).

Justice Estey could not agree that this was trademark legislation of the sort upheld as a valid exercise of the trade and commerce power in the *Canada Standard* case, discussed above in the note on *Dominion Stores*, because of the arrogation by Parliament of common names from the language. While suggesting the possibility of a federal “labelling power,” he went on to find it of no relevance to this case because labelling legislation typically prescribes no standards for the production or marketing of a product, but only requires the revelation of, for example, the contents or conditions of use.

Finally, Estey J found no basis for the legislation in either the criminal law power or the POGG power. With respect to the former power, Estey J found that the impugned provisions, which he characterized as involving detailed regulation of the brewing industry, were not directed at the protection of health or the prevention of deception. With respect to the latter, there was no matter of national concern.

Justice Ritchie wrote a separate judgment but concurred with Estey J as to the result. Pigeon J dissented (McIntyre J concurring). After stating that the federal Parliament had authority under s 91(2) to enact laws relating to trademarks, he concluded that the legislation here, as in the *Canada Standard* case, created a “national mark” within the exclusive use of the federal government (at 959):

In my view, the federal enactments under attack provide for no more than what might be called “labelling regulations.” These state what specifications must be met if some specific

designations are used on food labels. In my view this does not go beyond a proper concept of trade mark legislation.

Chief Justice Laskin also dissented. Though the federal law could be characterized merely as a labelling provision, he preferred to rest his judgment on a broader ground under the authority of the general trade power. In Laskin CJ's view (at 921-22):

[Parliament] should be able to fix standards that are common to all manufacturers of foods, including beer, drugs, cosmetics and therapeutic devices, at least to equalize competitive advantages in the carrying on of businesses concerned with such products. I find some reinforcement in this view of the scope of the federal trade and commerce power in s. 121 of the *British North America Act, 1867* which precludes interprovincial tariffs, marking Canada as a whole as an economic union.

The operations of Labatt Breweries and of other brewers of beer extend throughout Canada, and I would not attenuate the federal trade and commerce power any further than has already been manifested in judicial decisions by denying Parliament authority to address itself to uniform prescriptions for the manufacture of food, drugs, cosmetics, therapeutic devices in the way, in the case of beer, of standards for its production and distribution according to various alcoholic strengths under labels appropriate to the governing Regulations.

For discussion of the case, see James C MacPherson, "Economic Regulation and the British North America Act: Labatt Breweries and Other Constitutional Imbroglios" (1980-81) 5 Can Bus LJ 172.

NOTES

1. There are many product standards found in the *Food and Drug Regulations*, CRC, c 870: see, for example:

Meat, Meat By-Products

B.14.015.[S]. Regular Ground Beef shall be beef meat processed by grinding and shall contain not more than 30 per cent beef fat as determined by [the] official method ...

B.15.015A.[S]. Medium Ground Beef shall be beef meat processed by grinding and shall contain not more than 23 per cent beef fat as determined by [the] official method.

B.14.015B.[S]. Lean Ground Beef shall be beef meat processed by grinding and shall contain not more than 17 per cent beef fat as determined by [the] official method.

B.14.015C. No person shall sell ground beef that contains more than 30 per cent beef fat as determined by [the] official method.

2. Although the Supreme Court of Canada found s 6 of the *Food and Drugs Act ultra vires*, this did not leave the federal government without recourse to enforce product standards. Section 5(1) of the Act provides that "[n]o person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety." A constitutional challenge to this provision was rejected in *R v Wetmore*, [\[1983\] 2 SCR 284, 1983 CanLII 29](#).

3. The issue of the general trade power arose in *AG (Can) v Can Nat Transportation, Ltd*, [\[1983\] 2 SCR 206, 1983 CanLII 36](#). The case involved a challenge to the federal government's ability to initiate prosecutions for offences under the federal *Combines Investigation Act*, RSC 1970, c C-23. The argument raised was that the prosecution of criminal offences was a power

that belonged to the provinces under s 92(14) respecting the administration of justice within the province. That argument was rejected by the Court.

In analyzing this issue, the Court was required to characterize the legislation. A majority of the Court supported the Act under the criminal law power, which had been its traditional basis for support. Justice Dickson, writing for three members of the Court, would have supported the Act under the trade and commerce power, specifically under branch 2 of *Parsons*, the general trade power, because he believed the provinces had exclusive authority to prosecute criminal offences. In the course of his judgment, Dickson J discussed (at 266-67) the constitutional dilemma posed by interpretation of the general trade power and suggested some criteria central to the federal power:

Every general enactment will necessarily have some local impact and if it is true that an overly literal conception of "general interest" will endanger the very idea of the local, there are equal dangers of swinging the telescope the other way around. The forest is no less a forest for being made up of individual trees. Whatever the constitutional flaws in the *Board of Commerce Act* and *Combines and Fair Prices Act*, they cannot be attributed, as Duff J seems to contend, to the fact that any individual order made by the board would have its effect on a business or trade in the province. Were that the test then no economic legislation could ever qualify under the general trade and commerce power. Such a conception is merely the obverse of the equally unacceptable proposition that economic legislation qualifies under the general trade and commerce rubric merely because it applies equally and uniformly throughout the country.

The reason why the regulation of a single trade or business in the province cannot be a question of general interest throughout the Dominion, is that it lies at the very heart of the local autonomy envisaged in the *Constitution Act, 1867*. That a federal enactment purports to carry out such regulation in the same way in all the provinces or in association with other regulatory codes dealing with other trades or businesses does not change the fact that what is being created is an exact overlapping and hence a nullification of a jurisdiction conceded to the provinces by the Constitution. A different situation obtains, however, when what is at issue is general legislation aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. Such legislation is qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination. The focus of such legislation is on the general, though its results will obviously be manifested in particular local effects any one of which may touch upon "Property and Civil Rights in the Province." Nevertheless, in pith and substance such legislation will be addressed to questions of general interest throughout the Dominion. The line of demarcation is clear between measures validly directed at a general regulation of the national economy and those merely aimed at centralized control over a large number of economic entities. The regulations in the *Labatt* case were probably close to the line. It may also well be that, given the state of the economy in 1920 and the actual mechanics of the legislation, the *Board of Commerce Act* and the *Combines and Fair Prices Act* amounted simply to an attempt to authorize the issuance of an uncoordinated series of local orders and prohibitions.

The issue of the constitutionality of the *Combines Investigation Act* came before the Supreme Court again in the *General Motors* case, immediately below. Chief Justice Dickson, writing for the entire Court, drew heavily on his earlier judgment in *Canadian National Transportation* in upholding the legislation as a general regulation of trade.

General Motors of Canada Ltd v City National Leasing

[1989] 1 SCR 641, 1989 CanLII 133

DICKSON CJ (Beetz, McIntyre, Lamer, La Forest, and L'Heureux-Dubé JJ concurring):

The principal issue in this appeal is the constitutional validity of s. 31.1 of the *Combines Investigation Act*, RSC 1970, c. C-23. Section 31.1 creates a civil cause of action for certain infractions of the *Combines Investigation Act*. ... [A] civil cause of action is within the domain of the provinces to create. The essential question raised by this appeal is whether s. 31.1 can, nevertheless, be upheld ... by virtue of its relationship with the *Combines Investigation Act*. Answering this question requires addressing two issues: first, is the Act valid under the federal trade and commerce power, expressed in s. 91(2) of the *Constitution Act, 1867*; and second, is s. 31.1 integrated with the Act in such a way that it too is *intra vires* under s. 91(2).

... In answering the two aforementioned issues, I have decided, first, that the *Combines Investigation Act* is valid under the federal trade and commerce power, in particular, it is valid under the "second branch" of that power, the power over "general" trade and commerce. Second, I have found that s. 31.1 is constitutionally valid by virtue of being functionally related to the Act.

Legislation

Section 31.1 of the Act reads as follows:

31.1(1) Any person who has suffered loss or damage as a result of
(a) conduct that is contrary to any provision of Part V, or
(b) the failure of any person to comply with an order of the Commission or a court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Among the offences covered by Part V of the Act, referred to in s. 31.1(1)(a) above, are those set out in s. 34(1)

[Section 34(1) prohibited price discrimination—that is, a policy of selling products at an unreasonably low price with the intention of substantially lessening competition or eliminating a competitor. City National Leasing (CNL) alleged that General Motors (GM) had engaged in price discrimination and brought an action under s 31.1 seeking damages against GM equivalent to its lost profits.]

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IV

The General Trade and Commerce Power

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[In t]he leading case of *Citizens' Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, ... Sir Montague Smith noted at p. 112 that if the words trade and commerce were given their ordinary meaning, s. 91(2) conceivably granted very wide-ranging powers to the federal government To limit the breadth of a literal

interpretation of s. 91(2), Sir Montague Smith settled upon the following construction, at p. 113:

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.

Sir Montague Smith continued, on the same page:

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, ... might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects

In *[AG (Can) v Can Nat Transportation, Ltd*, [1983] 2 SCR 206, 1983 CanLII 36], at p. 258, I suggested that Parsons had established three important propositions with regard to the federal trade and commerce power:

- (i) it does not correspond to the literal meaning of the words "regulation of trade and commerce";
- (ii) it includes not only arrangements with regard to international and interprovincial trade but "it may be that ... [it] would include general regulation of trade affecting the whole dominion";
- (iii) it does not extend to regulating the contracts of a particular business or trade.

Since Parsons, the jurisprudence on s. 91(2) has largely been an elaboration on the boundaries of the two aspects or "branches" of federal power: (1) the power over international and interprovincial trade and commerce; and (2) the power over general trade and commerce affecting Canada as a whole. The first branch has been the subject of considerable constitutional challenge and judicial scrutiny. The second branch, in contrast, has remained largely unexplored, terra incognita. In this appeal, however, it is under this second branch of s. 91(2) that CNL and the Attorney General of Canada seek to uphold s. 31.1.

So far as I can gather, legislation has been upheld under the second branch by a final appellate court on only two occasions. In 1937 the Privy Council upheld a federal scheme creating a national trade mark ... : *Attorney-General for Ontario v. Attorney-General of Canada (Canada Standards Trade Mark)*, [1937] AC 405. ... The second occasion was in *John Deere Plow Co. v. Wharton*, [1915] AC 330, where the Privy Council located the regulation of federally incorporated companies within the general branch of s. 91(2), although they also upheld the legislation under the "peace, order and good government" power.

Aside from these two cases, at least until of late, the general trade and commerce power met with consistent rejection by the courts.

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In examining cases which have considered s. 91(2), it is evident that courts have been sensitive to the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights. Balancing has not been easy.

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... The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless.

This Court took the first step towards delineating more specific principles ... in [*MacDonald v Vapor Canada*, [1977] 2 SCR 134, 1976 CanLII 181]. In that case, s. 7(e) of the *Trade Marks Act*, R.S.C. 1970, c. T-10, was challenged as *ultra vires* Parliament. Section 7 prohibited certain commercial practices, including the making of false and misleading statements to discredit a competitor, passing off goods or services, and making use of false descriptions likely to mislead the public, under the general heading of unfair competition. The impugned subsection was a general catch-all provision, unrelated to the rest of the statute, which prohibited a person from doing "any other act" or adopting "any other business practice contrary to honest industrial or commercial usage in Canada." The respondent, *Vapor Canada Ltd.*, supported by the Attorney General of Canada, argued that s. 7(e) could be sustained as legislation regulating general trade and commerce under s. 91(2).

The Court struck down the provision as *ultra vires*. Chief Justice Laskin, speaking for five members of the Court, proposed three hallmarks of validity for legislation under the second branch of the trade and commerce power. First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry. Each of these requirements is evidence of a concern that federal authority under the second branch of the trade and commerce power does not encroach on provincial jurisdiction. By limiting the means which federal legislators may employ to that of a regulatory scheme overseen by a regulatory agency, and by limiting the object of federal legislation to trade as a whole, these requirements attempt to maintain a delicate balance between federal and provincial power. On the basis of these criteria, Laskin C.J. then rejected the general trade and commerce power as the constitutional foundation for s. 7(e).

Three members of the Court affirmed the *Vapor Canada* criteria in [*Attorney General of Canada v Canadian National Transportation, Ltd.*, [1983] 2 SCR 206, 1983 CanLII 36]. At issue in *Canadian National Transportation* was the authority of the Attorney-General of Canada to conduct prosecutions under the *Combines Investigation Act*. Four members of the Court held that provincial authority over the administration of justice in s. 92(14) of the *Constitution Act, 1867*, did not preclude the federal government from conducting prosecutions of criminal offences. I was of the view that s. 92(14) did preclude the federal government from prosecuting criminal offences—unless the offences could be upheld under a head of power other than s. 91(27). I then took the further position, in which Beetz and Lamer JJ. agreed in substance, that the section could be sustained as legislation relating to the general trade and commerce power

In reaching the conclusion ... , I adopted Laskin C.J.'s three criteria in *Vapor Canada, supra*, but added two factors ... : (i) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. These two requirements, like Laskin C.J.'s three criteria, serve to ensure that federal legislation does not upset the balance of power between federal and provincial governments. ... These [five] indicia do not, however, represent an exhaustive list. ... Nor is the presence or absence of any of these five criteria necessarily determinative. ...

On any occasion where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case by case analysis remains appropriate. The five factors articulated in *Canadian National Transportation* merely represent a principled way to begin the difficult task of distinguishing between matters relating to trade and commerce and those of a more local nature.

V**Approach to Determining Constitutionality**

[What then followed was a long discussion of the appropriate methodology in cases such as this, where the impugned provision is part of a larger act. This portion of the judgment has been reproduced in Chapter 8, Interpreting the Division of Powers, in the context of that chapter's examination of the ancillary powers doctrine. Only the final paragraph, which summarizes the methodology, is left here.]

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The steps in the analysis may be summarized as follows: First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so, to what extent Second, the court must establish whether the act (or a severable part of it) is valid If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers in order to decide on the proper standard for such a relationship.

[In a passage reproduced in Chapter 8, Dickson CJ concluded that s 31.1, in creating a civil right of action, encroached on provincial powers, but that the encroachment was a limited one.]

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VII**The Presence of a Regulatory Scheme in the Combines Investigation Act**

The second step in determining the validity of s. 31.1 is to establish whether the Act contains a regulatory scheme.

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... I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the marketplace. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy.

VIII**The Validity of the Regulatory Scheme**

Having discerned the presence of a regulatory scheme ... , it is necessary to consider the validity of the scheme under the general trade and commerce power in light of the [remaining] criteria established in *Canadian National Transportation, supra* ... : (1) whether the regulatory scheme operates under the oversight of an agency, (2) whether the Act is concerned with trade in general, (3) whether the provinces would

be constitutionally capable of enacting combines legislation, and finally, (4) whether the failure to include one or more provinces or localities would jeopardize the successful operation of the *Combines Investigation Act*.

The foregoing review of the *Combines Investigation Act* leaves no doubt that the scheme regulating anti-competitive activities operates under the watchful gaze of a regulatory agency. The regulatory mechanism is carefully controlled by the Director of Investigation and Research and to a lesser degree by the Restrictive Trade Practices Commission. ... It is clear that the Director exercises a significant degree of control over the operation of the *Combines Investigation Act*. In my view, the control over the entire process exercised by the Director and the Commission satisfies the requirement that there be vigilant oversight of the administration of a regulatory scheme.

I am also of the view that the *Combines Investigation Act* meets the remaining three indicia of *Canadian National Transportation*. These criteria share a common theme: all three are indications that the scheme of regulation is national in scope and that local regulation would be inadequate. The Act is quite clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity. ... I agree with [Justice Ryan, who found in *Miracle Mart*, 1982 CanLII 3743, 68 CCC (2d) 242 at 259]:

... [Section] 37.1 is part of, as I previously indicated, a complete regulatory scheme aimed at eliminating commercial practices which are contrary to healthy competition across the country, and not in a specific place, in a specific business or industry. [Emphasis in original.]

This generality of application distinguishes the Act from the legislation which was found *ultra vires* in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914. In that case the legislation regulated a single trade or industry. As I noted earlier, the purpose of the Act [here] is to ensure the existence of a healthy level of competition in the Canadian economy. The deleterious effects of anti-competitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy.

Various factors underlie the need for national regulation of competition in the economy. [In the words of] Professors Hogg and Grover, in "The Constitutionality of the Competition Bill" (1976), 1 Can. Bus. L.J. 197 at pp. 199-200 (an abridged version of a paper written for the federal government's Department of Consumer and Corporate Affairs) ... :

It is surely obvious that major regulation of the Canadian economy has to be national. Goods and services, and the cash or credit which purchases them, flow freely from one part of the country to another without regard for provincial boundaries. Indeed, a basic concept of the federation is that it must be an economic union. An over-all national policy is the key to efficiency in the production of goods and services. Each province of the country is differently endowed with national resources, capital, labour and access to consumers. The result is that each province will be able to produce some products or services more efficiently than others. The introduction of an effective competition policy can be seen as one method to ensure that these differing regional advantages will accrue to the nation as a whole ... in terms of lower prices, better quality and variety and increased opportunities for Canadians. Any attempt to achieve an optimal distribution of economic activity must transcend provincial boundaries, for, in many respects, Canada is one huge marketplace. ...

The relative unimportance of provincial boundaries has become progressively more obvious as industry has tended to become more concentrated. Improved

communications and transportation have increased the mobility of labour, capital and technology, as well as raw materials and the finished product. ...

With respect to businesses which are confined to Canada, with few exceptions, any individual or corporation, including a provincially incorporated corporation, has the capacity to "walk across" provincial boundaries in order to buy or sell, lend or borrow, hire or fire. In the absence of artificial impediments, therefore, the market for goods and services is competitive on a national basis, and provincial legislation cannot be an effective regulator.

Among the materials filed in this appeal by the Attorney-General of Canada was a study prepared by A.E. Safarian for the Government of Canada, entitled *Canadian Federalism and Economic Integration* (1974), which states a similar point at p. 58:

Competition policy can be used most effectively to support the common market if it is within federal power. With mobility of goods, it is quite unrealistic to attempt to maintain diverse provincial competition policies. The more competitive structure of industry in one or more provinces would tend to impose competitive conditions on the other provinces. In such circumstances, any provincial authority which was more tolerant of monopoly or combinations than other provincial authorities would be forced to resort to protection against interprovincial imports and might be tempted to subsidize interprovincial exports. By contrast, the point of a federal common market is precisely to allow consumers and producers anywhere in Canada free access to supplies and markets across Canada.

It is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally. As I have said, in my view combines legislation fulfills the three *indicia* of national scope as described in *Canadian National Transportation*: it is legislation "aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises," it is legislation "that the provinces jointly or severally would be constitutionally incapable of passing" and "failure to include one or more provinces or localities would jeopardize successful operation" of the legislation "in other parts of the country."

The above arguments also answer the claim of the Attorney General of Quebec that the regulation of competition does not fall within federal jurisdiction in its intraprovincial dimension and thus the Act should be read down so that s. 31.1 only applies to interprovincial trade. ...

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... [N]ot only is the Act meant to cover interprovincial trade, but ... it must do so if it is to be effective. Because regulation of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation which is restricted to interprovincial trade, the Quebec argument must fail. ...

On the other hand, competition is not a single matter, any more than inflation or pollution. The provinces too, may deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like. The point is, however, that Parliament also has the constitutional power to regulate intraprovincial aspects of competition.

In sum, the *Combines Investigation Act* is a complex scheme of competition regulation aimed at improving the economic welfare of the nation as a whole. It operates under a regulatory agency. It is designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all. As Linden J. of the Ontario High Court of Justice said, when discussing the Act in *R. v. Hoffman-La Roche* [1981 CanLII 1690, 33 OR (2d) 694, 62 CCC (2d) 118] at p. 191:

It is part of a legislative scheme aimed at deterring a wide range of unfair competitive practices that affect trade and commerce generally across Canada, and is not limited to a single industry, commodity or area. The conduct being prohibited is generally of national and of international scope. The presence or absence of healthy competition may affect the welfare of the economy of the entire nation. It is, therefore, within the sphere of the federal Parliament to seek to regulate such competition in the interest of all Canadians.

I am therefore of the view that the *Combines Investigation Act* as a whole is *intra vires* Parliament as legislation in relation to general trade and commerce and I would reiterate the conclusion I reached in *Canadian National Transportation, supra*, at p. 278:

A scheme aimed at the regulation of competition is in my view an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial government. Given the free flow of trade across provincial borders guaranteed by s. 121 of the *Constitution Act, 1867* Canada is, for economic purposes, a single huge market-place. If competition is to be regulated at all it must be regulated federally. This fact leads to the syllogism cited by Hogg and Grover, *The Constitutionality of the Competition Bill* (1977), 1 Can. Bus. L.J. 197, at p. 200:

... regulation of the competitive sector of the economy can be effectively accomplished only by federal action. If there is no federal power to enact a competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitutional power is therefore, in practical effect, a gap in the distribution of legislative powers.

[Chief Justice Dickson went on to conclude that the necessary link between s 31.1 and the Act existed. He found that s 31.1 was "an integral, well-conceived component of the economic regulation strategy found in the *Combines Investigation Act*." He held that this degree of connection clearly satisfied the "functionally related" test (which was deemed to be the proper test, given the limited intrusion on provincial powers) and would even have passed the stricter test of "necessarily incidental."]

Appeal dismissed.

NOTE: KIRKBI AG V RITVIK HOLDINGS INC

At issue in *Kirkbi AG v Ritvik Holdings Inc*, [2005 SCC 65](#), was the constitutionality of s 7(b) of the *Trademarks Act*, RSC 1985, c T-13, which codifies the common law tort of passing-off. If a person used a particular mark to identify the person's wares to the public, the person had the right, at common law, to enjoin others from using the same or a similar mark if the use would be liable to confuse the public about the origin of the products. In codifying this tort, s 7(b) protects common law trademarks, which the statute refers to as "unregistered trademarks."

The *Trademarks Act* also enables an individual to register a trademark by filing an application with a federal government agency. If the application is accepted, the government issues a "certificate of registration" to the applicant. Registering a trademark provides the trademark holder with additional enforcement rights specified in the Act, such as the right to apply for an interim court order seizing products pending a determination of whether or not they infringe the trademark holder's rights.

At issue in *Kirkbi AG*, was the constitutionality of s 7(b). The case arose in the context of a dispute between Kirkbi, which held the patents for LEGO construction sets, and Ritvik, a Canadian toy manufacturer which, after the expiry of Kirkbi's patents, began manufacturing and selling bricks that were interchangeable with LEGO. Kirkbi asserted that the "LEGO

indicia—the upper surface of the block with eight studs distributed in a regular geometric pattern—were an unregistered trademark and sought a declaration pursuant to s 7(b) that that mark had been infringed by Ritvik. Ritvik challenged the constitutionality of s 7(b), arguing that the provision was *ultra vires* the legislative competence of Parliament.

The Court unanimously held that s 7(b) was valid because, although it created a civil remedy and thereby encroached upon provincial jurisdiction over property and civil rights, the provision was incidental to and sufficiently integrated within the scheme of the *Trademarks Act*, which was itself valid under s 91(2). Regarding the validity of the *Trademarks Act*, the Court's reasons, provided by Lebel J (at para 28), were extremely brief:

In the second stage of the analysis, the Court must determine whether the *Trade-marks Act* is a valid exercise of Parliament's general trade and commerce power. The analysis is guided by the five indicia of validity set out above. In [Asbjorn Horgard A/S v Gibbs/Nortac Industries, [1987] 3 FC 544, 1987 CanLII 5269], MacGuigan J.A. of the Federal Court of Appeal noted that:

All of the criteria of Chief Justice Dickson are verified in the Act: a national regulatory scheme, the oversight of the Registrar of Trade Marks, a concern with trade in general rather than with an aspect of a particular business, the incapability of the provinces to establish such a scheme and the necessity for national coverage. [p. 559]

The brevity of the Court's reasons applying the GM indicia reflected the fact that Ritvik did not dispute the validity of the Act as a whole. Rather, the dispute between the parties concerned whether the *Trademarks Act* should be considered to be a scheme for the registration of trademarks (LEGO was not a registered trademark) or a scheme for the protection of both registered and unregistered trademarks. Ritvik advocated for the former characterization and argued that s 7(b) was functionally unrelated to the scheme of the Act, so characterized. The Court, however, adopted the latter characterization. Having determined that the Act is a scheme for the protection of trademarks (whether registered or unregistered), the Court then reasoned that s 7(b) "plays a clear role in the federal scheme [because without] this provision there would be a gap in the legislative protection of trade-marks" (at para 36).

NOTE: PROVINCIAL INABILITY

In *GM*, the Supreme Court added two criteria to those posited by Laskin CJ in *Vapor Canada* for a valid exercise of the general trade power. These criteria involved the concept of "provincial inability" that was also central to the Supreme Court of Canada's articulation of the national concern branch of the POGG power in *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 1988 CanLII 63, decided one year earlier.

But what did the criteria mean? Although the Court's application of the criteria in *GM* was unstructured and ambiguous, there was a strong implicit suggestion in *GM* that the underlying concern was with the efficacy (or otherwise) of province-by-province regulation. What Dickson CJ appears to have meant, in concluding that the provincial incapacity criteria were satisfied in the case of competition legislation, is that the economic problem addressed by the legislation "must be regulated nationally if it is to be successfully regulated at all" (at 682, above). To some commentators, this emphasis on functional considerations was welcome; however, others feared that the *GM* criteria would result in a significant erosion of provincial autonomy. For example, in anticipation that the criteria might be invoked in support of federal jurisdiction to enact securities regulatory legislation under s 91(2), Jean Leclair wrote:

The "provincial incapacity" criterion is extremely problematic. First, it was mobilized and applied by the Supreme Court itself [in *GM*] in a very erratic manner that shows how devoid of any logical barriers a functional test can be. Second, what does "provincial incapacity" mean? Does it refer to jurisdictional or political inability? Could not 100 years of successful

securities regulation count as evidence of "provincial capacity"? Could it mean unwillingness to cooperate then? It does seem that evidence of unwillingness to cooperate might be judicially equated with provincial incapacity. In *Multiple Access Ltd.*, Dickson J. (as he then was) quoted with approval the following excerpt taken from an article written by Philip Anisman:

[T]he factors that indicated a need for federal regulatory involvement in the securities market in 1979 are still present and, if anything, have been reinforced by events during the past two years. ... The fact that the market is national in scope has long been acknowledged and is demonstrated by the cooperative efforts of the provincial commissions with respect to the adoption of national policies and by the statutory authorization for and increasing frequency of joint hearings held by a number of provincial commissions to decide issues that transcend provincial boundaries.

It is somewhat baffling to realize that the provinces' willingness to cooperate with one another to harmonize regulation over a matter that falls under their jurisdiction could count as a reason for vesting legislative power over that very same subject matter with the federal government. Furthermore, since when is provincial willingness or unwillingness to cooperate on matters allocated under section 92 of the *Constitution Act, 1867* a reason to upset the balance of power in the Canadian federation? Is not a federation based on a principle of autonomy and diversity? This leads us to the third difficulty raised by the provincial incapacity test. ... Dickson C.J.C.'s approach is founded on the two following premises: effectiveness can only be achieved by the federal polity and efficiency is reducible to uniformity However, ... these are normative statements that do not appear to be validated by empirical reality.

See Jean Leclair, "'Please, Draw Me a Field of Jurisdiction': Regulating Securities, Securing Federalism" (2010), 51 Osgoode Hall LJ 555 at 590-91.

As it turned out, when the Supreme Court pronounced on the constitutionality of federal securities regulatory legislation the following year, it concluded that the legislation exceeded federal legislative authority under s 91(2). The Court's decision in the *Securities Reference* is excerpted immediately below.

Reference re Securities Act

2011 SCC 66

THE COURT (McLachlin CJ and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, and Cromwell JJ):

[1] This reference ... requires the Court to determine whether the proposed *Securities Act* set out in Order in Council P.C. 2010-667 falls within the legislative authority of the Parliament of Canada.

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[29] The preamble of the proposed Act states that its immediate purpose is to create a single Canadian securities regulator. More broadly, s. 9 states that the underlying purposes of the Act are to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system.

[30] The Act includes registration requirements for securities dealers, prospectus filing requirements, disclosure requirements, specific duties for market participants, a framework for the regulation of derivatives, civil remedies and regulatory and criminal offences pertaining to securities. It provides for the comprehensive regulation of securities in Canada, under the oversight of a single national regulator. ...

[31] The Act, as proposed, does not seek to unilaterally impose a unified system of securities regulation for the whole of Canada. Rather, it permits provinces to opt in, if and when they choose to do so. The hope is that, eventually, all or most provinces will opt in, creating an effective unified national securities regulation system for Canada. If this were to occur, it would represent a dramatic realignment in the manner in which securities have been regulated in this country.

[32] Canada, joined by Ontario ... , argues that the proposed Act, viewed in its entirety, is a constitutional exercise of Parliament's general power to regulate trade and commerce It does not invoke other federal heads of power (... —except with respect to some offence provisions the constitutionality of which is not contested). Nor does Canada [invoke the ancillary powers doctrine.]

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IV. The Regulation of Securities

A. Overview

[40] The term "securities" designates a class of assets that conventionally includes shares in corporations, interests in partnerships, debt instruments such as bonds and financial derivatives The securities market channels savings in two basic ways: it allows demanders of investment capital ("issuers") to receive investment capital from suppliers of capital ("investors") in exchange for a security; and it allows investors to trade securities with one another. The first type of transaction occurs through the "primary" market, where issuers trade directly or indirectly with investors, while the second type of transaction is referred to as "secondary" market trading

[41] Every province and territory has its own securities laws and regulatory agency. These agencies exercise a variety of responsibilities, including prospectus review and clearance; oversight of disclosure requirements; takeover bids and insider trading; registration and regulation of market intermediaries; enforcement of compliance with the regime; recognition and supervision of exchanges and other self-regulated organizations; and public education.

[42] Since the beginning of the 21st century, efforts to increase interprovincial cooperation and to harmonize provincial and territorial securities laws have intensified. For example, the supervision and regulation of securities firms are presently carried out by the Investment Industry Regulatory Organization of Canada ("IROC") working under the authority of the Canadian Securities Administrators, a creature of the various provincial and territorial securities commissions. The provincially organized Canadian Investor Protection Fund insures investors' funds in the event of the bankruptcy of an investment firm (in an analogous fashion to the federal Canada Deposit Insurance Corporation for bank depositors). IROC standards are national and directed at ensuring that investment firms are both liquid and solvent. Since 2008, all provincial and territorial jurisdictions except Ontario participate in a "passport regime" based on harmonized rules that allow issuers and market intermediaries to engage in activities in multiple jurisdictions while dealing with a single principal regulator. Nevertheless, distinctions remain between provincial securities regimes.

B. Legislative Competence Over Securities: A Shared Field

[43] Provinces have jurisdiction to regulate securities within their boundaries (intraprovincial jurisdiction) as a matter of property and civil rights, pursuant to s. 92(13) of the *Constitution Act, 1867*. As Lord Atkin stated in *Lymburn v. Mayland*, [1932] A.C. 318 (P.C.), "If [a company] is formed to trade in securities there appears no

reason why it should not be subject to the competent laws of the Province as to the business of all persons who trade in securities" (p. 324).

[44] More recently, this Court, in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, per Dickson J. (as he then was), confirmed [the provincial power to regulate the trade in corporate securities in the province, "provided the statute does not single out federal companies for special treatment or discriminate against them in any way ..."].

[45] The provincial power over securities extends to impacts on market intermediaries or investors outside a particular province

[46] The Constitution gives Parliament powers that enable it to pass laws that affect aspects of securities regulation and, more broadly, to promote the integrity and stability of the Canadian financial system. These include [the criminal law, banks, bankruptcy, telecommunications and peace, order and good government] Finally, s. 91(2) of the *Constitution Act, 1867* gives Parliament power over the regulation of trade and commerce. This power has two branches: the power over interprovincial and international commerce ... and the general trade and commerce

[47] Canada bases its argument that the proposed Act is constitutional entirely on the s. 91(2) general trade and commerce power. ...

C. Securities Regulation in Other Federal States

[The Court discussed the division of jurisdiction over securities regulation in other federations. In Germany, there is a three-tiered regulatory system, of which the first tier is federally enacted. In Australia, the states have referred powers to the Commonwealth, as is permitted under that country's constitution, to enact corporate and securities law. In the United States, the federal government regulates "virtually all aspects of interstate securities trading" under its interstate commerce power, although there is also some state regulation. The Court stated that "experience in other federal states suggests that power sharing between the central and local levels of government in this area can succeed" (at para 48).]

V. Constitutional Principles

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[The Court observed that, since the end of the Privy Council era, the Supreme Court has "moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation" (at para 57).]

[61] While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. ...

[62] ... The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

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VI. Section 91(2): The Federal Trade and Commerce Power

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[70] On its face, the general trade and commerce power ... is broad—so broad that it has the potential to permit federal duplication (and, in cases of conflict, evisceration) of the provincial powers over large aspects of property and civil rights and local matters. This would upset the constitutional balance envisaged by ss. 91 and 92 and undermine the federalism principle. To avoid this result, the trade and commerce power has been confined to matters that are genuinely national in scope and qualitatively distinct from those falling under provincial heads of power relating to local

matters and property and civil rights. The essence of the general trade and commerce power is its national focus.

[71] ... The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence. This is one of the principles that underlies the Constitution (*Secession Reference* ...).

[72] The jurisprudence on the general trade and commerce power reflects this fundamental principle. An overly expansive interpretation of the federal trade and commerce power under s. 91(2) not only would subsume many more specific federal heads of power (e.g., federal power over banking (s. 91(15)), weights and measures (s. 91(17)), bills of exchange and promissory notes (s. 91(18))), but, more importantly, would have the potential to duplicate and perhaps displace, through the paramountcy doctrine, the clear provincial powers over local matters and property and civil rights which embrace trade and commerce in the province. ...

[73] The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism—the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction. As stated in the *Secession Reference*, “[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity” (para. 58).

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[75] ... The first and still a leading statement of the scope of the trade and commerce power is found in *Parsons*. In that case, the Judicial Committee of the Privy Council established that a literal interpretation of the words “[t]he Regulation of Trade and Commerce” in s. 91(2) was inappropriate given the balance of powers established in the *Constitution Act, 1867*. *Parsons* also established the twin branches of the s. 91(2) power: (1) interprovincial and international trade and commerce; and (2) general trade and commerce (“general regulation of trade affecting the whole dominion” (p. 113)). The Judicial Committee further held that s. 91(2) does not include the power to regulate the contracts of a particular business or trade (p. 113).

[76] In the late 1970s and early 1980s, this Court revisited the general trade and commerce power. The “modern” trade and commerce cases have affirmed *Parsons* and taken up the task of developing indicia for matters that would properly fall within the general branch of s. 91(2)—an effort that culminated with the five indicia proposed in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641. ...

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[82] This Court confirmed this approach in *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302

[83] When *Canadian National Transportation*, *General Motors* and *Kirkbi AG* are read together, a common theme emerges. Provided the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory agency, it will fall under the general federal trade and commerce power if the matter regulated is genuinely national in importance and scope. To be genuinely national in importance and scope, it is not enough that the matter be replicated in all jurisdictions throughout the country. It must, to use the phrase in *General Motors*, be something that the provinces, acting either individually or in concert, could not effectively achieve. To put it another way, the situation must be such that if the federal government were not able to legislate, there would be a constitutional gap. Such a gap is constitutional anathema in a federation.

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[86] Before turning to whether the Act falls within s. 91(2), it may be useful to illustrate what it means to be a matter of genuine national importance and scope within the *General Motors* test, by looking at a matter that has been held to fall within the federal trade and commerce power—competition law.

[87] Competition, as Dickson C.J. observed in *General Motors*, “is not an issue of purely local concern but one of crucial importance for the national economy” (p. 678). It is a “genre of legislation that could not practically or constitutionally be enacted by a provincial government” (p. 683, citing *Canadian National Transportation*, at p. 278 (italics in original)). Competition law is not confined to a set group of participants in an organized trade, nor is it limited to a specific location in Canada. Rather, it is a diffuse matter that permeates the economy as a whole, as “[t]he deleterious effects of anti-competitive practices transcend provincial boundaries” (p. 678). Anti-competitive behaviour subjected to weak standards in one province could distort the fairness of the entire Canadian market. This national dimension, as the Court observed, must be regulated federally, or not at all (p. 683, citing *Canadian National Transportation*, at p. 278). Failure by one province to legislate or the absence of a uniform set of rules applicable throughout the country would render the market vulnerable.

[88] The federal power to regulate competition in Canada does not deprive the provinces of the ability to deal with competition in the exercise of their legislative powers in fields such as consumer protection, labour relations and marketing (*General Motors*, at p. 682). ...

[89] In sum, competition law illustrates how the indicia set out in *General Motors* function to identify a matter that properly falls under s. 91(2). The general trade and commerce power cannot be used in a way that denies the provincial legislatures the power to regulate local matters and industries within their boundaries. Nor, by the same token, can the power of the provinces to regulate property and civil rights within the province deprive the federal Parliament of its powers under s. 91(2) to legislate on matters of genuine national importance and scope—matters that transcend the local and concern Canada as a whole.

[90] We would add that, in applying the *General Motors* test, one should not confuse what is optimum as a matter of policy and what is constitutionally permissible. The fifth *General Motors* criterion, it is true, asks whether failure of one or more provinces to participate in the regulatory scheme would “jeopardize the successful operation of the scheme in other parts of the country” (p. 662). However, the reference to “successful operation” should not be read as introducing an inquiry into what would be the best resolution in terms of policy. Efficaciousness is not a relevant consideration in a division of powers analysis (see *Reference re Firearms Act (Can.)* [2000 SCC 31], at para. 18). ...

VII. Application: Does the Proposed Act Fall Within Section 91(2)?

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[92] ... [W]e must [first] identify the main thrust of the proposed legislation having regard to its purpose and effects, and then ask whether the scheme, thus characterized, meets the indicia set out in *General Motors*.

A. The Purpose and Effects of the Act

[93] The first step in the pith and substance analysis is to ascertain the purpose and effects of the Act, viewed as a single, comprehensive scheme.

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[95] Turning first to purpose, the Act's preamble states that Canada intends to create a single Canadian securities regulator. ... Section 9 of the proposed Act reveals the legislation's broader, underlying purposes: to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system.

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[98] This brings us to the effects of the proposed federal scheme. We must look not only at the direct effects of the legislation, but also at the follow-through effects the legislation may be expected to produce

[99] The direct effect of the proposed Act is to establish a federal securities regulation scheme. If implemented as contemplated, all provinces and territories will eventually join the scheme. This will produce follow-through effects. Once a sufficient number of jurisdictions opt in, the current provincial and territorial securities regulation schemes will be effectively displaced. ...

[100] A detailed look at the provisions of the Act confirms that once in place, it will regulate many matters which Canada concedes also fall within the provincial power over property and civil rights under s. 92(13). Parts 1 and 2 establish regulatory oversight mechanisms. These are followed by a number of provisions broadly pertaining to the registration of persons. To this end, Part 3 of the Act gives the Chief Regulator the power to recognize a person as a self-regulatory organization, an exchange, a clearing agency and an auditor oversight organization (s. 64). These bodies must in turn regulate standards of practice and business conduct of participants in the securities industry (s. 66). Part 4, in similar vein, provides the Chief Regulator with the authority to designate a person as a credit rating organization, an investor compensation fund, a dispute resolution service, an information processor, a trade repository or another entity that provides a market participant with prescribed services (s. 73). Designation engages information sharing duties (s. 74). Part 5 requires registration of dealers, advisers and investment fund managers (s. 76). Parts 6, 7, 8 and 9 deal with the registration of securities, public information on securities and the monitoring of securities and issuers. Other provisions of the Act set standards for trading. For instance, Part 10 prohibits misrepresentations (s. 114), market manipulation (s. 116), insider trading (s. 117(1)), tipping (s. 117(2)) and other unfair practices. It also contains certain standards of conduct and obligations to avoid conflicts of interest that pertain to registered persons (see, e.g., ss. 109 to 113). Finally, Part 11 locks these routine regulatory provisions in place by establishing a scheme for the administration and enforcement of the Act.

[101] The effect of these provisions is in essence to duplicate legislative schemes enacted by provincial legislators exercising their jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*.

[102] Against this, Canada argues that what appears, on superficial inspection, to be duplication of provincial legislation is in fact directed at distinct federal concerns—preserving fair, efficient and competitive capital markets throughout Canada and ensuring the integrity and stability of Canada's financial system. Duplication of provincial provisions, Canada correctly points out, does not mean that there is no federal aspect that can support the Act. Moreover, Canada argues that the Act is not merely duplicative. It includes provisions that go beyond provincial powers. For example, it contains provisions for the control of systemic risk and for data collection on a nationwide basis, something Canada argues cannot be accomplished at the provincial level.

[103] Systemic risks have been defined as "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others

to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system" (M. J. Trebilcock, *National Securities Regulator Report* (2010), Reference Record, vol. I, 222, at para. 26). By definition, such risks can be evasive of provincial boundaries and usual methods of control. . . .

[106] Against this background, we return to the question at hand: What is the main thrust of the proposed *Securities Act*? The purpose of the proposed Act, we have seen, is to implement a comprehensive Canadian regime for the regulation of securities with a view to investor protection, the promotion of fair, efficient and competitive capital markets and ensuring the integrity and stability of the financial system. The effects of the proposed Act would be to duplicate and displace the existing provincial and territorial securities regimes, replacing them with a new federal regulatory scheme. Thus, the main thrust of the Act is to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces.

B. Classification: Does the Act Fall Within the General Trade and Commerce Power?

[108] ... [T]he *General Motors* test frames the inquiry into whether a legislative scheme falls within the general trade and commerce power in terms of the following non-exclusive indicia: (1) Is the law part of a general regulatory scheme? (2) Is the scheme under the oversight of a regulatory agency? (3) Is the law concerned with trade as a whole rather than with a particular industry? (4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it? (5) Would failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?

[110] The first two *General Motors* indicia need not detain us. Clearly they are met. . . .

[112] The third question is whether the proposed Act is directed at trade as a whole rather than at a particular industry. This requires us to look at both the purpose and the effects of the Act. Opponents of the Act argue that it is aimed at a particular industry—the securities industry. From their perspective, economic activity consisting of the trading in securities represents a specific industry. They are correct to state that, on their face, the provisions of the proposed Act aimed at government registration and the day-to-day conduct of brokers or investment advisers are not obviously related to trade as a whole.

[113] Canada argues, however, that the proposed Act goes beyond these matters. It sees the Act as fostering a fair, efficient and competitive national capital market and contributing to the integrity and stability of Canada's financial system. Moreover, Canada points out that the securities market is a mechanism for channelling capital from suppliers to consumers and that the capital transferred is applied throughout the Canadian economy in innumerable areas of activity. The securities market thus has a pervasive and significant impact throughout the national economy. ... Regulating this market, Canada argues, relates to trade as a whole and is not an industry-specific matter.

[114] We accept that preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a particular "industry" and engages "trade as a whole" within the general trade and commerce power as contemplated by the *General Motors* test. Legislation aimed at imposing

minimum standards applicable throughout the country and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole. However, the proposed Act reaches beyond such matters and descends into the detailed regulation of all aspects of trading in securities, a matter that has long been viewed as provincial. In justifying the reach of the Act, Canada argues that while securities trading may once have been mainly a local matter, it has evolved to become a matter of transcendent national concern that brings it within the s. 91(2) general trade and commerce power.

[115] No doubt, much of Canada's capital market is interprovincial and indeed international. ... Equally, however, capital markets also exist within provinces that meet the needs of local businesses and investors. While it is obvious that the securities market is of great importance to modern economic activity, we cannot ignore that the provinces have been deeply engaged in the regulation of this market over the course of many years. To make its case, Canada must present the Court with a factual matrix that supports its assertion of a constitutionally significant transformation such that regulating every aspect of securities trading is no longer an industry-specific matter, but now relates, in its entirety, to trade as a whole.

[116] A long-standing exercise of power does not confer constitutional authority to legislate, nor does the historic presence of the provinces in securities regulation preclude a federal claim to regulatory jurisdiction . . . Nevertheless, ... Canada's argument is that this area of economic activity has been so transformed that it now falls to be regulated under a different head of power. This argument requires not mere conjecture, but evidentiary support. The legislative facts adduced by Canada in this reference do not establish the asserted transformation. On the contrary, the fact that the structure and terms of the proposed Act largely replicate the existing provincial schemes belies the suggestion that the securities market has been wholly transformed over the years. ...

[117] Aspects of the Act, for example those aimed at management of systemic risk and at national data collection, appear to be directly related to the larger national goals which the Act proclaims are its *raison d'être*. However, important as these elements are, they do not, on the record before us, justify a complete takeover of provincial regulation. ...

[118] The fourth *General Motors* consideration addresses the constitutional capacity of the provinces and territories to enact a similar scheme acting in concert. The provinces opposing the Act argue that if there is a national interest in both fair, efficient and competitive capital markets and the need to provide an effective national response to systemic risk, they can meet it by legislating in concert. No doubt the provinces possess constitutional capacity to enact uniform legislation on most of the administrative matters covered by the federal Act, like registration requirements and the regulation of participants' conduct. By way of administrative delegation, they could delegate provincial regulatory powers to a single pan-Canadian regulator.

[119] The difficulty with the provinces' argument, however, is that, as a matter of constitutional principle, neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at pp. 12-8 ff.). Inherently sovereign, the provinces will always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single regulator. ...

[120] The provinces' inherent prerogative to resile from an interprovincial scheme aimed for example at managing systemic risk limits their constitutional capacity to achieve the truly national goals of the proposed federal Act. ...

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[122] However, this only takes Canada so far. Canada's problem is that the proposed Act reflects an attempt that goes well beyond these matters of undoubted national interest and concern and reaches down into the detailed regulation of all aspects of securities. In this respect, the proposed Act is unlike federal competition legislation . . . It would regulate *all* aspects of contracts for securities within the provinces, including *all* aspects of public protection and professional competence within the provinces. Competition law, by contrast, regulates *only* anti-competitive contracts and conduct—a particular aspect of economic activity that falls squarely within the federal domain. . . .

[123] The fifth and final *General Motors* inquiry is whether the absence of a province from the scheme would prevent its effective operation. On lesser regulatory matters the answer might well be no. However, when it comes to genuine national goals, related to fair, efficient and competitive markets and the integrity and stability of Canada's financial system, including national data collection and prevention of and response to systemic risks, the answer must be yes—much for the reasons discussed under the fourth question. On these matters a federal regime would be qualitatively different from a voluntary interprovincial scheme. Viewed as a whole, however, because the main thrust of the proposed Act is concerned with the day-to-day regulation of securities, the proposed Act would not founder if a particular province declined to participate in the federal scheme. Incidentally, we note that the opt-in feature of the scheme, on its face, contemplates the possibility that not all provinces will participate. This weighs against Canada's argument that the success of its proposed legislation requires the participation of all the provinces.

[124] Against the backdrop of these considerations, we come to the ultimate question—whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns.

[125] The provisions of the proposed Act, viewed as a whole, compel a negative response. The Act chiefly regulates contracts and property matters within each of the provinces and territories, overlain by some measures directed at the control of the Canadian securities market as a whole that may transcend intraprovincial regulation of property and civil rights. A federal scheme adopted from the latter, distinctly federal, perspective would fall within the circumscribed scope of the general trade and commerce power. But the provisions of the Act that relate to these concerns, although perhaps valid on their own, cannot lend constitutional validity to the full extent of the proposed Act. Based on the record before us, the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity that the Act would sweep into the federal sphere simply cannot be described as a matter that is truly national in importance and scope making it qualitatively different from provincial concerns.

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VIII. Conclusion

[134] The *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

NOTE: REFERENCE RE PAN-CANADIAN SECURITIES REGULATION

Following the decision in the *Securities Reference*, the federal government decided to explore with the provincial governments the possibility of a cooperative securities regulatory system.

The outcome of these discussions was a memorandum of understanding (agreement in principle) entered into in 2013, between the federal government and the governments of five provinces and one territory. The memorandum of understanding contemplated a cooperative regulatory scheme whereby (1) federal legislation would be enacted to deal with systemic risk and the criminal law aspects of securities regulation, (2) the participating provinces and territories would adopt uniform legislation regarding the day-to-day aspects of securities regulation, and (3) a national securities regulator overseen by the relevant federal and provincial ministers would exercise authority delegated to it under the federal and provincial/territorial legislation.

In *Reference re Pan-Canadian Securities Regulation*, [2018 SCC 48](#), the Supreme Court unanimously upheld both the constitutionality of the general scheme of regulation contemplated by the memorandum of understanding and the authority of Parliament under s 91(2) to enact the proposed federal legislation in particular.

The Court accepted that the pith and substance of the proposed federal legislation was, as stated within the legislation itself, “to promote and protect the stability of Canada’s financial system through the management of systemic risk related to capital markets” (s 4(a)), and “to protect capital markets, investors and others from financial crimes” (s 4(b)) (at para 97).

The Court further concluded that the legislation satisfied the *GM* indicia and, in particular, “with its carefully tailored scope,” constituted a response to the provincial incapacity, identified in the *Securities Reference*, to effectively manage systemic risk (at para 113).

III. THE CANADIAN COMMON MARKET

A. INTRODUCTION

You will recall from Chapter 3, From Contact to Confederation, that a perceived need for economic integration was among the factors that led the pre-1867 colonies to pursue political union. Economic integration can take various forms, ranging from a free trade area, such as that established by the Canada–US–Mexico Agreement (CUSMA), to a deeply integrated economic union, such as that among the member states of the European Union (EU).

A common market is a form of economic integration characterized by the elimination of internal tariffs and other internal trade restrictions, the adoption of a common external trade policy, and the free internal movement of factors of production, including labour. Canada’s constitutional architecture possesses some characteristics of a common market. In particular, the *Constitution Act, 1867*, confers exclusive jurisdiction over trade and commerce on the federal Parliament, contemplates that the pre-1867 customs and excise legislation in each colony would be replaced by uniform federal legislation (s 122), and provides that goods produced in any province shall “be admitted free into each of the other Provinces” (s 121). Although the *Constitution Act, 1867* does not contain provisions dealing specifically with the free movement of people, s 6(2) of the Charter establishes the right of any citizen or permanent resident of Canada to “take up residence” and “pursue the gaining of a livelihood” in any province.

B. SECTION 121

Section 121 of the *Constitution Act, 1867* provides:

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

For nearly a century, the leading case on s 121 was *Gold Seal v Alberta (AG)*, [62 SCR 424, 1921 CanLII 25](#), in which the Supreme Court declined to invalidate a provision of the *Canada Temperance Act* prohibiting the importation of liquor into provinces where local prohibition

was in effect. Section 121 was not violated because, in the words of Justice Anglin, "the purpose of that section is to ensure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province" (at 466; see similarly at 456, Duff J). On the Court's interpretation, s 121 did not entail that goods produced in one province must be admitted into the others, but only that those goods, if admitted, must not be subject to customs duties. "The essential word here is 'free,'" stated Mignault J (at 470).

In 2018, without overruling *Gold Seal*, the Supreme Court offered in *obiter dicta* a somewhat different interpretation of s 121.

R v Comeau

2018 SCC 15

[The *Liquor Control Act* (NB) provides, at s 134(b), that no person in the province shall "have or keep liquor" that was not purchased from New Brunswick Liquor Corporation. A practical effect of the prohibition is that New Brunswick residents cannot possess more than a certain quantity of alcohol sourced in another province. When the respondent was stopped by the RCMP in New Brunswick upon returning from Quebec and found to be in possession of a large quantity of alcohol which he had purchased in Quebec, he was charged under s 134(b). The respondent's defence was that s 134(b) was of no force or effect on the basis that it violated s 121 of the *Constitution Act, 1867*. The trial judge accepted this argument, declining to apply *Gold Seal*, on the basis that the latter case was "wrongly decided": 2016 NBPC 3. After the New Brunswick Court of Appeal dismissed the Crown's application for leave to appeal, the Crown further appealed to the Supreme Court of Canada.

The Supreme Court first held that the trial judge was wrong to decline to follow *Gold Seal*, which was a binding precedent. This part of the judgment is omitted.]

B. What Is the Proper Interpretation of Section 121?

[44] The trial judge refused to apply binding precedent and instead adopted a different conclusion on the basis of an expert witness' evidence about the intention of the founding fathers at the time of Confederation and the impact of that intention on how we are to understand s. 121. As just discussed, he erred in doing this. The appeal could be allowed on this ground alone.

[45] However, this Court has been invited to offer guidance on the scope of s. 121. We take up this invitation in this section.

(1) "Admitted Free": the Competing Interpretations

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[48] The appellant Crown submits that "admitted free" in s. 121 should be read as prohibiting laws that, like tariffs, place burdens on the price of goods crossing inter-provincial boundaries. There are two versions of this position, one slightly broader than the other, which we will discuss in due course. At this point it suffices to note that on either version, Mr. Comeau would not succeed. Even on the second broader version of this position—that s. 121 prohibits laws that in essence and purpose impede the passage of goods across provincial borders (see Murphy, per Rand J.)—s. 134(b) would stand, because it is part of a comprehensive scheme to control liquor in the province of New Brunswick and is not directed to impeding interprovincial trade in both essence and purpose.

[49] Mr. Comeau ... advances a new and much more radical proposition—that “admitted free” in s. 121 means that provincial laws cannot do anything that impedes, or makes more difficult, the flow of goods across provincial borders, directly or indirectly. In his view, s. 134(b) of the *Liquor Control Act* impedes the flow of goods across the New Brunswick border by prohibiting New Brunswickers from stocking liquor from other provinces at home. Therefore, it violates s. 121 of the *Constitution Act, 1867*.

[50] Mr. Comeau essentially contends that s. 121 is a “free trade” provision that bars any impediment to interprovincial commerce. The purpose of s. 121, he says, was to foster the full unimpeded economic integration of the new federation.

[51] The implications of these competing interpretations of s. 121 of the *Constitution Act, 1867* are significant. If Mr. Comeau’s broad interpretation of s. 121 is correct, federal and provincial legislative schemes of many types—environmental, health, commercial, social—may be invalid. If a narrower interpretation is correct, the legal force of s. 121 is circumscribed to tariffs, or their functional equivalents.

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[53] [For the reasons that follow, we conclude] that the interpretation of “admitted free” proposed by Mr. Comeau should be rejected. Section 121 does not impose absolute free trade across Canada. We further conclude that s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders.

(2) Text

[54] The introductory words of s. 121 of the *Constitution Act, 1867* are broad; the phrase “All Articles of Growth, Produce, or Manufacture of any one of the Provinces” comprehensively covers all articles of trade of Canadian origin. (We need not decide in this case whether s. 121 applies to articles coming into Canada and then moved around the country.) This text on its own does not answer the question of how “admitted free” should be interpreted. That phrase remains ambiguous, and falls to be interpreted on the basis of the historical, legislative and constitutional contexts.

(3) Historical Context

[55] Historical circumstances surrounding the adoption of s. 121 form part of the contextual interpretation of the provision. ...

[Reviewing pre-Confederation economic history, the Court concluded that the elimination of tariffs between the colonies was important for the achievement of the economic goals of the union.]

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[62] ... To achieve economic union, the framers agreed that individual provinces needed to relinquish their tariff powers. As this Court stated in *Black*, at pp. 608-9, per La Forest J.:

The attainment of economic integration occupied a place of central importance in the scheme. “It was an enterprise which was consciously adopted and deliberately put into execution.”: [D. Creighton, *British North America Act at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (1939)]; see also *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at p. 373. The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this

economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.

Section 121 of the *Constitution Act, 1867*, was one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation.

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[65] What light does this history shed on the question that divides Mr. Comeau and the Crown? ...

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[67] We conclude that the historical context supports the view that, at a minimum, s. 121 prohibits the imposition of charges on goods crossing provincial boundaries—tariffs and tariff-like measures. At the same time, the historical evidence nowhere suggests that provinces, for example, would lose their power to legislate under s. 92 of the *Constitution Act, 1867* for the benefit of their constituents even if that might have impacts on interprovincial trade. The historical evidence, at best, provides only limited support for the view that “admitted free” in s. 121 was meant as an absolute guarantee of trade free of all barriers.

(4) Legislative Context

[68] Section 121 is found in Part VIII of the *Constitution Act, 1867*, which is entitled “REVENUES; DEBTS; ASSETS; TAXATION.” Its provisions describe the establishment of Canada’s Consolidated Revenue Fund; the timing for the cessation of certain provincial revenue-generating activities, like tariffs, inconsistent with consolidation; the terms by which the federal government would assume provinces’ debts; and stipulations about provincial fiscal matters that would continue after Confederation. ...

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[71] ... Part VIII is concerned with revenue-generating instruments and their consolidation: excise taxes, customs duties, levies. All of these are measures that attach to commodities and function by increasing the price of goods. Nothing in Part VIII suggests that s. 121 should be read to capture merely incidental impacts on demand for goods from other provinces; the focus of Part VIII is direct burdens on the price of commodities.

[72] [In addition,] s. 121’s position in Part VIII, as well as its text, make it clear that it does not confer power, but limits the exercise of the powers conferred on legislatures by ss. 91 and 92 of the *Constitution Act, 1867*. ... Limits on these powers by provisions like s. 121 must be interpreted in a way that does not deprive Parliament and provincial legislatures of the powers granted to them to deal effectively with problems that arise. Otherwise, there would be constitutional hiatuses—circumstances in which no legislature could act. ... It follows that s. 121 should be interpreted in a way that allows governments to enact proactive policies for the good of their citizens and in a way that maintains an appropriate balance between federal and provincial powers—even if the exercise of those powers may have an incidental effect on other matters, like bringing goods across provincial boundaries.

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(5) Foundational Principles

[77] In *Reference re Secession of Quebec*, at para. 32, this Court held that foundational principles underlying the Constitution may aid in its interpretation. [Among these is the federalism principle.]

[78] Federalism refers to how states come together to achieve shared outcomes, while simultaneously pursuing their unique interests. The principle of federalism recognizes the “autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction”: *Reference re Secession of Quebec*, at para. 58 The tension between the centre and the regions is regulated by the concept of jurisdictional balance: *Reference re Secession of Quebec*, at paras. 56-59. The federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests. The same concern has led to, for example, the development of doctrines like the necessarily incidental doctrine and the ancillary powers doctrine.

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[85] We begin with Mr. Comeau’s submission that the principle of federalism supports full economic integration. We cannot accept this submission. The federalism principle emphasizes balance and the ability of each level of government to achieve its goals in the exercise of its powers under ss. 91 and 92 of the *Constitution Act, 1867*. Full economic integration would “curtail the freedom of action—indeed, the sovereignty—of governments, especially at the provincial level”: K. Swinton, “Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union” (1995), 25 *Can. Bus. L.J.* 280, at p. 291; see also D. Schneiderman, “Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation” (1995), 21 *Queen’s L.J.* 125, at p. 152. Reading s. 121 to require full economic integration would significantly undermine the shape of Canadian federalism, which is built upon regional diversity within a single nation: *Reference re Secession of Quebec*, at paras. 57-58; *Canadian Western Bank*, at para. 22. A key facet of this regional diversity is that the Canadian federation provides space to each province to regulate the economy in a manner that reflects local concerns.

[86] The federalism principle supports the view that provinces within a federal state should be allowed leeway to manage the passage of goods while legislating to address particular conditions and priorities within their borders. For example, the Northwest Territories and Nunavut have adopted laws governing the consumption of liquor, which include controls on liquor coming across the border into their territories. The primary objective of the laws is public health, but they have the incidental effect of curtailing cross-border trade in liquor. The Northwest Territories and Nunavut argue that these sorts of laws do not fall under the spectre of s. 121. We agree that to interpret s. 121 in a way that renders such laws invalid despite their non-trade-related objectives is to misunderstand the import of the federalism principle.

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[88] . . . The need to maintain balance embodied in the federalism principle supports an interpretation of s. 121 that prohibits laws directed at curtailing the passage of goods over interprovincial borders, but allows legislatures to pass laws to achieve other goals within their powers, even though the laws may have the incidental effect of impeding the passage of goods over interprovincial borders.

(6) Defining the Ambit of Section 121: The Jurisprudence

[89] We have established in the preceding sections that the text, historical context, legislative context, and underlying constitutional principles do not support Mr. Comeau’s contention that s. 121 should be interpreted as prohibiting any and all

burdens on the passage of goods over provincial boundaries, essentially imposing an absolute free trade regime within Canada. Rather, these considerations support a flexible, purposive view of s. 121—one that respects an appropriate balance between federal and provincial powers and allows legislatures room to achieve policy objectives that may have the incidental effect of burdening the passage of goods across provincial boundaries.

[90] This established, the next question to be answered is: What does s. 121 of the *Constitution Act, 1867* actually prohibit? Before us, the debate was framed as a conflict between two lines of authority—the *Gold Seal* line of authority, which is said to confine s. 121 to the prohibition of tariffs, and the line of authority based on the [concurring] judgment of Rand J. in *Murphy*, which sets out the view that s. 121 prohibits not only tariffs, but extends to laws that in essence and purpose are directed to impeding the passage of goods across provincial boundaries.

[91] [W]e do not see these lines of authority to be in conflict. Properly understood, they represent a single, progressive understanding of the purpose and function of s. 121 in the broader constitutional scheme. This understanding is entirely consistent with our earlier conclusion that s. 121—understood through the lens of its text, its historical and legislative contexts and the principle of federalism—is best conceived as preventing provinces from passing laws aimed at impeding trade by setting up barriers at boundaries, while allowing them to legislate to achieve goals within their jurisdiction even where such laws may incidentally limit the passage of goods over provincial borders.

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[98] [W]hile the Court in [*Gold Seal*] spoke of s. 121 forbidding tariffs, and while Rand J. in *Murphy* spoke of s. 121 forbidding laws that purposely act like tariffs (i.e. laws that in essence burden the passage of goods over provincial borders), this is a distinction without a difference. Constitutional limits must operate on the level of principle and function, not on what label is applied to a particular kind of law. Constitutional compliance is not a matter of semantics. Clearly, traditional tariffs would offend the purpose of s. 121, as Rand J. describes it. But so might other measures that function in the same way. It follows that s. 121 applies not only to tariffs, but also to the functional equivalents of tariffs.

[99] ... *Gold Seal* and *Murphy* [also] support the proposition that s. 121 was not intended to catch burdens on goods crossing provincial borders that were merely incidental effects of a law or scheme aimed at some other purpose As Rand J. pointed out in *Murphy*, to prohibit incidental impacts on cross-border trade would allow s. 121 to trump valid exercises of legislative power, and create legislative hiatuses where neither level of government could act: pp. 638 and 642-43. The federalism principle militates against such an interpretation—the aim is balance and capacity, not imbalance and constitutional gaps. The federal government and provincial governments should be able to legislate in ways that impose incidental burdens on the passage of goods between provinces, in light of the scheme of the *Constitution Act, 1867* as a whole, This is illustrated by *Gold Seal*. If the federal government had not been able to enact its law prohibiting liquor from crossing the borders of the dry provinces, there would have been a legislative hiatus, and the cooperative scheme aimed at allowing these provinces to keep liquor out would not have been possible.

[100] Put another way, s. 121 allows schemes that incidentally burden the passage of goods across provincial boundaries, but does not allow them to impose such impediments only because they cross a provincial boundary. In Rand J.'s view, the gravamen of s. 121 was to prohibit laws directed to erecting barriers to trade at

provincial boundaries—whether customs duties or other measures that are intended to fill the role of such tariffs: *Murphy*, at p. 642.

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[107] It follows that a party alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across a provincial border. “[E]ssence” refers to the nature of the measure—“what a thing is”; ... [its] character”: *The Oxford English Dictionary* (2nd ed. 1989), at p. 400. “Purpose” focuses on the object, or primary purpose, of the measure.

[108] The first question is whether the essence or character of the law is to restrict or prohibit trade across a provincial border, like a tariff. Tariffs, broadly defined, are “customs duties and charges of any kind imposed on or in connection with importation or exportation”: *General Agreement on Tariffs and Trade* (World Trade Organization), Can. T.S. 1948 No. 31, Part I, Article I. The claimant must therefore establish that the law imposes an additional cost on goods by virtue of them coming in from outside the province. Put another way, a claimant must establish that the law distinguishes goods in a manner “related to a provincial boundary” that subjects goods from outside the province to additional costs: *Murphy*, at p. 642, per Rand J. A prohibition on goods crossing the border is an extreme example of such a distinction.

[109] The additional cost need not be a charge physically levied at the border, nor must it take the form of an actual surcharge; all that is required is that the law impose a cost burden on goods crossing a provincial border. A law that provides that “rum produced in the Maritime provinces will be subject to a 50% surcharge upon entering Newfoundland” has the same effect, in principle, as a law that states that “any person who brings rum produced in the Maritime provinces into Newfoundland is guilty of an offence and liable to a fine.” Both laws impose a burden on the cost of goods that cross a provincial boundary.

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[111] If the law does not in essence restrict the trade of goods across a provincial border, the inquiry is over and s. 121 is not engaged. If it does, the claimant must also establish that the primary purpose of the law is to restrict trade. A law may have more than one purpose. But impeding trade must be its primary purpose to engage s. 121. The inquiry is objective, based on the wording of the law, the legislative context in which it was enacted (i.e. if it is one element of a broader regulatory scheme), and all of the law’s discernable effects (which can include much more than its trade-impeding effect). If the purpose of the law aligns with purposes traditionally served by tariffs, such as exploiting the passage of goods across a border solely as a way to collect funds, protecting local industry or punishing another province, this may, depending on other factors, support the contention that the primary purpose of the law is to restrict trade

[112] Stand-alone laws that have the effect of restricting trade across provincial boundaries will not violate s. 121 if their primary purpose is not to impede trade, Thus a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate s. 121. More commonly, however, the primary purpose requirement of s. 121 fails because the law’s restriction on trade is merely an incidental effect of its role in a scheme with a different purpose. The primary purpose of such a law is not to restrict trade across a provincial boundary, but to achieve the goals of the regulatory scheme.

[113] However, a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme. If the primary purpose of the broader scheme is to impede trade, or if the impugned law is not connected in a rational way to the scheme’s objective,

the law will violate s. 121. A rational connection between the impugned measure and the broader objective of the regulatory scheme exists where, as a matter of reason or logic, the former can be said to serve the latter: see, e.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153, per McLachlin J. (as she then was), and at para. 184, per Iacobucci J. ...

[114] In summary, two things are required for s. 121 to be violated. The law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.

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[116] There is debate about whether s. 121 applies equally to provincial and federal laws. While this Court has in previous decisions proceeded on the basis that federal laws may engage s. 121 (see, e.g., *Gold Seal and Murphy*), no federal law is properly at issue in the present appeal and so the question need not be resolved here. We agree with Laskin C.J.'s statement in *Reference re Agricultural Products Marketing Act*, at p. 1267, that "the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute."

[Applying this framework, the Court concluded that s 134(b) of the *Liquor Control Act* does not violate s 121. Although the impact of s 134(b) on interprovincial movement of goods resembles that of a tariff, the primary purpose of s 134(b) is not to restrict trade, but rather "to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick" (at para 124).]

NOTE: THE FREE MOVEMENT OF GOODS WITHIN THE EUROPEAN UNION

Section 121 of the *Constitution Act, 1867* textually resembles art 30 of the *Treaty on the Functioning of the European Union*, 26 October 2012, EU, OJ L 326/47-326/390 (TFEU), which prohibits "customs duties ... and charges having equivalent effect ... between Member States." The TFEU goes well beyond s 121, however, in establishing an integrated European market. For example, art 34 of the TFEU provides:

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 34 has received a broad interpretation at the hands of the European Court of Justice (ECJ) (whose decisions on questions of EU law are binding on the courts of the Member States). In particular, the concept of "measures having equivalent effect" to a "quantitative restriction" has been construed as applying to Member State product standards, whether or not applied equally to domestic products and imports, and whether or not adopted with protectionist intent, that hinder cross-border trade. In a famous case, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649, the ECJ held that a German law prescribing the minimum alcoholic content of certain liqueurs sold in Germany (whether or not imported) was contrary to art 34, because "there is no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State" (at para 14).

It is clear that the legal position is quite different in Canada. Divergent provincial product standards are an unquestioned consequence of provincial jurisdiction over in-province transactions under s 92(13). Economic integration is not, in our system, elevated above provincial autonomy: see *Comeau*, at para 85. While a direct “quantitative restriction on imports” enacted by a province would no doubt run afoul of s 91(2) (about which see Section III.C below), many of the measures which the ECJ has characterized as “having equivalent effect” to a quantitative restriction would clearly not, if enacted by a Canadian province, be precluded by s 121 (or, as you will see in Section III.C, by s 91(2)). As a general rule, Canadian provinces can impose their own rules on transactions taking place within the province, including to goods that have been produced elsewhere, even if the result is to reduce the volume of imported goods that are sold.

NOTE: STEAM WHISTLE BREWING INC V ALBERTA GAMING AND LIQUOR COMMISSION

The Alberta Gaming, Liquor and Cannabis Commission (the Commission) possesses a statutory monopoly over the distribution and sale of liquor to private retailers in Alberta. In 2015 and 2016, the Commission implemented policies whereby it applied a higher mark-up—the difference between the Commission’s cost and the price it charges to retailers—to beer brewed in Alberta, British Columbia, and Saskatchewan than to beer brewed elsewhere. In *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, [2019 ABCA 468](#), the Alberta Court of Appeal held that these policies contravened s 121 and were of no force or effect.

The Court first rejected a claim by the Commission that, insofar as the Commission was merely exercising the powers of a legal person (entering into contracts), its actions were not subject to s 121. The Court accepted the principle that the Crown (whether provincial or federal) inherently possesses the legal capacity to enter into contracts, and to hold and dispose of property, and that, in the exercise of these powers, the Crown is not subject to s 121 or to the constitutional rules concerning the division of powers. However, the principle did not apply here because the Commission “was not solely exercising natural-person powers,” but was exercising “statutory duties and powers” under provincial law and “benefiting from a statutory monopoly” (at paras 71-72, 167).

The Court then applied the two-stage *Comeau* test and determined, first, that the essence of the policies was “to restrict trade by imposing differential costs on the sale of beer produced inside and outside the province” (at para 100) and, second, that the primary purpose of the policies was “to promote the competitive position” of brewers in the favoured provinces (at para 104)—to “protect local industry, a purpose traditionally served by tariffs” (at para 110). The Court concluded (at paras 112-13):

Promoting local industry may be a constitutionally permissible purpose in some circumstances but not when it is implemented by tariff-like measures on goods produced outside the province. Most grant programs designed to promote local industry are too unlike a tariff to run afoul of s 121. However, the Mark-up schemes in this case, which impose additional costs on beer produced outside the province for the primary purpose of promoting the local beer industry, do violate s 121.

Finally, the [impugned policies] do not constitute, or form part of, a regulatory scheme whose primary purpose is to regulate some aspect of access to alcohol (unlike *Comeau*). The purpose is to create revenue in a way that promotes the competitive position of local producers in the local craft beer market

C. LIMITS IMPOSED BY SECTION 91(2) ON PROVINCIAL AUTHORITY TO ESTABLISH TRADE BARRIERS

Until the reinterpretation of s 121 undertaken in *Comeau*, the major constraint on the ability of provinces to enact trade barriers was the exclusive federal power to regulate trade and commerce under s 91(2). In a series of cases, of which two are excerpted below, the Supreme Court of Canada reviewed provincially enacted schemes regulating the marketing of products that, at some point, moved into interprovincial or international trade. In each case, it was asserted by those challenging the legislation that the province was impermissibly attempting to regulate international or interprovincial trade.

Carnation Company Limited v Quebec Agricultural Marketing Board

[1968] SCR 238, 1968 CanLII 82 (footnotes omitted)

MARTLAND J (Fauteux, Abbott, Judson, Ritchie, Hall, and Spence JJ concurring):

This is an appeal from the Court of Queen's Bench for the Province of Quebec (Appeal Side), which confirmed the judgment given in the Superior Court, upholding the validity of three decisions of the Quebec Agricultural Marketing Board, herein-after referred to as "the Marketing Board." The question in issue before this Court is as to whether, in making these orders, the Marketing Board had infringed on the exclusive legislative powers of Parliament under s. 91(2) of the *British North America Act* to regulate trade and commerce. ...

The Marketing Board was created as a corporation by the provisions of the *Quebec Agricultural Marketing Act*, 4-5 Eliz. II, 1955-56 (Que.), c. 37. It was empowered, inter alia, to approve joint marketing plans, and to arbitrate any dispute arising in the course of carrying out a joint marketing plan. The Act provided that ten or more producers of agricultural products in any territory in Quebec could apply to the Marketing Board for approval of a joint plan for the marketing of one or more classes of farm products in such territory, if such plan was supported by a vote of at least 75 per cent in number and value of all producers concerned.

On July 25, 1957, the Marketing Board approved the Quebec Carnation Company Milk Producers' Plan. The administration of the Plan was entrusted to the Quebec Carnation Company Milk Producers' Board. The Plan bound all bona fide milk producers shipping milk and dairy products to any of the plants of the appellant in Quebec. The Producers' Board had power to negotiate with the buyer (the appellant) for the marketing and sale to it of milk and dairy products from the farms of producers bound by the Plan. The Plan provided for a board of arbitration, which might be the Marketing Board, to decide conflicts in the event of a failure to agree with the appellant in the negotiation or execution of a convention.

Agreement was not reached as to the purchase price of milk to be purchased by the appellant from the producers, pursuant to the Plan. The matter was arbitrated by the Marketing Board which ... determined a price of \$3.07 per hundred pounds. ... [A]fter a further arbitration, the Marketing Board decided on a price of \$2.78 per hundred pounds.

It is these three orders of the Marketing Board, which approved the Plan, and which determined the price to be paid by the appellant for milk purchased from producers subject to the Plan, which are the subject of the appellant's attack.

The appellant was incorporated under the Canadian *Companies Act* [later renamed *Canada Corporations Act*, 1964-65, c 52, s 2], and has its head office in

Toronto. It operates, in Quebec, an evaporated milk plant at Sherbrooke and a receiving station at Waterloo.

During the period concerned, it purchased raw milk from approximately 2,000 farmers, situated mostly in the Eastern Townships. At the Sherbrooke plant it processes raw milk into evaporated milk. The major part of such production is shipped and sold outside Quebec. Milk received at the Waterloo receiving station ... was either sent to the Sherbrooke plant, for processing, or ... sent to appellant's plant at Alexandria, Ontario

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The position taken by the appellant is that the three orders of the Marketing Board are invalid because they enable it to set a price to be paid by the appellant for a product the major portion of which, after processing, will be used by it for export out of Quebec. This, it is contended, constitutes the regulation of trade and commerce within the meaning of s. 91(2) of the *British North America Act*, a field reserved to the Parliament of Canada.

The appellant, in support of this submission, relies upon the reasons of four of the Judges of this Court in the *Reference Respecting The Farm Products Marketing Act*, R.S.O. 1950, Chapter 131, As Amended [1957] SCR 198, 1957 CanLII 1], which case is hereinafter referred to as "*the Ontario Reference*."

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Four of the members of the Court, Kerwin C.J., Rand, J., Locke J. and Nolan J., were of the view that a transaction might take place within a province and yet not constitute an "intra-provincial" transaction which would be subject to provincial control.

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Counsel for the respondent points out that, as a result of the reference, there was no majority opinion as to what transactions, completed within a province, constituted interprovincial trade, and contends that the views expressed by the four Judges were not in harmony with earlier decisions of this Court and of the Privy Council.

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The validity of provincial legislation governing the marketing of agricultural products was before this Court in *Lawson v. Interior Tree Fruit & Vegetable Committee of Direction*, [1931] SCR 357, 1930 CanLII 91], which concerned the *Produce Marketing Act* of British Columbia, 1926-27 (B.C.), c. 54. In holding that Act to be *ultra vires* of the Legislature of British Columbia, Duff J. (as he then was), said, at p. 364:

Coming now to the first ground of attack, namely, that the statute constitutes an attempt to regulate trade within the meaning of s. 91(2). To repeat the general language of s. 10(1), the functions of the Committee are

for the purpose of controlling and regulating the marketing of any product within its authority,

and for that purpose the Committee is empowered

to determine whether or not and at what time and in what quantity, and from and to what places, and at what price and on what terms the product may be marketed and delivered.

As I have said, the respondent committee has attempted ... to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does) the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the committee's interpretation of its powers), subject to the committee's dictation as to the quantity of it which he may dispose of, as to the places from which, and the places to which he may ship, as to the route of transport,

as to the price, as to all the terms of sale ... I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely inter-provincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia ... , shall carry out their inter-provincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces, which constitute in fact the most extensive market for these products. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus *ad quem*, the committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

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In 1938, the Privy Council dealt with the validity of a British Columbia statute, *The Natural Products Marketing (British Columbia) Act, 1936*, in *Shannon v. Lower Mainland Dairy Products Board* [1938] CanLII 250, [1938] AC 708]. This Act enabled the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions.

It was held that this statute was, in pith and substance, an Act to regulate particular businesses, entirely within the Province, and was *intra vires* of the Provincial Legislature under s. 92(13) of the *British North America Act*. In dealing with the contention that this Act encroached upon s. 91(2) of the *British North America Act*, Lord Atkin said, at p. 718:

It is sufficient to say upon this point that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92. Their Lordships do not accept the view that natural products as defined in the Act are confined to natural products produced in British Columbia. There is no such restriction in the Act, and the limited construction would probably cause difficulty if it were sought at some future time to co-operate with a valid Dominion scheme. But the Act is clearly confined to dealings with such products as are situate within the Province. ...

It is now necessary to consider, in the light of these decisions, the validity of the three orders which are under attack in the present case. The first order, which created the Quebec Carnation Company Milk Producers' Board and empowered it to negotiate, on behalf of the milk producers, for the sale of their products to the appellant, is somewhat analogous to the creation of a collective bargaining agency in the field of labour relations. The purpose of the order was to regulate, on behalf of a particular group of Quebec producers, their trade with the appellant for the sale to it, in Quebec, of their milk. Its object was to improve their bargaining position.

The Producers' Board then undertook, with the appellant, negotiations for the sale to it of that milk. The order provided a machinery whereby the price of milk could be determined by arbitration if agreement could not be reached. In this respect it differs from most provincial legislation governing labour disputes, but there would seem to

be no doubt that provincial labour legislation incorporating compulsory arbitration of disputes would be constitutional, unless objectionable on some other ground.

The two subsequent orders of the Marketing Board, under attack, contained the decisions which it reached in determining the proper price to be paid to the producers for milk purchased by the appellant.

Are these orders invalid because the milk purchased by the appellant was processed by it and, as to a major portion of its product, exported from the province? Because of that fact, do they constitute an attempt to regulate trade in matters of interprovincial concern?

That the price determined by the orders may have a bearing upon the appellant's export trade is unquestionable. It affects the cost of doing business. But so, also, do labour costs affect the cost of doing business of any company which may be engaged in export trade and yet there would seem to be little doubt as to the power of a province to regulate wage rates payable within a province, save as to an undertaking falling within the exceptions listed in s. 92(10) of the *British North America Act*. It is not the possibility that these orders might "affect" the appellant's interprovincial trade which should determine their validity, but, rather, whether they were made "in relation to" the regulation of trade and commerce ...

Thus, as Kerwin C.J., said in the *Ontario Reference*, in the passage previously quoted: "Once a statute aims at 'regulation of trade in matters of inter-provincial concern' ... it is beyond the competence of a Provincial Legislature."

I am not prepared to agree that, in determining that aim, the fact that these orders may have some impact upon the appellant's interprovincial trade necessarily means that they constitute a regulation of trade and commerce within s. 91(2) and thus renders them invalid. The fact of such impact is a matter which may be relevant in determining their true aim and purpose, but it is not conclusive.

In the *Lawson* case, where the provincial legislation was found to be unconstitutional, the Committee created by the statute was enabled and purported to exercise a large measure of direct and immediate control over the movement of trade in commodities between a province and other provinces. That is not this case.

On the other hand, in the *Shannon* case the regulatory statute was upheld, as it was confined to the regulation of transactions taking place wholly within the province. It was held that s. 91(2) was not applicable to the regulation for legitimate provincial purposes of particular trades or businesses confined to the province.

The view of the four Judges in the *Ontario Reference* was that the fact that a transaction took place wholly within a province did not necessarily mean that it was thereby subject solely to provincial control. The regulation of some such transactions relating to products destined for interprovincial trade could constitute a regulation of interprovincial trade and be beyond provincial control.

While I agree with the view of the four Judges in the *Ontario Reference* that a trade transaction, completed in a province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control.

I agree with the view of Abbott J., in the *Ontario Reference*, that each transaction and each regulation must be examined in relation to its own facts. In the present case, the orders under question were not, in my opinion, directed at the regulation of interprovincial trade. They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business

in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.

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Appeal dismissed.

NOTE: ATTORNEY-GENERAL FOR MANITOBA V MANITOBA EGG AND POULTRY ASSOCIATION

Attorney-General for Manitoba v Manitoba Egg and Poultry Association, [1971] SCR 689, 1971 CanLII 135, commonly referred to as the *Manitoba Egg Reference*, was one of the battles fought in what became known as the interprovincial “chicken and egg war.” The following summary is taken from Paul Weiler:

[The “chicken and egg war” was] primarily an engagement fought by the bordering provinces of Ontario and Quebec. Ontario farmers produced an abundance of cheap eggs and Quebec farmers an abundance of cheap chickens. The surplus producers were naturally interested in the market of the consumers in the neighbouring jurisdiction. Equally naturally, the somewhat less efficient producers of each product were not so enamoured of competition within their own bailiwick. When they went to their own government for protection, the response was legislation facilitating the creation of marketing schemes. These provided for the controlled marketing, at fixed prices, of all the chickens sold in Ontario and all the eggs in Quebec, whatever the source. Unfortunately, it appears that the marketing boards became a little greedy and went even further, giving undue preference in marketing to those products coming from within the province. This had particularly adverse effects on farmers in other provinces such as Manitoba, which, as a consistent producer of agricultural surpluses, was the classic innocent and injured bystander in the “chicken and egg war.” ...

At this very time, the federal government was attempting to shepherd through Parliament a new *Farm Products Marketing Act* which would endeavour to solve these problems through a complicated process of inter-administrative delegation. Though there appeared to be substantial consensus in favour of the general scheme of the Bill by both federal and provincial ministers of agriculture, it was being delayed by opposition members who largely represented western farming interests. In the interim, the federal government had carefully resisted many calls to refer the “political” dispute to the Supreme Court of Canada for immediate “legal” resolution.

Unfortunately, Manitoba, which was understandably loath to wait for a political decision on the larger questions, devised a scheme for circumventing the reluctance of the federal Justice Minister. This provincial government manufactured a controversy by initiating a carbon copy of the Quebec scheme, a proposed Order-in-Council which provided for Manitoba control of the marketing of extraprovincial eggs in Manitoba. It then referred these regulations to the Manitoba Court of Appeal for a decision about their constitutionality, under its own provincial reference legislation. When the Manitoba Court of Appeal decided against the constitutional validity of the scheme, the Manitoba government was entitled as of right to appeal this “loss” to the Supreme Court of Canada. In this way, it could achieve a binding decision as to all such schemes which would be authoritative in all the provinces.

See Paul C Weiler, *In the Last Resort* (Toronto: Carswell, 1974) at 156–57.

The scheme at issue in the reference applied to all eggs marketed within the province of Manitoba, whether or not produced within the province. Complete control over the marketing of eggs in Manitoba was vested in the Manitoba Egg Producers’ Marketing Board, the members of which were to be elected by Manitoba producers. In the main judgment in the case, written by Martland J (Fauteux CJ, Abbott, Judson, Ritchie, and Spence JJ concurring), the marketing board’s authority was described as follows (at 700; footnotes omitted):

It is only through the Board, as selling agent, that any eggs may be sold or offered for sale. It has the authority, as already noted, to impose marketing quotas and to prohibit the offering for sale of a particular regulated product to ensure the orderly marketing of the regulated product. No eggs can be sold or offered for sale unless graded, packed and marked by a grading or packing station under contract with the Board. All eggs must be offered for sale to distributors, under contract with the Board, at prices set, from time to time, by the Board.

Justice Martland then turned to the main issue on appeal (at 701-3):

The issue which has to be considered in this appeal is as to whether the Plan is *ultra vires* the Manitoba Legislature because it trespasses upon the exclusive legislative authority of the Parliament of Canada to legislate on the matter of the regulation of trade and commerce conferred by s. 91(2) of the *British North America Act*.

When the Privy Council first addressed itself to the meaning of that provision it was stated that it included "regulation of trade in matters of inter-provincial concern" (*Citizens Insurance Company of Canada v. Parsons* [(1881), 4 SCR 215, 7 App Cas 96 at 113 (UKJCPC)]. That proposition has not since been challenged. However, the case went on to hold that the provision did not include the regulation of the contracts of a particular business or trade in a single province.

This limitation on the federal power was reiterated in subsequent decisions of the Privy Council

In [*Shannon v Lower Mainland Dairy Products Board*, 1938 CanLII 250, [1938] AC 708] the *Natural Products Marketing (British Columbia) Act, 1936* was held to be *intra vires* the provincial Legislature because it was confined to dealings with such products as were situate within the province, even though not necessarily produced there. The basis of this decision was that "The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province. ..." (at p. 720).

Similarly, this Court upheld, in *Home Oil Distributors Limited v. Attorney-General of British Columbia* [(1940) SCR 444, 1940 CanLII 46], provincial legislation authorizing the fixing of wholesale or retail prices for coal or petroleum products sold in British Columbia for use in that province. This judgment was based upon the decision in the *Shannon* case.

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The earlier authorities on the matter of provincial marketing regulation were ... reviewed in the judgment of this Court in *Carnation Company Limited v. The Quebec Agricultural Marketing Board* [(1968) SCR 238, 1968 CanLII 82]. ...

Our conclusion was that each transaction and regulation had to be examined in relation to its own facts, and that, in determining the validity of the regulatory legislation in issue in that appeal, the issue was not as to whether it might affect the inter-provincial trade of the appellant company, but whether it was made in relation to the regulation of inter-provincial trade and commerce. ...

It is my opinion that the Plan now in issue not only affects interprovincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.

Justice Laskin (Hall J concurring) expressed concern about answering the reference question in the abstract. There was "no factual underpinning for the issues" (at 704) that were raised by the reference, he complained. Nevertheless, Laskin J proceeded to answer the reference question, holding the proposed scheme to be beyond provincial authority. He first distinguished the earlier holdings of the Court in *Carnation*, *Shannon*, and *Home Oil* on the

basis that, unlike the legislation in these earlier cases, the scheme at issue in *Manitoba Egg* was directed at goods coming from outside the province (at 715-18):

Although the emphasis is on control of the Manitoba producers and distributors in order (as stated in the proposed measures) "to obtain for producers the most advantageous marketing conditions" and "to avoid overproduction," the scheme brings into its grasp "persons" as well as producers, that is, those outside the province who are either producers or distributors seeking to enter the Manitoba market, or those inside the province who are not themselves producers but who bring in out-of-province eggs for disposition in Manitoba. This view is reinforced by the provision for indicating the origin of eggs, including eggs other than those produced in Manitoba.

There may be a variety of reasons which impel a province to enact regulatory legislation for the marketing of various products. For example, it may wish to secure the health of the inhabitants by establishing quality standards; it may wish to protect consumers against exorbitant prices; it may wish to equalize the bargaining or competitive position of producers or distributors or retailers, or all three classes; it may wish to ensure an adequate supply of certain products. These objects may not all nor always be realizable through legislation which fastens on the regulated product as being within the province. That is no longer, if it ever was, the test of validity. Just as the province may not, as a general rule, prohibit an owner of goods from sending them outside the province, so it may not be able to subject goods to a regulatory scheme upon their entry into the province. This is not to say that goods that have come into a province may not, thereafter, be subject to the same controls in, for example, retail distribution to consumers as apply to similar goods produced in the province.

Assuming such controls to be open to a province, the scheme before this Court is not so limited. It embraces products which are in the current of interprovincial trade and, as noted at the beginning of these reasons, it embraces them in whatever degree they seek to enter the provincial market. It begs the question to say that out-of-province producers who come in voluntarily (certainly they cannot be compelled by Manitoba) must not expect to be treated differently from local producers. I do not reach the question of discriminatory standards applied to out-of-province producers or distributors (that is, the question of a possibly illegal administration of the scheme as bearing on its validity) because I am of opinion that the scheme is on its face an invasion of federal power in relation to s. 91(2).

There are several grounds upon which I base this conclusion. The proposed scheme has as a direct object the regulation of the importation of eggs, and it is not saved by the fact that the local market is under the same regime. Anglin J. said in *Gold Seal Ltd. v. Dominion Express Co* [(1921), 62 SCR 424 at 465, 1921 CanLII 25] that "It is common ground that the prohibition of importation is beyond the legislative jurisdiction of the province." Conversely, the general limitation upon provincial authority to exercise of its powers within or in the province precludes it from intercepting either goods moving into the province or goods moving out, subject to possible exceptions, as in the case of danger to life or health. Again, the Manitoba scheme cannot be considered in isolation from similar schemes in other provinces; and to permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada . . . The existence of egg marketing schemes in more than one province, with objectives similar to the proposed Manitoba scheme, makes it clear that interprovincial trade in eggs is being struck at by the provincial barriers to their movement into various provincial markets. If it be thought necessary or desirable to arrest such movement at any provincial border then the aid of the Parliament of Canada must be sought, as was done through Part V of the *Canada Temperance Act*, RSC 1952, c. 30, in respect of provincial regulation of the sale of intoxicating liquor.

I do not find it necessary in this case to invoke s. 121, and hence say nothing about its applicability to the marketing scheme under review.

As a reference proceeding, the *Manitoba Egg Reference* allowed for certain strategic choices by the Manitoba cabinet that heavily influenced the outcome. Carissima Mathen has observed:

Manitoba, plainly, did not wish the putative scheme to be upheld. After all, it had drawn up the Order-in-Council for the sole purpose of showing its constitutional defect[. It] carefully avoided putting before the Court any broader context in which provinces enacting such schemes might be responding to negative circumstances elsewhere. The reference thus impeded those provinces with an interest in preserving such boards—namely Quebec and Ontario—from highlighting additional economic facts that might have explained their protectionism.

See Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) at 96–98. The reference function is discussed in more detail in Chapter 13, The Role of the Judiciary, Section VII.

Paul Weiler questioned whether it was appropriate for the Court to respond to the *Manitoba Egg Reference* at all:

There was no concrete focus around which the reasoning of the Court could be organized, nor was the factual economic background to the statute depicted. The Manitoba government conspicuously omitted to set out in the Reference the relevant economic background which might well have supported the reasonability of provincial action in the area. Ontario and Quebec, which were vitally interested in sustaining this kind of legislation, did not have an opportunity to present this factual support. Indeed, the questions which the Manitoba government posed to the Court did not focus on what appears to have been the real character of the dispute—the discriminatory application of provincial marketing quotas against out-of-province producers—and instead required the Court to make a blanket decision about the legality of any such marketing scheme, no matter how favourably it might be applied to extra-provincial products. In my opinion, the most sensible response would have been a forthright refusal to answer the questions on the grounds that the dispute was not appropriate for judicial resolution. One senses that Mr. Justice Laskin, who was especially critical of the abstract character of the Reference, was drawn in this direction, but eventually the legal mystique surrounding issues of federalism overcame his reluctance. The majority opinion proceeded blithely ahead, without any apparent concern for the complex and inter-related political or economic interests involved in the dispute, and the Court gave Manitoba the broad legal weapon it was hoping for.

See Paul Weiler, “The Supreme Court of Canada and Canadian Federalism” in Jacob S Ziegel, ed, *Law and Social Change* (Toronto: Carswell, 1973) at 41–42.

According to Weiler, this resulted in several inadequacies in the Court’s reasoning including the lack of any real distinction between the provincial schemes at issue in *Carnation* and *Manitoba Egg* (at 46):

In the final analysis, the only difference is that in *Carnation* the wholesale marketing and prices of Quebec milk are controlled by Quebec law—whether it is destined for inside or outside Quebec—while in the *Manitoba Egg* case, all eggs sold in Manitoba are to be marketed and priced under Manitoba controls, whether they come from within or without Manitoba. Yet Martland J decided that, “on its own facts,” the Manitoba legislation is *in relation to* trade and commerce, as well as *affecting* it, and thus unconstitutional. As to the *Carnation* scheme, again “on its own facts” he said it merely had some effect on inter-provincial trade, and was valid. If there is a difference, which is relevant to the federal division of legislative power, it is not apparent to me, and certainly not adverted to on the face of the opinion.

Weiler went on to say (at 47):

The functional problem which the Court is required to face in the case is the degree of latitude which a province should be allowed in subjecting the business sector of our society to regulation within its borders. As a matter of plain, economic facts, the inter-dependent nature of business activity in this country is such that almost all provincial regulations will have ramifications on citizens and enterprises outside the country, whether or not the legal rule technically applies only to purely intra-provincial trade or transactions. Moreover, the citizens of these provinces, who are so affected by these regulatory decisions, have no real say in the election of the representative governments which make them. Hence the arguments which can be made for judicial laissez-faire with respect to democratically-elected parliaments do not have the same weight as in many of the other constitutional areas decided by the Court.

NOTES AND QUESTIONS

1. Do you agree with Weiler's argument that the economic consequences of the Manitoba and Quebec schemes were similar? Are the two cases distinguishable? What do you think Weiler means when he refers to "the legal mystique surrounding issues of federalism"?

2. *Manitoba Egg* was followed in *Burns Foods Ltd v Attorney General for Manitoba*, [1975] 1 SCR 494, 1973 CanLII 194, which involved a challenge to a Manitoba hog marketing scheme that required that all hogs slaughtered in the province by processors be purchased from the Hog Producers' Marketing Board. The scheme applied to hogs brought from other provinces as well as hogs produced in the province. There was no power to limit the entry of out-of-province hogs or impose quotas, only a requirement that out-of-province hogs be treated the same way as in-province hogs. The Supreme Court concluded (Ritchie J dissenting) that because the legislation had the effect of prohibiting processors from purchasing hogs from producers in another province except through the agency of the board, it was *ultra vires* in substance as an attempt to regulate the interprovincial trade in hogs.

Pigeon J (Fauteux CJ, Abbott, Martland, Judson, and Spence JJ concurring) stated at 505-6:

It was also said that the pith and substance is not to erect any barrier against the free flow of trade but to stabilize the price of hogs in Manitoba. The difficulty is that such regulation by subjecting the price of "imports" to the same regulations as local sales is, of itself, a regulation of the interprovincial trade. The fact that this is presently being done without the features of discrimination present in the *Egg* case ... cannot make a real difference, not only because discrimination could at any time be established at the discretion of the Board, but also because what is sought to be regulated in all its essential aspects is the trade in hogs between the Packers in Manitoba and hog producers in any other province.

The case discussed in the following note involved the constitutionality of a federal–provincial egg marketing scheme. The case, *Reference re Agricultural Products Marketing*, is noteworthy for several reasons: first, it seems to indicate a greater degree of judicial deference when reviewing joint federal–provincial action; second, Pigeon J emphasizes that the "production" stage is *prima facie* provincial jurisdiction; and, third, there is discussion in Laskin CJ's reasons of the "common market" clause in s 121 of the *Constitution Act, 1867*.

NOTE: REFERENCE RE AGRICULTURAL PRODUCTS MARKETING

Reference re Agricultural Products Marketing, [1978] 2 SCR 1198, 1978 CanLII 10 originated in a reference by the lieutenant governor of Ontario to that province's Court of Appeal of a

series of questions concerning the validity of certain provisions of the *Agricultural Products Marketing Act*, RSC 1970, c A-7; the *Farm Products Marketing Agencies Act*, SC 1970-71-72, c 65; and the *Farm Products Marketing Act*, RSO 1970, c 162, and of the orders in council and regulations passed pursuant to these statutes. This legislative package constituted a solution worked out, through federal–provincial cooperation, to the problems of regulating the marketing of agricultural products that gave rise to *Manitoba Egg*.

This legislation and a companion agreement (entered into by the federal and ten provincial ministers of agriculture, together with the federal and provincial marketing boards) established a comprehensive program for regulating the marketing of eggs in Canada. The program provided for sharing of the interprovincial and export market by allocating quotas to each province and to each egg producer. The Canadian Egg Marketing Agency (CEMA) administered the plan, with authority to buy and dispose of any surplus production, to impose levies on producers so as to finance its operations, and to authorize local boards to collect the levies on its behalf. Under provincial regulations, the Ontario board set quotas on eggs to be marketed intraprovincially that were identical to the interprovincial and export quotas established under the national program. Ontario egg producers challenged quotas set by the Ontario Farm Products Marketing Board, arguing that provincial quotas could apply only to goods sold within the province, and thus these quotas were beyond provincial competence.

A number of other constitutional issues were raised, including the validity of CEMA's surplus disposal program; the authority of Parliament to provide for levies in respect of intraprovincial marketing; and the validity, in the light of s 121 of the *British North America Act, 1867* (now the *Constitution Act, 1867*), of a marketing scheme based on provincial boundaries.

The majority judgment was delivered by Pigeon J (Martland, Ritchie, Beetz, and de Grandpré JJ concurring). He began his analysis by establishing that control of production is *prima facie* a matter falling within provincial jurisdiction (at 1293-94):

In my view, the control of production, whether agricultural or industrial, is *prima facie* a local matter, a matter of provincial jurisdiction. Egg farms are local undertakings subject to provincial jurisdiction under s. 92(10) of the *B.N.A. Act*, unless they are considered as within the scope of "agriculture" in which case, by virtue of s. 95, the jurisdiction is provincial subject to the overriding authority of Parliament. In my view [*Carnation Company Ltd v Quebec Agricultural Marketing Board*, [1968] SCR 238, 1968 CanLII 82] is conclusive in favour of provincial jurisdiction over undertakings where primary agricultural products are transformed into other food products. In that case, the major portion of the production was shipped outside the province) . . . In view of the reasons given, the conclusion could not be different even if the whole production had been going into extraprovincial trade.

Justice Pigeon recognized the difficulty of distinguishing between eggs consumed within the province and those destined for out-of-province trade—"any workable control scheme has to be effective with respect to all eggs irrespective of intended disposition" (at 1295). He also acknowledged that, as was held in *Manitoba Egg*, provincial authority cannot extend to the control of extraprovincial trade. However, according to Pigeon J (at 1296-97), "marketing" does not extend to production and so

provincial control of production is *prima facie* valid. In the instant case, the provincial regulation is not aimed at controlling the extraprovincial trade. In so far as it affects this trade, it is only complementary to the regulations established under federal authority. In my view this is perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal–provincial cooperative action to arrive at any practical scheme for the orderly and efficient production and marketing of a commodity which all governments concerned agree requires regulation in both intraprovincial and extraprovincial trade. As early as 1912, it was asserted by the Privy Council that "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces" [References Case, 1912

CanLII 407, [1912] AC 571 at 584 (UKJCPC)]. I do not overlook the admonition in [AG BC v A-G Can; Reference re Natural Products Marketing Act, 1937 CanLII 364, [1937] AC 377 at 389 (UKJCPC)], that the legislation has to be carefully framed but, when after 40 years a sincere cooperative effort has been accomplished, it would really be unfortunate if this was all brought to nought. While I adhere to the view that provinces may not make use of their control over local undertakings to affect extraprovincial marketing, this does not, in my view prevent the use of provincial control to complement federal regulation of extraprovincial trade.

Justice Laskin (Judson, Spence, and Dickson JJ concurring) delivered a separate judgment addressing the claim that the scheme offended s 121 of the *British North America Act, 1867*. The argument was that the Canadian Egg Marketing Agency, by establishing a fixed quota system for the production of eggs within each province, "effectively prevents the establishment of a single economic unit in Canada with absolute freedom of trade between its constituent parts, which was one of the main purposes of confederation and which is guaranteed by s 121 of the Constitution." Justice Laskin admitted (at 1268) that s 121 applied to federal law as it did to provincial law, but that its application may be different

according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. ... A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in intraprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121. ...

... I find nothing in the marketing scheme here that, as a trade regulation, is *in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to intraprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province.

Patrick Monahan argues that the Court, in this case, did not engage in any sensitive balancing of the issues at stake:

It would not have been difficult to construct some functional counterargument in favour of the provincial quotas. For instance, it could have been suggested that it was impossible to identify, at the point of production, whether the goods were eventually to be sold locally or interprovincially. Any requirement that separate regimes be established for local as opposed to interprovincial producers would have been unworkable. But Pigeon J did not rely on any such limited, functional argument. Instead, he advanced the sweeping generalization that a province had control over all "production" of eggs. The destination of the eggs was irrelevant. One did not have to inquire whether most or even all of a producer's eggs would eventually leave the province. The only relevant issue was that the province had enacted "production" quotas rather than "marketing" quotas; "marketing does not include production and, therefore, provincial control of production is *prima facie* valid."

See Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 207-8.

NOTE: US DORMANT COMMERCE CLAUSE DOCTRINE

Like all federal legislative powers in the US, the power of the Congress to regulate interstate commerce is concurrent, not exclusive. Nevertheless, under what is known as the "Dormant

Commerce Clause" doctrine, a state law has been held to be inconsistent with the Commerce Clause (US Const art I, § 8, cl 3), and therefore unconstitutional, if it "clearly discriminates against interstate commerce, ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism" (*Wyoming v Oklahoma*, 502 US 437 at 454-55, 112 S Ct 789 (1991)); or if it imposes "an undue burden on interstate commerce," in the sense that the burden is disproportionate to a legitimate interest of the state (*Northwest Central Pipeline Corp v State Corp Comm'n of Kansas*, 489 US 493 at 625, 109 S Ct 1262 (1989)). (Such discrimination or burdens by a state law would be valid, however, if authorized by legislation enacted by Congress under the Commerce Clause.)

Notice the role that proportionality analysis plays under the US doctrine, in contrast to Canadian doctrine under s 91(2) and s 121. The upshot of *Manitoba Egg and Comeau* appears to be that the provincial regulation of transactions within the province will not run afoul of s 91(2) or s 121 so long as its purpose is not to interfere with interprovincial trade, even if there is an impact on interprovincial trade. By contrast, under the Dormant Commerce Clause doctrine, where a state law has the effect of burdening interstate commerce, it is not enough that the state's interest be legitimate; the impact on interstate commerce must, in addition, not be disproportionate to that interest.

D. FREE MOVEMENT OF PEOPLE

So far, we have examined only one aspect of the Canadian common market—the internal free movement of goods. Another characteristic of a common market is the internal free movement of people. What constraints does the Canadian constitution impose on the ability of provinces (or the federal government) to restrict the interprovincial mobility of people?

Within the *Constitution Act, 1867*, there is no equivalent to s 121 prohibiting restrictions on the "admission" of people into other provinces. In Chapter 15, Antecedents of the Charter, we will examine a handful of JCPC decisions from the turn of the 20th century in which the exclusive federal legislative authority with respect to "naturalization" (s 91(25)) served as a barrier against provincially enacted race-based restrictions on the mobility of citizens. However, for provisions dealing directly with the free movement of people within Canada, one must look to the *Constitution Act, 1982*: specifically, s 6(2) of the Charter enacts a guarantee of interprovincial mobility for citizens and permanent residents with respect to employment and residency. The leading cases interpreting s 6 are *Black v Law Society of Alberta*, [1989] 1 SCR 591, 1989 CanLII 132 and *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157, 1997 CanLII 17020.

Black v Law Society of Alberta

[1989] 1 SCR 591, 1989 CanLII 132

[This case involved a challenge to a rule of the Law Society of Alberta prohibiting partnerships between resident and non-resident lawyers, a rule enacted to prevent the Toronto-based law firm McCarthy and McCarthy from opening a branch office in Calgary. The Supreme Court concluded that the rule violated s 6(2)(b) of the Charter and could not be upheld as a reasonable limit under s 1 of the Charter. Section 6(2)(b) guarantees a citizen or permanent resident the right to pursue the gaining of a livelihood in any province. Section 6(3) subjects these rights to laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence. Although much of the discussion in the majority reasons, written by LaForest J, is about individual rights, note the discussion of economic integration as a goal of

federalism at the time of Confederation and the links made between s 6 of the Charter and the constitutional norm of economic union.]

La FOREST J (Dickson CJ and Wilson J concurring):

A discussion of the scope and effect of s. 6(2)(b) in the context of this case is enhanced by a brief review of the history of the protection of interprovincial mobility in Canada.

A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy: D. Creighton, *British North America Act at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (1939), [Appendix 2,] at p. 40 [(Ottawa: King's Printer, 1940)]. The attainment of economic integration occupied a place of central importance in the scheme. "It was an enterprise which was consciously adopted and deliberately put into execution": Creighton, *supra*; see also *Lawson v. Interior Tree Fruit & Vegetable Committee*, [1931] S.C.R. 357, at p. 373. The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements

Section 121 of the *Constitution Act, 1867* was one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation. ... Rand J. in *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, at p. 638, commented on the scope of s. 121:

Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces.

The word "free" in the context of s. 121 was held to mean "without impediment related to the traversing of a provincial boundary."

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Before the enactment of the *Charter*, however, there was no specific constitutional provision guaranteeing personal mobility, but it is fundamental to nationhood, and even in the early years of Confederation there is some, if limited, evidence that the courts would, in a proper case, be prepared to characterize certain rights as being fundamental to, and flowing naturally from a person's status as a Canadian citizen. In *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580, the Privy Council dealt with the validity of a British Columbia enactment that prohibited people of Chinese origin or descent from being employed in mines. The Privy Council found the provision to be *ultra vires* the provincial legislature and thus illegal. Lord Watson based his reasons on s. 91(25) of the *British North America Act*, which gives exclusive legislative authority over "naturalization and aliens" to the Parliament of Canada. "Naturalization," it was held at p. 586, includes "the power of enacting ... what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized." Provincial interference with a resident's right to live and work in the province was thus not permitted; see also *Cunningham v. Homma*, [1903] A.C. 151 at p. 157.

It was left to Rand J. in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, to spell out the full implications of the *Bryden* case for Canadian citizenship. Rand J. makes it clear that Canadian citizenship carries with it certain inherent rights, including some form of mobility right. The essential attributes of citizenship including the right to

enter and the right to work in a province, he asserted, cannot be denied by the provincial legislatures. And he extended this right for practical purposes to other residents of Canada. He thus put it at pp. 919-20:

What this implies is that a Province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian. He may, of course, disable himself from exercising his capacity or he may be regulated in it by valid provincial law in other aspects. But that attribute of citizenship lies outside of those civil rights committed to the province, and is analogous to the capacity of a Dominion corporation which the province cannot sterilize.

It follows, a *fortiori*, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the "union" which the original provinces sought and obtained disrupted. In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizen.

Such, then, is the national status embodying certain inherent or constitutive characteristics, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only by Parliament.

During the constitutional exercise culminating in the enactment of the *Charter*, there was a wave of political and academic concern regarding the construction of numerous barriers to interprovincial economic activity. There was also a strong feeling that the integration of the Canadian economy, which had been only partially successful under the *British North America Act*, should be completed. The federal government in particular was concerned about the growing fragmentation of the Canadian economic union

These economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights, under s. 6(2) of the *Charter*. But citizenship, and the rights and duties that inhere in it are relevant not only to state concerns for the proper structuring of the economy. It defines the relationship of citizens to their country and the rights that accrue to the citizen in that regard, a factor not lost on Rand J., as is evident from the passage already quoted. This approach is reflected in the language of s. 6 of the *Charter*, which is not expressed in terms of the structural elements of federalism, but in terms of the rights of the citizen and permanent residents of Canada. Citizenship and nationhood are correlative. Inhering in citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries. Under *Charter* disposition, that right is expressly made applicable to citizens and permanent residents alike. Like other individual rights guaranteed by the *Charter*, it must be interpreted generously to achieve its purpose to secure to all Canadians and permanent residents the rights that flow from membership or permanent residency in a united country.

The purposes of the *Charter's* mobility rights section were revisited in the *Richardson* case, excerpted immediately below. Note a shift in emphasis in the Court's reasons concerning the objectives served by s 6.

Canadian Egg Marketing Agency v Richardson[1998] 3 SCR 157, 1997 CanLII 17020

[This case concerned the exclusion of egg producers in the Northwest Territories from Canada's national egg marketing scheme. The scheme was the product of interlocking federal and provincial legislation and regulations governing the production and marketing of eggs in Canada. The federal portion of the scheme was administered by the Canadian Egg Marketing Agency. Under the scheme, production and marketing quotas were allocated based on egg production levels in 1972, at which time there was no egg production in the Northwest Territories. Thus, egg producers in the Northwest Territories, like Richardson, were prohibited by law from marketing or exporting eggs interprovincially or internationally. In the course of addressing the claim that the scheme offended s 6 of the Charter, the Court addressed the larger purposes served by the mobility guarantees.]

IACOBUCCI and BASTARACHE JJ (Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, and Binnie JJ concurring):

[60] Situated in the *Charter*, and closely mirroring the language of international human rights treaties, it seems clear then that s. 6 responds to a concern to ensure one of the conditions for the preservation of the basic dignity of the person. The specific guarantee described in s. 6(2)(b) and s. 6(3)(a) is mobility in the gaining of a livelihood subject to those laws which do not discriminate on the basis of residence. The mobility guarantee is defined and supported by the notion of equality of treatment, and absence of discrimination on the ground normally related to mobility in the pursuit of a livelihood (i.e. residence). ... The freedom guaranteed in s. 6 embodies a concern for the dignity of the individual. Sections 6(2)(b) and 6(3)(a) advance this purpose by guaranteeing a measure of autonomy in terms of personal mobility, and by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present. The freedom to pursue a livelihood is essential to self-fulfilment as well as survival. Section 6 is meant to give effect to the basic human right, closely related to equality, that individuals should be able to participate in the economy without being subject to legislation which discriminates primarily on the basis of attributes related to mobility in pursuit of their livelihood.

[61] The terms of s. 6 suggest that this right is not violated by legislation regulating any particular type of economic activity, but rather by the effect of such legislation on the fundamental right to pursue a livelihood on an equal basis with others. Indeed, the provinces and federal government are authorized by virtue of ss. 91 and 92 of the *Constitution Act, 1867* to regulate all manner of economic activity, as defined by type of activity. ... [Cooperative federal–provincial] economic legislation, and the growth of divergent regulatory regimes in the provinces, is undoubtedly authorized by the Constitution.

[62] There is, thus, a tension in the purposes and text of ss. 91 and 92 of the *Constitution Act, 1867*, and s. 6 of the *Charter*. The former sections authorize the development of distinct legal regimes in the provinces, and define the matters, including many integral to the functioning of the economy, under their exclusive jurisdiction; the latter section, however, says that the individual has a right to pursue a livelihood throughout Canada, without discrimination "primarily on the basis of province of present or previous residence."

[63] This tension is heightened when one takes into account the judicial interpretation and legislative history of s. 121 of the *Constitution Act, 1867*. That section reads:

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

• • •

[65] Dissatisfaction in the federal government with the scope of s. 121 and a perceived tendency in the provinces to erect interprovincial trade barriers led to a proposal for a more robust version of the section in the constitutional negotiations leading up to the 1982 amendments . . . In addition to the free movement of persons, this new version of s. 121 would also have expressly protected the mobility of specified factors of economic production which are often integrally related to the gaining of a livelihood by a person: goods, services, and capital. This proposed s. 121 did not purport to confer rights on individuals or groups; rather, it sought to ensure mobility in the pursuit of a livelihood by dramatically limiting any government's right to legislate with respect to the interprovincial mobility of certain factors of economic production. As it turned out, nine of ten provinces rejected this amendment, leaving s. 121 as it is worded today.

[The majority went on to characterize the inclusion of s 6 in the Charter as reflecting "a human rights objective," holding that "it guarantees the mobility of persons, not as a feature of the economic unity of the country, but in order to further a human rights purpose" (at para 66). The majority could not find that the primary purpose of the scheme was to "discriminate among persons primarily on the basis of province of present . . . residence" (the language of s 6). Evaluating the primary purpose of the law in this context was akin to identifying its "pith and substance." It could not be said that the dominant feature of the legislation was to discriminate against out-of-province producers. Hence, the challenge to the legislation was dismissed.]

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[Justice McLachlin (Major J concurring) offered dissenting reasons. The purpose of the mobility rights guarantee, according to McLachlin J, was to enshrine]

[122] . . . the right of Canadian citizens and permanent residents to pursue a living wherever in the country they choose without undue government interference. It has two purposes, one collective, one individual: (1) to promote economic union among the provinces; and (2) to ensure to all Canadians one of the fundamental incidents of citizenship: the right to travel throughout the country, to choose a place of residence anywhere within its borders, and to pursue a livelihood, all without regard to provincial boundaries. These purposes are related. The individual right of citizens and permanent residents of Canada to reside and pursue the gaining of a living in any province is the private correlative of the collective interest in a unified economy.

[For McLachlin J, the exclusion of NWT producers from the national egg marketing scheme "is a senseless and counter-productive impediment to the right of the respondents to pursue their chosen livelihood, egg production, in the province or territory of their choice, the Northwest Territories" (at para 173). Nor could this scheme constitute a reasonable measure demonstrably justified in a free and democratic society and so be saved under s 1. Being the product of historical accident, the infringing aspects of the scheme could not be characterized as a pressing and substantial objective.]

NOTE: MOBILITY RESTRICTIONS AND THE COVID-19 PANDEMIC

In *Black*, excerpted above, La Forest J quoted an assertion by Rand J, in *Winner v SMT (Eastern) Ltd*, [1951] SCR 887, 1951 CanLII 2, that "a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for

example, health" (at 611). During the COVID-19 pandemic, several provinces and territories in fact enacted rules restricting the entry of persons into the province. In *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, the Supreme Court of Newfoundland and Labrador dismissed a challenge, brought on both federalism and Charter grounds, to s 28(1)(h) of the provincial *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3 [PHPPA], which provides:

28.(1) While a declaration of a public health emergency is in effect, the Chief Medical Officer of Health may do one or more of the following for the purpose of protecting the health of the population and preventing, remedying or mitigating the effects of the public health emergency: ...

(h) make orders restricting travel to or from the province or an area within the province.

First addressing the federalism aspect of the challenge, Burrage J of the Supreme Court of Newfoundland and Labrador began by characterizing the provincial legislation. Although the legal effect of s 28(1)(h) was certainly to restrict interprovincial travel, the Court considered the pith and substance of the legislation to be governed by the legislation's purpose:

[239] On its surface, s. 28(1)(h) of the PHPPA empowers the CMOH to restrict interprovincial travel, just as in *Ward* [discussed in Chapter 11] the impugned regulation might be seen as a prohibition on sale. The question, however, is not whether s. 28(1)(h) restricts travel, but why does it do so?

[240] As was the case in *Ward*, to say that because s. 28(1)(h) restricts travel it must be pith and substance concerned with the regulation of travel, is to confuse the purpose of s. 28(1)(h) with the means to carry out that purpose. At its core, s. 28(1)(h) is directed toward the health of those in the province. The "mischief" the legislature sought to address by empowering the CMOH to restrict travel included the spread of a communicable disease. In this sense the effect of s. 28(1)(h) is felt well beyond those directly impacted by the travel restriction, such as Ms. Taylor.

[241] For the foregoing reasons, I thus conclude that the purpose of s. 28(1)(h) of the PHPPA, its pith and substance, is the protection and promotion of the health of those in Newfoundland and Labrador. At its core it is a public health measure.

The Court concluded that the measure came within the province's authority to legislate on matters of a local or private nature (s 92(16)).

On the Charter challenge, the Court concluded that the applicant's rights under s 6(2) had been infringed, but that the measure, undertaken with the goal of reducing the importation of COVID-19 into the province, was a reasonable limit on her mobility.

IV. NATURAL RESOURCES

Jurisdiction over natural resources is one of the most contentious areas of Canadian intergovernmental relations. Given the geographic distribution of resources across regions of Canada, the opposition of interests that arises, at a global level, between producing and consuming nations has played out in Canada between producing and consuming regions. These tensions have given rise to disputes over, for example, the distribution of the gains and losses resulting from external shocks, such as the oil crisis of the 1970s. More recently, the growing public consciousness of environmental issues has created additional opportunities for intergovernmental conflict over resource development, for example, where the economic benefits and environmental risks of a development activity are not distributed equally across different parts of the country.

Although the focus of this chapter is on the division of powers between the federal and provincial levels of government, an additional layer of jurisdictional complexity arises by

virtue of the Aboriginal and treaty rights recognized and affirmed under s 35 of the *Constitution Act, 1982*. As will be apparent when you read the materials in Chapter 14, Indigenous Peoples and the Constitution, s 35 has significant implications for natural resource management and development at both the provincial and the federal levels.

As originally enacted, the *Constitution Act, 1867* did not contain “natural resources” as an enumerated head of legislative power. There was, to be sure, a federal power to regulate the fisheries (s 91(12)) and a provincial power to legislate in relation to the management and sale of timber and wood on public lands (s 92(5)), as well as a concurrent power of both levels of government to legislate in relation to agriculture (s 95). More generally, however, a federal or provincial law having some connection with natural resources fell to be classified as one of the enumerated heads of power, or under the residual POGG power, depending on the form and subject-matter of the legislation. Thus, for example, the provisions of the *National Energy Board Act* challenged in *Caloil* were determined to be measures incidental to a scheme for the regulation of the importation of oil, while the impugned provincial marketing board orders in *Carnation* were determined to be measures regulating intraprovincial contracts in agricultural products.

In 1982, a provincial “natural resources” power was added to the *Constitution Act, 1867* in the form of s 92A(1), which provides that provinces have the exclusive authority to make laws in relation to the exploration, development, conservation, and management of non-renewable natural resources in the province. Even without this provision, however, it was clear that the provinces could pass such laws on the basis of their jurisdiction over property and civil rights and matters of a local or private nature (ss 92(13) or (16)).

However, s 92A also made two other, more important changes to the extent of provincial legislative authority. The first change was to provide that the provinces have the authority to “make laws in relation to the export [of natural resources] from the province to another part of Canada” (s 92A(2)). This authority is concurrent, not exclusive, and is subject to a caveat that there must be no “discrimination in prices and in supplies” exported to the rest of Canada. Nevertheless, in the absence of s 92A(2), the laws now authorized by that provision would doubtless have been found to be incursions on federal jurisdiction under s 91(2).

The second change was to authorize the provinces to levy indirect taxes on natural resources in the province and on their production (s 92A(4)). An indirect tax is a tax that is nominally levied on a person or firm within a supply chain and passed along to consumers as part of the price of the good. In the absence of this provision, the provinces were limited to direct taxation only, under the terms of s 92(3).

The *CIGOL* and *Central Canada Potash* cases excerpted below were decided before s 92A was added to the *Constitution Act, 1867*. As you read the cases, consider what difference, if any, s 92A would have made to their respective outcomes.

Canadian Industrial Gas and Oil Ltd v Government of Saskatchewan

[\[1978\] 2 SCR 545, 1977 CanLII 210](#)

MARTLAND J (Laskin CJ and Judson, Ritchie, Spence, Pigeon, and Beetz JJ concurring):

The question in issue in this appeal is as to the constitutional validity of certain statutes enacted by the Legislature of the Province of Saskatchewan and regulations enacted pursuant thereto, to which reference will be made hereafter. Their validity was challenged by the appellant, a corporation engaged in the exploration for, drilling for and production of oil and natural gas in Saskatchewan and owning freehold leases, Crown leases and royalty interests in that Province. The respondents are the

Government of the Province of Saskatchewan and the Attorney General of the Province. The appellant was unsuccessful in seeking to obtain a declaration of their invalidity, both at trial and on appeal to the Court of Appeal for Saskatchewan. It appeals, with leave, to this Court from the judgment of the Court of Appeal.

The legislation was enacted following the sharp rise in the price of oil on the world market which occurred in 1973. The effect of the legislation has been summarized in the reasons of my brother Dickson, which I have had the advantage of reading. For purposes of convenience I substantially repeat that summary here:

First, production revenues from freehold lands were subjected to what was called a "mineral income tax." The tax was 100% of the difference between the price received at the well-head and the "basic well-head price," a statutory figure approximately equal to the price per barrel received by producers prior to the energy crisis. The owner's interest in oil and gas rights in producing tracts of less than 1,280 acres were exempted from tax. Deductions approved by the Minister of Mineral Resources were allowed in respect of increases in production costs and extraordinary transportation costs. Provision was made for the Minister to determine the well-head value of the oil where he was of the opinion that oil had been disposed of at less than its fair value.

Secondly, all petroleum and natural gas in all producing tracts within the Province were expropriated and subjected to what was called a "royalty surcharge." Oil and gas rights owned by one person in producing tracts not exceeding 1,280 acres were exempted. Although introduced by Regulation rather than statute, the royalty surcharge is calculated in the same manner as the mineral income tax. For all practical purposes they are the same, save one exception. The well-head value for the purposes of royalty surcharge is the higher of the price received at the well-head and the price per barrel listed in the Minister's order.

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The practical consequence of the application of this legislation is that the Government of Saskatchewan will acquire the benefit of all increases in the value of oil produced in that Province above the set basic well-head price fixed by the statute and regulations, which is approximately the same as that which existed in 1973 before the increase in world prices for oil. In this connection, there is the important fact that 98 per cent of all crude oil produced in Saskatchewan is destined for export from the Province either to Eastern Canada or the United States of America.

The appellant's attack upon the legislation is made upon two grounds:

1. It is contended that both the mineral income tax and the royalty surcharge constitute indirect taxation, and are therefore beyond the power of the Province to impose, the provincial legislative powers being limited to direct taxation within the province under s.s. 92(2) of the *British North America Act, 1867*.
2. It is contended that the legislation relates to the regulation of interprovincial and international trade and commerce, a matter over which the federal Parliament has exclusive legislative power under s. 91(2) of the *British North America Act*.

[The discussion of the taxation issue has been omitted. Martland J concluded that the mineral income tax and royalty surcharge were an indirect tax and hence not within provincial jurisdiction.]

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Regulation of Trade and Commerce

In considering this issue the important fact is, of course, that practically all of the oil to which the mineral income tax or the royalty surcharge becomes applicable is destined for interprovincial or international trade. Some of this oil is sold by producers at the well-head and thereafter transported from the Province by pipeline. Some of the oil is not sold at the well-head, but is produced by companies for their own purposes, and is likewise transported out of the Province by pipeline. In either case the levy becomes applicable. The producer in the first case must, if he is to avoid pecuniary loss, sell at the well-head at the well-head value established. The company which has its own oil production transported from the Province must, if it is to avoid pecuniary loss, ultimately dispose of the refined product at a price which will recoup the amount of the levy. Thus, the effect of the legislation is to set a floor price for Saskatchewan oil purchased for export by the appropriation of its potential incremental value in interprovincial and international markets, or to ensure that the incremental value is not appropriated by persons outside the Province.

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The purpose of the legislation under review was accurately defined by Chief Justice Culliton in the Court of Appeal [1975 CanLII 807, 65 DLR (3d) 79 at 98 (Sask CA)]:

There is no doubt in my mind that both the mineral income tax and the royalty surcharge were imposed for one purpose, and one purpose only—to drain off substantial benefits that would have accrued to the producers due to the sudden and unprecedented price of crude oil.

The means used to achieve this end are to compel a Saskatchewan oil producer to effect the sale of the oil at a price determined by the Minister. The mineral income tax is defined as the difference between the basic well-head price and the price at which the oil is sold, but with the important proviso that if the Minister is of the opinion that the oil has been sold at less than its fair value, he can determine the price at which it should have been sold, and that price governs in determining the amount of the tax. The royalty surcharge, as provided under the Regulations requires the payment of the surcharge on oil produced on the basis of the difference between its well-head value, as established by the Minister, less the basic well-head price. In either case the Minister is empowered to determine well-head value of the oil which is produced which will govern the price at which the producer is compelled to sell the oil which he produces. In an effort to obtain for the provincial treasury the increases in the value of oil exported from Saskatchewan which began in 1973, in the form of a tax upon the production of oil in Saskatchewan, the legislation gave power to the Minister to fix the price receivable by Saskatchewan oil producers on their export sales of a commodity that has almost no local market in Saskatchewan. Provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market. It involves the regulation of interprovincial trade and trenches upon s. 91(2) of the *British North America Act*.

This is not a case similar to *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board* [[1968] SCR 238, 1968 CanLII 82], where the effect of the Regulations was to increase the cost of the milk purchased by Carnation in Quebec and processed there, mostly for sale outside Quebec. The legislation there indirectly affected Carnation's export trade in the sense that its costs of production were increased, but was designed to establish a method for determining the price of milk sold by Quebec milk producers, to a purchaser in Quebec, who processed it there. Here the legislation is directly aimed at the production of oil destined for export and has the effect of

regulating the export price, since the producer is effectively compelled to obtain that price on the sale of his product.

For these reasons, in my opinion, the statutory provisions, and the Regulations and orders enacted and made relating to the imposition of the mineral income tax and royalty surcharge, are *ultra vires* of the Legislature of the Province of Saskatchewan. ...

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DICKSON J (de Grandpré J concurring) dissenting:

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Before considering in detail the legislation, one or two observations of a general nature are warranted. This Court is sensitive to the freedom of action which must be allowed to the Legislatures to safeguard their legitimate interests as in their wisdom they see fit. It presumes that they have acted constitutionally. The onus of rebutting that presumption is upon the appellant. Before the Court concludes that the Province has transcended its constitutional powers the evidence must be clear and unmistakable; more than conjecture or speculation is needed to underpin a finding of constitutional incompetence.

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Subject to the limits imposed by the Canadian Constitution, the power of the Province to tax, control and manage its natural resources is plenary and absolute.

[Dickson J's analysis of the taxation issue has been omitted. He would have upheld the mineral income tax as a form of direct taxation within the province.]

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Counsel for appellant urged the Court to strike down the legislation as an infringement of Parliament's exclusive authority respecting the regulation of trade and commerce. Appellant says: "the tax and surcharge are established in a way which enables the Province of Saskatchewan to control the minimum price at which Saskatchewan crude oil is sold. This control is imposed on a commodity almost exclusively consumed outside of Saskatchewan, either in the Canadian or international marketplace. This imposition of a minimum price by the Province to be passed on to consumers outside of the Province is an interference with the free flow of trade between provinces ... so as to prevent producers in Saskatchewan from dealing unhampered with purchasers outside of Saskatchewan."

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The conceptual tool of "flow" or "current," or "stream" of commerce has been referred to by the Court in a number of subsequent cases, the most recent being *MacDonald v. Vapor Canada Ltd.* [[1977] 2 SCR 134 at 167, 1976 CanLII 181]. The real question, unsettled in the jurisprudence, is the determination of when the product enters the export stream marking the start of the process of exportation. American jurisprudence has held that the distinguishing mark of an export product is shipment or entry with a common carrier for transportation to another jurisdiction: *Coe v. Errol*, [116 US 517] at 527; *Richfield Oil Corp. v. State Board of Equalization* [329 US 69]; *Empresa Siderurgica v. Merced Co.* [337 US 154]. Implicit in the argument of the appellant is the assumption that federal regulatory power pursuant to s. 91(2) follows the flow of oil backward across provincial boundaries, back through provincial gathering systems and finally to the well-head. A secondary assumption is that sale at the well-head marks the start of the process of exportation. In the view I take of the case it is unnecessary to reach any conclusion as to the validity of either of these assumptions. It is, however, worth noting that neither American nor Canadian jurisprudence has ever gone that far.

I can find nothing in the present case to lead me to conclude that the taxation measures imposed by the Province of Saskatchewan were merely a colourable device for assuming control of extra-provincial trade. The language of the impugned statutes does not disclose an intention on the part of the Province to regulate, or control, or impede marketing or export of oil from Saskatchewan. "Oil produced and sold" means produced and sold within the Provinces. "Well-head price" by definition means the price at the well-head of a barrel of oil produced in Saskatchewan. The mineral income tax and the royalty surcharge relate only to oil produced within Saskatchewan. The transactions are well-head transactions. There are no impediments to the free movement of goods as were found objectionable in *Attorney-General for Manitoba v. Manitoba Egg & Poultry Ass'n* [[1971] SCR 689, 1971 CanLII 135], and in *Burns Foods Ltd. v. Attorney-General for Manitoba* [[1975] 1 SCR 494, 1973 CanLII 194].

Nor is there anything in the extraneous evidence to form the basis of an argument that the impugned legislation in its effect regulated interprovincial or international trade. The evidence is all to the contrary and that evidence comes entirely from witnesses called on behalf of the appellant. Production and export of oil increased after the legislative scheme was implemented. Sales of oil by the appellant were continued in 1974 as in 1973 and previously.

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It was contended in argument that the effect was to place a floor price under Saskatchewan oil and thereby interfere with interprovincial trade. So far as mineral income tax is concerned the incidence of taxation is pegged to the price received for the oil at the well-head. Section 4A is an "after-the-event" provision which comes into play only if there was a sale at less than fair value. The emphasis on fair value ensures that the tax will not change the export oil price. The price of oil subject to the tax and the price of oil free of the tax, i.e., from the exempted 1,280-acre tracts, will be the same as the product crosses the provincial border. The ultimate position of consumers is unaffected. The only way in which extra-provincial consumers could have benefited would have been in the event of the Province freezing the price of oil, assuming constitutional competence to do so.

One is free to speculate that, to the extent producers would be prepared to undercut the fair market value of their oil, the legislation discourages them from doing so by virtue of the constant tax liability. The possibility of price-cutting is highly theoretical, unsupported by evidence and in view of the inelasticity of demand for petroleum products, highly unlikely.

• • •

The Province of Saskatchewan had a *bona fide* legitimate and reasonable interest of its own to advance in enacting the legislation in question, as related to taxation and natural resources, out of all proportion to the burden, if there can be said to be a burden, imposed on the Canadian free trade economic unit through the legislation. The effect, if any, on the extra-provincial trade in oil is merely indirectly and remotely incidental to the manifest revenue-producing object of the legislation under attack.

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Appeal allowed.

NOTES AND QUESTIONS

1. Are the facts in *Canadian Industrial Gas and Oil Ltd (CIGOL)* distinguishable from those in *Carnation*? Is CIGOL more faithful, instead, to the decision in the *Manitoba Egg Reference*?

For discussion, see Patrick Monahan, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2012) at 332-34.

2. Saskatchewan ultimately paid CIGOL \$3.7 million. To safeguard the over \$500 million collected under the mineral income tax and royalty scheme, it enacted new legislation, the *Oil Well Income Tax Act*, RSS 1978, c O-3.1 (Supp), which implemented an income tax on oil well income earned after January 1, 1974: see William Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) 18:1 Osgoode Hall LJ 1 at 25.

3. If s 92A had been in force, how would it have affected the outcome of the case?

Central Canada Potash Co Ltd v Government of Saskatchewan

[1979] 1 SCR 42, 1978 CanLII 21

[Facing possible trade sanctions by the United States arising out of a complaint of dumping and a depressed market for potash, Saskatchewan instituted a potash prorationing scheme in 1969. At that time, almost all of its potash was sold outside the province, with about 64 percent marketed in the United States. The scheme was discussed with officials from New Mexico, the only US producer of potash. The scheme and its successors controlled production through licences, which prevented Central Canada Potash from fulfilling one of its contracts. The trial judge found the regulations *ultra vires*, while the Court of Appeal upheld their validity. The other issue in the case involving a claim for damages for intimidation, is omitted.]

LASKIN CJ (Martland, Ritchie, Spence, Pigeon, Dickson, and Pratte JJ concurring):

This appeal, which is here by leave of this Court, concerns (1) the validity of what I may compendiously refer to as a potash prorationing scheme, established pursuant to the *Mineral Resources Act*, R.S.S. 1965, c. 50, as amended

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What is evident from the circumstances under which the Potash Conservation Regulations were promulgated, and from the terms of the directives and licences through which the ABC and FP schemes were instituted and administered, is that the Government of Saskatchewan had in view the regulation of the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quotas. The only market for which the schemes had any significance was the export market. There could be no suggestion that the schemes had any relation to the marketing of potash within the Province of Saskatchewan when there was hardly any Saskatchewan market for the mineral. There was no question here of any concluded transactions of sale and purchase in the Province, as was the situation in [*Carnation Co Ltd v Quebec Agricultural Marketing Board*, [1968] SCR 238, 1968 CanLII 82]. Out of Province and offshore sales were the principal objects of the licences and directives.

The documentary evidence leaves no doubt about this. The first directive fixing the minimum floor price for potash to the producer, f.o.b. the potash plant, dated November 25, 1969, was stated to be for the purpose of determining the demand for it "for reasonable current requirements and current consumption or use within or without Saskatchewan." The first producing licence to Noranda, dated December 12, 1969, required the licensee to comply with "all applicable Acts, regulations, orders and directions governing production, conservation, processing, disposal, marketing, transporting ..." The second producing licence conditioned its validity on observance of the minimum selling price, f.o.b. the producer's plant in Saskatchewan.

Subsequent producing licences did not indicate any change of focus, although they forfeited ministerial control.

A directive of August 24, 1971, to all producers fixed the minimum price f.o.b. vessel, Vancouver. On August 27, 1971, a letter to producers from the Deputy Minister advised of approval given, on certain conditions, to an agreement for delivery of potash to a business organization in France. One of the conditions required that "all potash delivered to Europe from Saskatchewan pursuant to the agreement shall be for consumption in Europe." The new allocation formula prescribed by the directive of June 30, 1972, from which I have already quoted, was concerned with the sharing of production "to meet the market demand." The purpose of Canpotex, to which I have also referred above, was to make it the instrument for offshore sales of Saskatchewan potash.

In all of the foregoing, the Government of Saskatchewan, and its responsible Ministers and their Deputies, were acting not under proprietary right but in pursuance of legislative and statutory authority directed to the proprietary rights of others, including the appellant. It was strenuously contended by the respondent Government (and in this they were supported by the intervening Provinces) that the natural resources, the mineral wealth of the Province was subject to provincial regulatory control alone, and that production controls or quotas were peculiarly matters within exclusive provincial legislative authority. Chief Justice Culliton gave force to this point in two concluding paragraphs of his reasons, which he prefaced by saying that "Courts must approach constitutional problems with a sense of realism and practicality." The two paragraphs read as follows [1977 CanLII 1459, 79 DLR (3d) 203 at 234-35 (Sask CA)]:

It was admitted by all parties that the potash industry of Saskatchewan was facing difficult problems—problems which, if not solved, would have a most detrimental effect on the industry and on the Province. In these circumstances, the potash industry had a right to seek assistance from whatever Government had the power to grant that assistance. Natural resources, being exclusively within the provincial jurisdiction, the industry turned to the Province. The Province, to protect and conserve the potash industry, implemented controlled production and established minimum prices in the Province. These programmes did assist the industry but at the same time had some effect on areas within Federal jurisdiction. However, in pith and substance, they were programmes directed to a matter within Provincial jurisdiction and thus were valid notwithstanding such ultimate effects.

If I am not right in this conclusion, then it must be said the right to control production of potash within the Province and to establish a minimum price at the mine, rests with the Parliament of Canada, for the right to do so must rest somewhere. Clearly, in my opinion, the Parliament of Canada does not have the power to control the production of potash within the Province, or to set a minimum price at the mine. Thus, in my opinion, to hold that the prorationing and price stabilization programmes are *ultra vires* the Province, is to determine their validity by the ultimate effects of such programmes and not by their true nature and character.

It is, of course, true, that production controls and conservation measures with respect to natural resources in a Province are, ordinarily, matters within provincial legislative authority. This Court's reasons in its recent judgment in the *Ontario Egg Reference (Reference re Agricultural Products Marketing Act ... [since reported [1978] 2 SCR 1198, 1978 CanLII 10]*, supports that view. The situation may be different, however, where a province establishes a marketing scheme with price fixing as its central feature. Indeed, it has been held that provincial legislative authority does not extend

to the control or regulation of the marketing of provincial products, whether minerals or natural resources, in interprovincial or export trade. ...

The present case reduces itself therefore to a consideration of "the true nature and character" of the prorationing and price stabilization schemes which are before us. This Court cannot ignore the circumstances under which the Potash Conservation Regulations came into being, nor the market to which they were applied and in which they had their substantial operation. In *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan* [[1978] 2 SCR 545, 1977 CanLII 210], this Court, speaking in its majority judgment through Martland J., said (at p. 568) that "provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market." It may properly be said here of potash as it was said there of oil that "the legislation is directly aimed at the production of potash destined for export, and it has the effect of regulating the export price since the producer is effectively compelled to obtain that price on the sale of his product" (at p. 569).

I do not agree with Chief Justice Culliton that the consequence of invalidating the provincial scheme in this case is to move to the Parliament of Canada the power to control production of minerals in the Province and the price to be charged at the mine. There is no accretion at all to federal power in this case, which does not involve federal legislation, but simply a determination by this Court, in obedience to its duty, of a limitation on provincial legislative power. It is true, as he says that (with some exceptions, not relevant here) the *British North America Act* distributes all legislative power either to Parliament or to the provincial Legislatures, but it does not follow that legislation of a Province held to be invalid may *ipso facto* be validly enacted by Parliament in its very terms. It is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing. It is especially important for Courts, called upon to interpret and apply a constitution which limits legislative power, to do so in a case where not only the authorizing legislation but regulations enacted pursuant thereto are themselves couched in generalities, and the bite of a scheme envisaged by the parent legislation and the delegated regulations is found in administrative directions.

Where governments in good faith, as in this case, invoke authority to realize desirable economic policies, they must know that they have no open-ended means of achieving their goals when there are constitutional limitations on the legislative power under which they purport to act. They are entitled to expect that the Courts, and especially this Court, will approach the task of appraisal of the constitutionality of social and economic programmes with sympathy and regard for the serious consequences of holding them *ultra vires*. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern. That is the situation here.

In my opinion, the judgment of the Saskatchewan Court of Appeal on the constitutional question posed for this Court should be set aside and the declaration of invalidity by the trial Judge should be restored.

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Appeal with respect to constitutional validity allowed; declaration of invalidity by trial Judge restored.

NOTE: PROPRIETARY RIGHTS

Apart from any regulatory jurisdiction the provinces possess under ss 92, 92A, and 95, another important source of provincial authority in relation to natural resources is each

province's proprietary rights over the resources situated within the province. Section 109 of the *Constitution Act, 1867*, which applies to the four original provinces, provides:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union ... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any ... Interest other than that of the Province in the same.

The constitutional instruments by which British Columbia, Prince Edward Island, and Newfoundland were admitted to the federation similarly provide for provincial ownership of the lands and resources located within each of those provinces. Manitoba, Alberta, and Saskatchewan initially received different, less favourable treatment: when they were carved out of the Northwest Territories, ownership of the land and resources situated within those newly established provinces was retained by the federal Crown. A long political struggle followed, culminating in the 1930 Natural Resource Transfer Agreements (*Constitution Act 1930*, 20-21 Geo V, c 26 (UK), pursuant to which the three prairie provinces finally acquired resource ownership on the same terms as the others).

From forests and mines to hydroelectric energy and oil, all of the provinces have used their ownership of their resources—and the consequent power to decide whether, and on what terms, the resources may be used—as a means of achieving provincial goals.

NOTE: OFFSHORE RESOURCES

An important difference exists between resources situated within a province and those situated, for example, offshore. In *Reference Re: Offshore Mineral Rights*, [1967] SCR 792, 1967 CanLII 71, the Supreme Court held that the coastal waters off British Columbia (from the low water mark) fall outside the boundaries of the province and, therefore, are not the property of the province. Rather, they are the property of the federal Crown. On similar grounds, in *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86, 1984 CanLII 132, the Court rejected a claim by Newfoundland to ownership of offshore continental shelf rights and to legislative jurisdiction over the related resources. Specifically, regarding the jurisdictional issue, the Court held that given that the offshore area is outside the boundaries of Newfoundland (or any other province), legislative authority belongs to the federal Parliament, under POGG.

The political aftermath of the *Newfoundland Continental Shelf* decision illustrates the point that, although the law defines baseline entitlements, it is usually open to governments to reach a different arrangement through negotiation. On February 11, 1995, the Governments of Canada and of Newfoundland entered into a Memorandum of Agreement providing for the "joint management of the offshore oil and gas resources off Newfoundland and Labrador and the sharing of revenues from the exploitation of these resources" (art 1). In particular, the agreement, known as the Atlantic Accord, contemplated that Newfoundland would receive revenues in the form of taxes and royalties from offshore petroleum activities as if those activities occurred on provincial land.

NOTE: INTERPROVINCIAL PIPELINES AND PROVINCIAL ENVIRONMENTAL LAW

In addition to disputes about which level of government owns or has jurisdiction over resources, disagreements can also arise where a resource development activity has negative impacts outside the jurisdiction that primarily benefits from the activity. The controversy over the proposal to expand the Trans Mountain pipeline linking Alberta and the British Columbia coast, and the ensuing constitutional litigation, provide an example of such a conflict.

Pursuant to the *Canadian Energy Regulator Act*, SC 2019, c 28, s 10, the Canada Energy Regulator (CER) regulates pipelines in Canada that cross provincial or national borders. Parliament's jurisdiction over interprovincial and international pipelines comes from s 92(10)(a), which excludes from provincial jurisdiction the enactment of laws in relation to "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province." Federal statutes and regulations impose many obligations on federally regulated pipeline companies for the purpose of environmental protection, including the requirement for an environmental assessment prior to approval by the CER of a pipeline project, ongoing operational oversight by the CER, obligations related to spill prevention and management, and financial liability for damage caused by spills.

To what extent are interprovincial and international pipelines also subject to provincial laws of general application, such as environmental protection laws? It would seem that this question engages the interjurisdictional immunity doctrine, discussed in Chapter 8: an otherwise valid provincial law cannot be applied so as to impair the "vital part" of a federal undertaking. In the *Reference re Environmental Management Act (BC)*, however, the BC Court of Appeal determined that the provincial legislation was not merely inapplicable; it was *ultra vires*.

Reference re Environmental Management Act (BC)

2019 BCCA 181

[The Trans Mountain pipeline carries oil from Alberta to the coast of British Columbia. A proposed expansion project involves "twinning" the existing pipeline, and expanding certain related infrastructure, with the objective of increasing the capacity of the pipeline from approximately 300,000 barrels of oil per day to approximately 890,000. An application to the National Energy Board (the predecessor to the CER) for permission to undertake the project was filed in 2013 and remained pending at the time of the Reference.

The *Environmental Management Act (BC)* [EMA] is provincial legislation regulating, among other things, waste discharges, hazardous waste storage, transportation, contaminated sites, and greenhouse gas emissions. In 2018, the government of BC proposed to amend the EMA to add part 2.1, which establishes a scheme for the issuance of a "hazardous substance permit" and prohibits any person from possessing, without such a permit, more than a specified amount of any substance listed in a schedule to the legislation. The only substance listed in the schedule is "heavy oil." The Lieutenant Governor in Council referred to the BC Court of Appeal's three questions: (1) whether the proposed legislation is *intra vires*; (2) if so, whether the proposed legislation is applicable to interprovincial undertakings; and (3) if so, whether existing federal legislation would render the proposed legislation inoperative.]

NEWBURY JA (Baumann CJ and Groberman, Harris, and Fenlon JJ concurring):

[1] The protection of the environment is one of the driving challenges of our time. No part of the world is now untouched by the need for such protection; no government may ignore it; no industry may claim immunity from its constraints. This reference is not about whether the planned Trans Mountain pipeline expansion ("TMX") should be regulated to minimize the risks it poses to the environment—that is a given. Rather, this reference asks which level or levels of government may do so under our constitution, specifically ss. 91 and 92 of the *Constitution Act, 1867*. British Columbia asserts that it may regulate the pipeline in the interests of the environment—not exclusively, but to the extent that it may impose conditions on, and even prohibit, the presence of "heavy oil" in the Province unless a director under the *Environmental*

Management Act issues a "hazardous substance permit" under the proposed addition that is the subject of the reference.

[2] The Province readily acknowledges that the pipeline is an interprovincial (and therefore "federal") undertaking. However, it asserts that the expansion and operation of the pipeline as a carrier of heavy oil will have a disproportionate effect on the interests of British Columbians, as compared with other Canadians. It emphasizes that provincial environmental legislation has long affected aspects of federal undertakings without serious challenge; that the heads of power set out in ss. 91 and 92 are not "watertight compartments"; and that the Supreme Court of Canada has recognized on occasion that certain functions are best carried out by the level of government closest to the citizens affected (the principle of "subsidiarity"). The Province sees the proposed addition to the *Environmental Management Act* as relating to "Property and Civil Rights in the Province" or "Matters of a merely local or private Nature" under s. 92 of the *Constitution Act*.

[3] Canada on the other hand characterizes the addition as relating to the "matter" of "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province." It submits that its jurisdiction under ss. 91(29) and 92(10)(a) of the *Constitution Act* includes the regulation of the construction and operation of the pipeline, its route and contents, and the management of risks of environmental harm. Although Canada acknowledges that provincial environmental laws of general application may affect interprovincial undertakings "incidentally," it says the proposed addition is targeted legislation and would effectively lead to a situation of concurrent jurisdiction, contrary to the exclusive authority contemplated by the *Constitution Act*.

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[92] [Although] interjurisdictional immunity has on occasion overshadowed the determination of "pith and substance," the Supreme Court has clarified in recent years that the first task in determining the constitutional validity of legislation is to determine its "true character" or "dominant characteristic." That determination is not to be conflated with deciding whether the law "impairs" a "vital part" of the federal jurisdiction over interprovincial undertakings. If the law relates in substance to a federal head of power, that is "the end of the matter." In this case, the pith and substance of the subject legislation is indeed "the end of the matter" and it is unnecessary for us to continue on to paramountcy or interjurisdictional immunity.

[93] It is clear that federal undertakings are not "enclaves" immune from provincial environmental laws. Indeed, both levels of government have jurisdiction over aspects of the environment, and both levels have adopted complex and far-ranging legislation dealing with the prevention and mitigation of environmental harm and the remediation of and compensation for such harm, usually incorporating the principle of "polluter pays." Mr. Arvay submitted, however, that provincial jurisdiction in respect of the environment is "plenary and direct" while Parliament's jurisdiction is "derivative." He seemed to base this submission on the proposition that environmental legislation is intended to protect "property" and therefore fits directly into "Property and Civil Rights in the Province" in s. 92(13) of the *Constitution Act*. But while the provincial head of power is broad, the authorities do not support a superior or presumptive claim to jurisdiction for the provinces by reason of the role of "property"; nor do they support the notion of absolute and unqualified jurisdiction. Environmental protection is indeed "too important"—and too diffuse—to belong to one level exclusively or absolutely.

[94] I have already suggested that although Part 2.1 is framed as a law of general application, it is intended, and (more importantly) its sole effect is, to set conditions for, and if necessary prohibit, the possession and control of increased volumes of

heavy oil in the Province. Heavy oil will enter the Province only via Trans Mountain's interprovincial pipeline and railcars destined for export. The Province contended that that fact is irrelevant to the purpose of Part 2.1, and that if there were no interprovincial pipeline, there would be no doubt about the validity of the proposed law. Counsel also cautioned against confusing the "motives" of government, or any of its members, with legislative purpose. ... I agree with the latter proposition, and have been careful not to rely on extrinsic evidence contained in the ASF [Agreed Statement of Facts] that consisted of statements made by governmental officials outside the Legislative Assembly concerning the TMX project or the introduction of Part 2.1. Such statements lack the "institutional" quality that gives some assurance of relevance to the question of legislative purpose. ... I do consider that we may take judicial notice of the fact that there is currently much public discussion about the TMX project and that Part 2.1 has been brought forward at the same time as that discussion.

[95] As for the proposition that there would be no doubt about the validity of Part 2.1 in the absence of the Trans Mountain pipeline, it resolves nothing. The fact is that there is an interprovincial undertaking the purpose of which is to carry the heavy oil from outside of British Columbia to tidewater, and that while heavy oil produced and refined in this province (if there were such a thing) would have the same properties as heavy oil from Alberta or elsewhere, the *Constitution Act* distinguishes between the two in terms of regulatory authority.

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[97] I would not characterize the proposed amendment to the *EMA* as "colourable" in the sense that anything is being concealed; but the practicalities cannot be ignored. The 'default' position of the law is to prohibit the possession of all heavy oil in the Province above the Substance Threshold—an immediate and existential threat to a federal undertaking that is being expanded specifically to increase the amount of oil being transported through British Columbia. This can hardly be described as an "incidental" or "ancillary" effect. Even stopping short of prohibition, the permitting requirement may be used to impose conditions relating to the environment. This seems likely to occur in a qualitatively different manner from the manner in which the existing *EMA* [and other provincial environmental assessment] provisions operate—otherwise no new legislation would be necessary.

[98] At what point is the line crossed between valid provincial environmental legislation and the impermissible regulation of a federal undertaking? ...

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[100] [T]he Court in *Bell Canada* (1988) ... suggested that a matter that is "intrinsic to a field of federal jurisdiction" is not within provincial jurisdiction, even if it has elements of property and civil rights. (At 842.) *Canadian Western Bank* (2007) similarly referred to what makes federal undertakings "specifically of federal jurisdiction." (At paras. 51 and 57.) See also *Consolidated Fastfrate* (2009) at para. 36; *National Battlefields* (1990) at 853; and *Montcalm* (1979), where it was said that provincial legislation must not reach a federal work *qua federal organization*, or regulate it "under some primary federal aspect." (See para. 67 above; my emphasis.)

[101] In my view, Part 2.1 does cross the line between environmental laws of general application and the regulation of federal undertakings. Even if it were not intended to 'single out' the TMX pipeline, it has the potential to affect (and indeed 'stop in its tracks') the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil. It is legislation that in pith and substance relates to, and relates *only* to, what makes the pipeline "specifically of federal jurisdiction." By definition, an interprovincial pipeline is a continuous carrier of liquid across provincial borders. Indeed, in Canada the pipeline owner is subject to conditions of common

carriage across those borders: see s. 71(1) of the *National Energy Board Act*. Unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated. Notwithstanding Mr. Arvay's contention that there is "nothing wrong with a patchwork", it is simply not practical—or appropriate in terms of constitutional law—for different laws and regulations to apply to an inter-provincial pipeline (or railway or communications infrastructure) every time it crosses a border. ... [The] operation of an interprovincial pipeline would be "stymied" by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of any accidental release of oil. Jurisdiction over interprovincial undertakings was allocated exclusively to Parliament by the *Constitution Act* to deal with just this type of situation, allowing a single regulator to consider interests and concerns beyond those of the individual province(s).

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[103] ... I view environmental protection as a ... diffuse field in which both levels of government play important roles. Part 2.1, however, is unlike the *EMA* and [existing provincial environmental assessment legislation]. It is not legislation of general application, but is targeted at one substance in one (interprovincial) pipeline. Immediately upon coming into force, it would prohibit the operation of the expanded Trans Mountain pipeline in the Province until such time as a provincially-appointed official decided otherwise. This alone threatens to usurp the role of the NEB, which has made many rulings and imposed many conditions to be complied with by Trans Mountain for the protection of the environment. The approval process is still continuing. The minimization of environmental harm associated with inter-provincial undertakings is a key component of the federal "matter," and there is no authority for the 'hiving off' of damage cleanup and remediation from the prevention of mishaps in the operation and management of an interprovincial work. To the contrary, all of these aspects are part of an integrated whole.

[104] At the end of the day, the NEB is the body entrusted with regulating the flow of energy resources across Canada to export markets. Although the principle of subsidiarity has understandable appeal, the TMX project is not only a "British Columbia project." The project affects the country as a whole, and falls to be regulated taking into account the interests of the country as a whole.

[105] Both the law relating to the division of powers and the practicalities surrounding the TMX project lead to the conclusion, then, that the pith and substance of the proposed Part 2.1 is to place conditions on, and if necessary, prohibit, the carriage of heavy oil thorough an interprovincial undertaking. Such legislation does not in its pith and substance relate to "Property ... in the Province" or to "Matters of a merely local or private Nature," but to Parliament's jurisdiction in respect of federal undertakings under s. 92(10) of the *Constitution Act*. Contrary to Mr. Arvay's submission, this conclusion does not reflect a 'sea change' in the law, a return to 'watertight' compartments of jurisdiction or a diminution of co-operative federalism. Rather it reflects the more basic principle that ss. 91 and 92 provide for "exclusive" heads of power that have substantive content.

[106] I would therefore answer 'no' to the first question on the reference. In light of this answer to the first question, it is unnecessary to answer the latter two questions.

NOTES AND QUESTIONS

1. The Court took pains to suggest that its conclusion did not depend on colourability, or even on a finding that the purpose of part 2.1 was to interfere with interprovincial pipelines. Instead, the effects of the legislation seem to have been dispositive. As you know from *Morgentaler* (1993) and other cases, there is a distinction between “legal effects” and “practical effects.” Did the Court’s characterization of part 2.1 rest on legal effects, practical effects, or both?
2. The hurdle should be greater for a finding that legislation is invalid than for a finding that the legislation, although valid in most of its applications, cannot validly be applied to a particular undertaking. In this case, was there any difference between what the Court identified as the basis for its finding that the law is *ultra vires* and what would have needed to be shown in order to sustain a finding of constitutional inapplicability under the doctrine of interjurisdictional immunity?
3. An appeal to the Supreme Court of Canada was dismissed. In an unusual move, the Court issued its judgment directly from the bench at the conclusion of the hearing. It unanimously adopted the reasons of the Court of Appeal: *Reference re Environmental Management Act*, [2020 SCC 1](#).

CHAPTER ELEVEN

CRIMINAL LAW AND PROCEDURE

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I. FEDERAL POWERS OVER CRIMINAL LAW AND PROCEDURE

Section 91(27) of the *Constitution Act, 1867* assigns responsibility over criminal law and criminal procedure to the federal Parliament, a choice embraced by many other modern federations, such as South Africa and Brazil. Other federations—notably, the United States and Australia—have made criminal law a state responsibility, opting for local rather than national standards for defining and prosecuting criminal activities. Canada, however, is unusual in assigning the criminal law power to a different level of government from the power over property and civil rights. This division began with the *Quebec Act, 1774*, 14 Geo III, c 83 (UK), which provided that although Quebec would follow the “Criminal Law of England,” French civil law would govern disputes about “Property and Civil Rights.” The division gives rise to complicated questions about the interplay between the two heads of power.

This chapter explores two issues about the choice to make criminal law an area of national rather than local standards: (1) the scope of the federal power over criminal law and procedure; and (2) the extent to which the interpretation of this federal power has constrained provincial attempts, using the ss 92(13) and (16) heads of power, to control local conditions of public order and safety; impose local standards of morality; and design various methods for enforcing local standards.

On the first issue, the scope of the federal criminal power, Allan Hutchinson and David Schneiderman have commented:

The federal government’s “exclusive” jurisdiction under section 91(27) has always been a difficult and dynamic category of power to circumscribe: its scope is potentially limitless and can subvert the division of powers between the federal and provincial legislatures. With succinct understatement, Justice Estey was close to the mark when he noted [*in Scowby v Glendinning, [1986] 2 SCR 226 at 236, 1986 CanLII 30*] that “criminal law is easier to recognize than to define.” In seeking to set some guidelines and limits, the courts have tended to swing between unrealistically narrow and broad interpretations. Striking a considered and consistent balance has proved an elusive task for the courts.

See Allan Hutchinson and David Schneiderman, “Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies” (1995) 7 Const Forum Const 16 at 16.

As Hutchinson & Schneiderman note, s 91(27) has experienced fairly dramatic shifts in interpretation. Recall that in *Canada (AG) v Alberta (AG)*, [\[1921\] CanLII 399, \[1922\] 1 AC 191 \(UKJCPC\)](#) [Reference re the Board of Commerce Act], excerpted in Chapter 5, The Early Twentieth Century: Beginnings of Economic Regulation, Lord Haldane interpreted the criminal law power as “enabling the Dominion Parliament to exercise exclusive legislative power

where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence" (at 518). He gave incest as an example and, applying this restrictive definition, concluded that the federal *Combines and Fair Prices Act* was not an exercise of the criminal law power. Subsequently, in *Proprietary Articles Trade Association v Canada (AG)*, [1931 CanLII 385, \[1931\] AC 310 \(UKJCPC\)](#), excerpted in Chapter 6, The 1930s: The Depression and the New Deal, Lord Atkin rejected a narrow definition of criminal law that would be restricted to matters that, because of their inherent nature, have traditionally fallen within the domain of criminal jurisprudence. He offered instead a wide definition of criminal law that included all acts that, at any particular period of time, are prohibited with penal sanctions. Applying this definition, he concluded that the federal *Combines Investigation Act*, 1927 was a valid exercise of the criminal law power.

The modern starting point for any discussion of the federal criminal law power is the judgment of Rand J in the *Margarine Reference*, immediately below. Concerned with the impact of a purely formal definition of criminal law in a federal system, Rand J emphasized the need for a criminal purpose, in addition to the formal requirements of prohibition and penalty, in order for a federal law to be upheld as an exercise of the criminal law power.

Reference re Validity of Section 5(a) of the Dairy Industry Act

[\[1949\] SCR 1, 1984 CanLII 2 \[Margarine Reference\]](#)

RAND J:

His Excellency in Council has referred to this Court the following question:

Is section 5(a) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, ultra vires of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

The section is as follows:

5. No person shall
 - (a) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

[Justice Rand then traced the history of this provision, finding its origins in legislation enacted in 1886 that banned the manufacture and sale of butter substitutes and that included a preamble stating that butter substitutes were harmful to health.]

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But whatever might have been the case of the 1886 legislation, the situation now is that not only has the preamble disappeared, but its recital of fact is admittedly no longer true [of] either margarine or oleomargarine. It is conceded that both of them ... are substantially as nutritious, possess as much energy value and are as free from deleterious effects as butter itself

The appearance of the provision in a statute dealing comprehensively with the dairy industry and the inclusion of prohibition of importation, the ordinary mode of protection of industry in its ultimate form, are, for this initial purpose, of considerable significance. On the other hand, the scope and importance of agriculture in the economy of this country, the part played by the dairy industry as an essential branch of it, and the desirability of maintaining a market demand for butter to meet the seasonal exigencies of that industry, are beyond controversy. What, then, in that whole background is the true nature of the enactment?

Mr. Varcoe argues that it is simply a provision of criminal law, a field exclusively Dominion, and the issue, I think, depends upon the validity of that contention. In *The Proprietary Articles Trade Association v. Attorney-General of Canada* [1931 CanLII 385, [1931] AC 310 (UKJCPC)], Lord Atkin rejected the notion that the acts against which criminal law is directed must carry some moral taint. A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

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Criminal law is a body of prohibitions; but that prohibition can be used legislatively as a device to effect a positive result is obvious; we have only to refer to Adam Smith's *Wealth of Nations* ... to discover how extensively it has been used not only to keep foreign goods from the domestic market but to prevent manufactures in the colonies for the benefit of home industries The Court in its enquiry is not bound by the *ex facie* form of the statute; and in the ordinary sense of the word, the purpose of a legislative enactment is generally evidential of its true nature or subject matter Under a unitary legislature, all prohibitions may be viewed indifferently as of criminal law, but as the cases cited demonstrate, such a classification is inappropriate to the distribution of legislative power in Canada.

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to particular trade within the provinces

The public interest in this regulation lies obviously in the trade effects: it is annexed to the legislative subject-matter and follows the latter in its allocation to the one or other Legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction. [Here] there is nothing of a general or injurious nature to be abolished or removed; it is a matter of preferring certain local trade to others.

[Justice Rand then went on to conclude that the prohibition of the manufacture, possession, and sale of margarine was *ultra vires* Parliament, because it could not be upheld under either the criminal law power or the trade and commerce power. However, he concluded that the prohibition of importation could be upheld under the federal government's power to regulate foreign trade, and that it could stand on its own apart from the remainder of the legislation. Justices Taschereau, Kellock, and Estey wrote concurring judgments; Locke J concurred in part; Rinfret CJ and Kerwin J dissented.]

Question answered in the affirmative.

The judgment of the Supreme Court of Canada in the *Margarine Reference* was affirmed by the Privy Council: *Reference re Validity of Section 5(a) of the Dairy Industry Act, Canadian Federation of Agriculture v AG of Quebec*, [1950 CanLII 342](#), [1951] AC 179.

NOTES AND QUESTIONS

1. Why did it seem so apparent to Rand J that there was no “public” interest informing protection of the dairy industry? Could it not be argued that a healthy dairy industry was an important component of the overall Canadian economy, and hence a benefit to all Canadians? Or is giving a competitive advantage to one industry over another—in this case, the dairy industry over the margarine industry—a choice that should be authorized and justified, if possible, under Parliament’s economic powers, not its criminal law power? Should it matter if authorization under economic powers is not possible, as Rand J held in this case?

2. Margarine may be the only consumer product with its own constitutional provision. When Newfoundland joined Confederation in 1949, s 46 of the Terms of Union (being the Schedule to the *Newfoundland Act*, 12 & 13 Geo IV, c 22 (UK)) specifically permitted the new province to continue manufacturing and selling margarine without federal interference, a protection of local margarine production that benefited the vital fishing industry (as marine oil was used in margarine produced in Newfoundland) as well as impoverished Newfoundland consumers. The provision was deemed necessary in light of the economic and political context of margarine production. From the time of margarine’s development in the mid-1870s as a safe and inexpensive alternative to butter, its production had generated controversial legislative controls, typically at the behest of dairy producers. In addition to the federal ban in Canada on margarine production and sale that began in the 1880s (although lifted during and immediately after the First World War, when butter was in short supply), which was invalidated in the *Margarine Reference*, most governments across North America regulated margarine in such a way as to make its consumption less desirable, such as imposing heavy taxes and licensing fees and forbidding margarine to be dyed pale yellow (and, in several American states, requiring it to be coloured pink). As Ruth Dupré pointed out, the restrictions had a disproportionately negative effect on people who could not afford to purchase butter: see Ruth Dupré, “If It’s Yellow, It Must Be Butter: Margarine Regulation in North America Since 1886” (1999) *J Economic Hist* 353. Although the *Margarine Reference* declared the federal prohibition to be *ultra vires*, provincial regulation of margarine, especially its colour, continued into modern times in several provinces with large dairy industries. In *UL Canada Inc v Quebec (AG)*, [2005 SCC 10](#), the Supreme Court unanimously upheld provincial regulation of margarine colour as a valid exercise of provincial power over property and civil rights. (It also rejected a challenge to the regulation based on freedom of expression). Recently, however, the remaining regulations about margarine colour have been repealed. The margarine and butter wars appear to be over.

3. Despite the constraint of “a public purpose which can support it as being in relation to criminal law” (at 50) imposed in the *Margarine Reference*, the criminal law power has remained broad and has been relied on by the federal government in enacting a vast array of regulatory legislation beyond the *Criminal Code*, including environmental and health and safety legislation, as well as combines legislation. Between the *Margarine Reference* and *Reference re Assisted Human Reproduction Act*, [2010 SCC 61](#), excerpted below, there have been relatively few occasions where federal laws that meet the formal requirements of criminal law—that is, prohibition and penalty—have been found invalid because of the absence of a criminal law purpose. One such occasion was a notable trilogy of decisions released between 1979 and 1981. The first two cases concerned economic regulation enforced by criminal sanctions. In *Dominion Stores Ltd v R*, [\[1980\] 1 SCR 844](#), [1979 CanLII 57](#), Estey J, writing for a narrow majority of the Court, held that federal legislation creating national grade names and

standards for agricultural products, which left the use of the grade names voluntary in intra-provincial trade, but made it an offence not to comply with the standards if the grade names were used, was marketing legislation involving no criminal purpose. Shortly after, in *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914, 1979 CanLII 190, discussed further in Chapter 10, Federalism and the Economy, Estey J, writing the plurality opinion of a badly fractured Court—it issued five separate opinions—refused to find federal commodity standards for food valid under the criminal law power, concluding that there was no consumer protection purpose because the legislation was not directed at either the adulteration of food or false or misleading advertising or labelling. In that case, the form of the law, dealing as it did with the “detailed regulation of the brewing industry in the production and sale of its product” (at 915), may also have contributed to the Court’s reluctance to characterize the legislation as criminal law. Finally, in *Boggs v R*, [1981] 1 SCR 49, 1981 CanLII 39, Estey J, writing for a unanimous Court, struck down a section of the *Criminal Code* that made it an offence to drive while one’s provincial driver’s licence was suspended. Licence suspensions could be imposed not only for violations of the *Criminal Code* but also for breach of various provincial regulations and failure to pay taxes, judgments, and other fees. Justice Estey concluded that there was no discernible community interest in the criminalization of the administration of such provincial regulatory schemes.

4. Many years later, in *Ward v Canada (AG)*, 2002 SCC 17, a regulation enacted under the federal *Fisheries Act*, RSC 1985, c F-14 that prohibited the sale of young harp seals and hooded seals was found not to be sustainable under the criminal law power because the legislative history suggested that the legislation was enacted to manage the fisheries, not to criminalize the killing or sale of seals. The regulation sought to eliminate the large-scale killing and commercial hunting of the young seals because the international reaction to the harvest was threatening the markets for Canadian fish products abroad, and hence the economic viability of the Canadian fishery. The regulation was upheld, however, under the fisheries power. The most recent example of a federal law failing to satisfy the test of criminal purpose is *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, excerpted below, in which a divided Court found most parts of the *Assisted Human Reproduction Act*, SC 2004, c 2, to be *ultra vires*. As in *Labatt Breweries of Canada Ltd v AG Canada*, above, there were also problems with the form of the law.

5. In *R v Malmo-Levine; R v Caine*, 2003 SCC 74, the Court upheld the prohibition of possession of marijuana in the *Narcotic Control Act*, SC 1960-61, c 35 as a valid exercise of the criminal law power on the basis that the protection of vulnerable groups from self-inflicted harms was a valid public purpose within the meaning of the *Margarine Reference*. It defended this characterization in the following terms:

[76] The purpose of the NCA [Narcotic Control Act, SC 1960-61, c 35] fits within the criminal law power, which includes the protection of vulnerable groups: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 595.

[77] The protection of vulnerable groups from self-inflicted harms does not, as [the appellant] argues, amount to no more than “legal moralism.” Morality has traditionally been identified as a legitimate concern of the criminal law ([*Labatt Breweries of Canada Ltd v AG Canada*, [1980] 1 SCR 914, 1979 CanLII 190], at p. 933) although today this does not include mere “conventional standards of propriety” but must be understood as referring to societal values beyond the simply prurient or prudish . . . The protection of . . . chronic users . . . and adolescents who may not yet have become chronic users, but who have the potential to do so, is a valid criminal law objective. In *R v. Hydro-Québec* [[1997] 3 SCR 213, 1997 CanLII 318], the Court held at para. 131 that “Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power.” . . . In our view, the control of a “psychoactive drug” that “causes alteration of mental function”

clearly raises issues of public health and safety, both for the user as well as for those in the broader society affected by his or her conduct.

Do you agree?

In the first three decisions excerpted below—*RJR MacDonald Inc v Canada (AG)*, *R v Hydro-Québec*, and *Reference re Firearms Act (Can)*—the Supreme Court of Canada provides strong confirmation of the broad scope of the federal criminal law power. As you read the cases, note the ways in which the Supreme Court applies the tests of both purpose and form. In the fourth decision below, *Reference Re Assisted Human Reproduction Act*, a narrow majority of the Court drew back from further expansion of the criminal law power. A fifth decision, *Re Genetic Non-Discrimination Act*, demonstrates the crucial role that characterization plays in the analysis of validity under s 91(27), as well as continuing concerns on the part of some members of the Supreme Court that further refinement of the purpose requirement is needed in order to prevent federal legislative jurisdiction under s 91(27) from being effectively without limits.

RJR-MacDonald Inc v Canada (AG)

[1995] 3 SCR 199, 1995 CanLII 64

[The *Tobacco Products Control Act*, SC 1988, c 20 was enacted by Parliament in 1988. The purpose of the Act was set out in s 3, which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
 - (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
 - (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
 - (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Act prohibited all advertising and promotion of tobacco products offered for sale in Canada, with an exemption for advertising of foreign tobacco products in imported publications. As well, the legislation required the display of unattributed health warnings on all tobacco products and precluded manufacturers from putting other information on tobacco products. Violation of the provisions of the Act constituted an offence punishable by way of summary conviction or indictment, with penalties ranging in seriousness from a fine not exceeding \$2,000 or six months' imprisonment to a fine not exceeding \$300,000 or two years' imprisonment.

Two tobacco companies sought declarations that the law was *ultra vires* Parliament as an intrusion into provincial jurisdiction over advertising grounded in ss 92(13) or (16) of the *Constitution Act, 1867* and that it infringed freedom of expression guaranteed by s 2(b) of the Charter. A majority of the Supreme Court of Canada found the legislation *intra vires* as a legitimate exercise of the criminal law power, but then went on to declare its central provisions of no force and effect as an unjustifiable infringement of freedom of expression. Only those portions of the judgment dealing with the federalism issue are reproduced here. On that issue, the trial judge had found the legislation to be *ultra vires* because it was in relation to the control of

advertising, a provincial matter under ss 92(13) and (16). The Quebec Court of Appeal concluded that the legislation was *intra vires*, finding that, although it could not be sustained under the criminal law power, it was a valid exercise of Parliament's power to legislate for the peace, order, and good government (POGG) of Canada in a matter of national concern.]

La FOREST J (Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, McLachlin, and Iacobucci JJ concurring) (dissenting):

[28] ... The criminal law power is plenary in nature and this Court has always defined its scope broadly. ... In developing a definition of the criminal law, this Court has been careful not to freeze the definition in time or confine it to a fixed domain of activity In *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (PATA), at p. 324, the Privy Council defined the federal criminal law power in the widest possible terms to include any prohibited act with penal consequences. Subsequent to that decision, this Court recognized that the Privy Council's definition was too broad in that it would allow Parliament to invade areas of provincial legislative competence colourably simply by legislating in the proper form [The] necessary adjustment was introduced in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*). Rand J. drew attention ... to the need to identify the evil or injurious effect at which a penal prohibition was directed. ...

[29] Taking into account the broad definition of the criminal law developed by this Court, I am satisfied that the Act is, in pith and substance, criminal law From a plain reading of the Act, it seems clear that Parliament's purpose in enacting this legislation was to prohibit three categories of acts: advertisement of tobacco products (ss. 4 and 5), promotion of tobacco products (ss. 6 to 8) and sale of tobacco products without printed health warnings (s. 9). These prohibitions are accompanied by penal sanctions under s. 18 of the Act, which, as Lord Atkin noted in PATA ... creates at least a *prima facie* indication that the Act is criminal law. However, the crucial further question is whether the Act also has an underlying criminal public purpose in the sense described by Rand J. in the *Margarine Reference*. ...

[30] In these cases, the evil targeted by Parliament is the detrimental health effects caused by tobacco consumption. This is apparent from s. 3, the Act's "purpose" clause Quite clearly, the common thread running throughout the three enumerated purposes ... is a concern for public health and, more specifically, a concern with protecting Canadians from the hazards of tobacco consumption. This is a valid concern. A copious body of evidence was introduced at trial demonstrating convincingly, and this was not disputed by the appellants, that tobacco consumption is widespread in Canadian society and that it poses serious risks to the health of a great number of Canadians.

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[32] It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills. Given this fact, can Parliament validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use? In my view, there is no question that it can. "Health," of course, is not an enumerated head under the *Constitution Act, 1867*. As Estey J. observed in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142:

... "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial

legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.

Given the “amorphous” nature of health as a constitutional matter, and the resulting fact that Parliament and the provincial legislatures may both validly legislate in this area, it is important to emphasize once again the plenary nature of the criminal law power. In the *Margarine Reference* ... Rand J. made it clear that the protection of “health” is one of the “ordinary ends” served by the criminal law, and that the criminal law power may validly be used to safeguard the public from any “injurious or undesirable effect.” The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a “colourable” intrusion upon provincial jurisdiction, then it is valid as criminal law. ...

[33] As I have indicated, it is clear that this legislation is directed at a public health evil and that it contains prohibitions accompanied by penal sanctions. Is it colourable? In my view, it is not. Indeed, it is difficult to conceive what Parliament’s purpose could have been in enacting this legislation apart from the reduction of tobacco consumption and the protection of public health. ... [I]f Parliament’s intent had been to regulate the tobacco industry as an industry, and not merely to combat the ancillary health effects resulting from tobacco consumption, then it would surely have enacted provisions that relate to such matters as product quality, pricing and labour relations [T]here is no evidence in the present cases that Parliament had an ulterior motive in enacting this legislation, or that it was attempting to intrude unjustifiably upon provincial powers under ss. 92(13) and (16). It thus differs from the *Margarine Reference* ... where the prohibition was not really directed at curtailing a public evil, but was in reality, in pith and substance, aimed at regulating the dairy industry.

[34] Why, then, has Parliament chosen to prohibit tobacco advertising, and not tobacco consumption itself? In my view, there is a compelling explanation for this choice. It is not that Parliament was attempting to intrude colourably upon provincial jurisdiction but that a prohibition upon the sale or consumption of tobacco is not a practical policy option at this time. It must be kept in mind that the very nature of tobacco consumption makes government action problematic. ... Given the addictive nature of tobacco products, and the fact that over one-third of Canadians smoke, it is clear that a legislative prohibition on the sale and use of tobacco products would be highly impractical. ... As legislators in this country discovered earlier in the century, the prohibition of a social drug such as tobacco or alcohol leads almost inevitably to an increase in smuggling and crime.

[35] However, the mere fact that it is not practical or realistic to implement a prohibition on the use or manufacture of tobacco products does not mean that Parliament cannot, or should not, resort to other intermediate policy options. ...

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[39] ... This Court has long recognized that Parliament may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health, and that Parliament may also validly impose labelling and packaging requirements on dangerous products with a view to protecting public health. ...

[Reference is then made to a number of cases, including *R v Wetmore*, [1983] 2 SCR 284, 1983 CanLII 29, in which offences under the federal *Food and Drug Act* of

manufacturing drugs under unsanitary conditions and deceptive labelling of drugs were upheld as criminal law.]

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[41] Moreover, in my view ... the federal criminal law power to legislate with respect to dangerous goods also encompasses the power to legislate with respect to health warnings on dangerous goods. Since health warnings serve to alert Canadians to the potentially harmful consequences of the use of dangerous products, the power to prohibit sales without these warnings is simply a logical extension of the federal power to protect public health by prohibiting the sale of the products themselves. ...

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[43] From the foregoing, it is clear that Parliament could, if it chose, validly prohibit the manufacture and sale of tobacco products under the criminal law power on the ground that these products constitute a danger to public health. Such a prohibition would be directly analogous to the prohibitions on dangerous drugs and unsanitary foods or poisons. ... In my view, once it is accepted that Parliament may validly legislate under the criminal law power with respect to the manufacture and sale of tobacco products, it logically follows that Parliament may also validly legislate under that power to prohibit the advertisement of tobacco products and sales of products without health warnings. In either case, Parliament is legislating to effect the same underlying criminal public purpose: protecting Canadians from harmful and dangerous products.

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[45] The foregoing considerations, it seems to me, are sufficient to establish that the pith and substance of the Act is criminal law for the purpose of protecting public health and that Parliament accordingly has the legislative authority under s. 91(27) of the *Constitution Act, 1867* to enact this legislation. However, I think it right to address directly the three principal arguments raised by the appellants in support of their submission that the Act is not valid as criminal law

i. Affinity of the Act with a Traditional Criminal Law Concern

[46] The appellants' first argument is that the Act is not a valid exercise of the criminal law power because it does not involve conduct having an affinity with a traditional criminal law concern. The appellants observe that both tobacco consumption and tobacco advertising have always been legal in this country and, on this basis, argue that this legislation does not serve a "public purpose commonly recognized as being criminal in nature"

[47] In my view, this argument fails because it neglects the well-established principle that the definition of the criminal law is not "frozen as of some particular time." ... It has long been recognized that Parliament's power to legislate with respect to the criminal law must, of necessity, include the power to create new crimes.

[Justice La Forest then quickly dealt with the second argument that Parliament cannot criminalize an activity ancillary to an "evil" if it does not criminalize the "evil" itself, emphasizing once again that Parliament is allowed to choose a "circuitous path" (at para 51) to accomplish its goals as long as the goals are constitutionally valid. In this case, Parliament's underlying purpose was clearly to eradicate the practice of tobacco consumption.]

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iii. The Creation of Exemptions Under the Criminal Law Power

[52] The appellants' third argument is that the Act is fundamentally regulatory, not criminal, in nature. In support of this argument, they observe that the Act contains exemptions for publications and broadcasts originating outside Canada. ... The practical effect of these exemptions, the appellants argue, is that the very same act can be legal when committed by one party in Canada but illegal when committed by another.

[53] In my view, this argument fails because it disregards the long-established principle that the criminal law may validly contain exemptions for certain conduct without losing its status as criminal law. As early as 1959, in *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497, this Court held that the *Lord's Day Act*, R.S.C. 1952, c. 171, which prohibited gambling on Sunday, was a valid exercise of the criminal law power despite the fact that s. 6 of that Act created an exemption for provinces which had passed legislation to the contrary. ...

[54] This principle was reiterated in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, where this Court addressed the constitutionality of s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34. Under s. 251(1) of the Code, the intentional procurement of a miscarriage was declared to be unlawful. However, under s. 251(4) and (5), Parliament had also created an exemption for miscarriages carried out by qualified medical practitioners where the life of the woman was in danger. Laskin CJ, dissenting in the result but not on this issue, made it clear that the creation of such an exemption did not detract from the validity of the provision as criminal law, at p. 627:

I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation. ...

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[56] The clear implication of this Court's decisions ... is that the creation of a broad status-based exemption to criminal legislation does not detract from the criminal nature of the legislation. On the contrary, the exemption helps to define the crime by clarifying its contours. In my view, this is precisely what Parliament has done in creating exemptions under the Act. The crime created by Parliament is the advertisement and promotion of tobacco products offered for sale in Canada. Rather than diluting the criminality of these acts, the exemptions to which the appellants refer serve merely to delineate the logical and practical limits to Parliament's exercise of the criminal law power in this context. For example, it is clear that the exemption for foreign media under s. 4(3) was created to avoid both the extraterritorial application of Canadian legislation and the page-by-page censorship of foreign publications at the border. ... Given the fact that foreign tobacco products comprise less than 1 percent of the Canadian market, it is apparent that the exemption has an extremely limited scope. ...

[57] For all the foregoing reasons, I am of the view that the Act is a valid exercise of the federal criminal law power. ...

MAJOR J (Sopinka J concurring) (dissenting):

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[195] It is undisputed that Parliament may legislate with respect to hazardous, unsanitary, adulterated and otherwise dangerous foods and drugs pursuant to its power to legislate in the field of criminal law.

[196] It follows that Parliament can require manufacturers to place warnings on tobacco products which are known to have harmful effects on health. Manufacturers of tobacco products are under a duty to disclose and warn of the dangers inherent

in the consumption of tobacco products. Failure to place warnings on tobacco products can validly constitute a crime, a "public wrong" which merits proscription and punishment and ought to be suppressed as "socially undesirable conduct" . . . Section 9 of the *Tobacco Products Control Act* [requiring the display of unattributed health warnings] . . . falls within Parliament's power under s. 91(27) of the *Constitution Act, 1867*.

[197] However, I do not agree that Parliament under its criminal law power is entitled to prohibit *all* advertising and promotion of tobacco products and restrict the use of tobacco trademarks . . .

[Justice Major then discussed the requirement of a "typically criminal public purpose" (at para 198) and referred to cases where that test was not satisfied—the *Margarine Reference*, *Labatt Breweries*, and *Boggs*. (The latter two cases are discussed in the notes following the *Margarine Reference*.) These cases are read as standing for the principle that "although Parliament's power to legislate in the field of criminal law is broad, it is subject to constitutional limits" (at para 199).]

[200] A definitive and all-encompassing test to determine what constitutes a "criminal offence" remains elusive but the activity which Parliament wishes to suppress through criminal sanction must pose a significant, grave and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the criminal law power. While there is a range of conduct between the most and less serious, not every harm or risk to society is sufficiently grave or serious to warrant the application of the criminal law.

[201] The heart of criminal law is the prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole. . . [A] crime is a public wrong involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. Matters which pose a significant and serious risk of harm or which cause significant and serious harm to public health, safety or security can be proscribed by Parliament as criminal.

[202] Consequently, lesser threats to society and its functioning do not fall within the criminal law, but are addressed through non-criminal regulation, either by Parliament or provincial legislatures, depending on the subject matter of the regulation.

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[204] . . . I agree that criminal law is not frozen in time. . . I disagree that affinity with a traditional criminal law concern has no part to play in the analysis, whether the conduct proscribed by Parliament has an affinity with a traditional criminal law concern is a starting point in determining whether a particular matter comes within federal criminal competence. . .

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[208] The objective of the advertising ban and trade mark usage restrictions . . . is to prevent Canadians from being persuaded by advertising and promotion to use tobacco products. I respectfully disagree with La Forest J. that this type of persuasion constitutes criminal conduct.

[209] Tobacco advertising and promotion may encourage some people to start or to continue to smoke. For that reason, it is viewed by many as an undesirable form of commercial expression. I do not disagree that it may be an undesirable form of expression, but is this undesirability sufficient to make such expression criminal? Does tobacco advertising pose a significant, grave and serious danger to public health? Or does it simply encourage people to consume a legal but harmful product? I cannot agree that the commercial speech at issue poses such a significant, grave

and serious danger to public health to fall within the purview of the federal criminal law power. In my opinion, the Act is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of Parliament's criminal law power. Legislation prohibiting all advertising of a product which is both legal and licensed for sale throughout Canada lacks a typically criminal public purpose and is *ultra vires* Parliament under s. 91(27) of the *Constitution Act, 1867*. ...

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[212] Since Parliament has chosen not to criminalize tobacco use, it is difficult to understand how tobacco advertising can somehow take on the character of criminal activity. The Act does not deal in any way with the regulation or prohibition of dangerous products or drugs. The underlying "evil" of tobacco use which the Act is designed to combat remains perfectly legal. Tobacco advertising is in itself not sufficiently dangerous or harmful to justify criminal sanctions. In my view, it is beyond Parliament's competence to criminalize this type of speech where Parliament has declined to criminalize the underlying activity of tobacco use.

[213] On a final note, La Forest J. addressed the exemptions contained within the Act, most notably the exemption for foreign periodicals. He concluded that notwithstanding the exemptions, tobacco advertising still constitutes criminal law. I disagree. ... While exemptions do not necessarily take a statute out of criminal law, broadly based exemptions are a factor which may lead a court to conclude that the proscribed conduct is not truly criminal. Both *Morgentaler* (dealing with abortion) and *Furtney* (dealing with gambling) involved conduct which has traditionally been viewed as criminal. The exemptions could not be described as "broadly based." ...

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[215] In these appeals, McLachlin J. notes that despite the advertising ban, 65 percent of the Canadian magazine market will contain tobacco advertisements, given that the ban applies only to Canadian media and not to imported publications. The exemptions for advertising cannot be seen as being limited in nature because most Canadians will be exposed to advertising for tobacco products in newspapers, magazines and so forth. It is hard to understand how the respondent on the one hand claims that nothing short of a total ban will accomplish the goal of reducing tobacco consumption while at the same time the Act allows a very significant amount of advertising to enter the country. It is difficult to imagine how tobacco advertising produced by the United States or other countries and distributed in Canada through publications somehow becomes criminal when produced and distributed by Canadians. The broadly based exemptions contained in the Act, combined with the fact that the Act does not engage a typically criminal public purpose, leads to the conclusion that the prohibitions on advertising cannot be upheld as a valid exercise of Parliament's criminal law power.

[216] The Act, except for s. 9 and its associated provisions relating to mandatory health warnings on tobacco packaging, cannot be upheld as valid criminal legislation. The Act is a regulatory measure aimed at decreasing tobacco consumption. While Parliament's desire to limit tobacco advertising may be desirable, its power to do so cannot be found in s. 91(27) of the *Constitution Act, 1867*.

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Appeal allowed.

NOTES AND QUESTIONS

1. The excerpt from the majority opinion begins with La Forest J's statement that the criminal law power "is plenary in nature." What does it mean to describe a power as "plenary"? Ian

Lee suggests that a plenary power is one that is not carved out from a broader concept. He notes, for example, that the federal power over bills of exchange and promissory notes in s 91(18) is a carve-out from the provincial power over property and civil rights, and that the provincial power in s 92(15) to impose penalties for violations of provincial laws is a "subtracted subset" of the broader concept of criminal law: see Ian Lee, "Case Comment" (2011) 90 Can Bar Rev 469 at 482. In the *Firearms Reference*, excerpted below, the Supreme Court of Canada explicitly rejected the argument that the federal criminal law power was a subtraction from the provincial power over property and civil rights.

2. The definition and scope of "criminal procedure" in s 91(27) has received relatively scant attention. In *The Queen v Zelensky*, [1978] 2 SCR 940, 1978 CanLII 8, the constitutionality of the *Criminal Code*'s compensation and restitution provisions were before the Court for the first time. In upholding the provisions, the Court recognized the wide scope of the federal powers over both criminal law and criminal procedure. In the *Firearms Reference*, the Court stated that criminal law "includes criminal procedure, which regulates many aspects of criminal law enforcement, such as arrest, search and seizure of evidence, the regulation of electronic surveillance and the forfeiture of stolen property" (at para 28). In *Chatterjee v Ontario (AG)*, 2009 SCC 19, excerpted below, the Court noted that criminal procedure "in general refers to the means by which an allegation of a particular criminal offence is proven against a particular offender" (at para 4). By its express terms, however, s 91(27) does not include the "Constitution of Courts of Criminal Jurisdiction," a matter specifically given to the provinces in s 92(14) as part of the "Administration of Justice in the Province." Would it matter if "Constitution of Courts of Criminal Jurisdiction" in s 92(14) is treated as a carve-out from the federal power over criminal procedure? Or should criminal procedure be treated as a carve-out from the provincial power in s 92(14) over the "Administration of Justice in the Province"? In light of the extensive rights in criminal proceedings that are now contained in the Charter, has the answer acquired greater or lesser importance?

NOTE: THE REQUIREMENT OF A CRIMINAL FORM

One main constraint on the federal criminal law power has been that of form—the standard form of criminal law is a prohibition and penalty enforced by courts. The presence of regulatory features in a federal law—for example, powers of licensing and prior inspection, involvement of an administrative agency exercising discretionary authority in the administration of the law, detailed regulation, and civil remedies—may engage property and civil rights in a way that makes the law incapable of being upheld as an exercise of the criminal power. However, in cases where the courts have found a clear criminal law purpose, they have allowed some deviation from the strict form of prohibition and penalty. In *RJR MacDonald*, a majority of the Court found that the presence of exemptions did not preclude a finding that the legislation was criminal law. The majority also referred to cases establishing the federal government's undisputed power to regulate unsafe food and products under the criminal law power. In *R v Cosman's Furniture (1972) Ltd*, 1976 CanLII 1279, 73 DLR (3d) 312 (Man CA), for example, detailed regulations setting out standards for the manufacture of babies' cribs and cradles, made pursuant to the federal *Hazardous Products Act*, which made it an offence to manufacture or sell products that did not conform to the safety standards set in the regulations, were found to be a valid exercise of the criminal law power because they were directed at safeguarding the health and security of infants. In *R v Hydro-Québec*, which follows, the Supreme Court of Canada went even further in finding that a regulatory scheme with a large measure of ministerial discretion satisfied the formal requirements of criminal law.

Remedies that are ancillary to criminal prohibitions have also been upheld under the criminal law power. For example, in *R v Zelensky*, noted above, the Supreme Court of Canada upheld a provision of the *Criminal Code* authorizing a court to order an accused found guilty

of an indictable offence to pay compensation to the victim on the basis that such an order was a functional part of sentencing, which is an integral component of the criminal law power. In *Goodyear Tire & Rubber Co of Canada v R*, [1956] SCR 303, 1956 CanLII 4, the Court upheld a provision allowing courts to make an order prohibiting the repetition of competition offences. In *Industrial Acceptance Corp Ltd v The Queen*, [1953] 2 SCR 273, 1953 CanLII 50, it upheld federal forfeiture provisions relating to property used in the commission of crimes as an "integral part of criminal law" (as per Rand J at 278), and thus validly enacted by Parliament. The *Criminal Code* also contains provisions authorizing a sentencing court to order forfeiture of property that is the proceeds of crime, even without a showing that the offence was committed in relation to that property. Is this provision vulnerable to challenge on the ground of division of powers? Consider this question again after you read *Chatterjee v Ontario (AG)*, 2009 SCC 19, later in this chapter.

In some cases, a departure from the criminal form of prohibition and penalty has been allowed where the purpose of the law is the prevention of a crime. For example, in *R v Swain*, [1991] 1 SCR 933, 1991 CanLII 104, the Supreme Court of Canada found that the provisions of the *Criminal Code* that provided for the detention in a provincial mental health institution of persons acquitted of an offence by reason of insanity were *intra vires* the federal Parliament. While acknowledging that the criminal committal provisions were not designed to impose punishment, the Court nonetheless found that they were a valid exercise of the preventive branch of the criminal law power. The provisions, which related only to insane persons whose actions were proscribed by the *Criminal Code*, were intended to protect society by preventing further dangerous conduct. The protection of society was found to be one of the important aims of the criminal law. (The provisions were, however, found to violate s 7 of the Charter.)

Finally, it has long been recognized that form requirements are not imposed when legislation repeals criminal offences, a point recently affirmed in *Quebec (AG) v Canada (AG)*, 2015 SCC 14, excerpted at the end of this chapter. The Court unanimously held that Parliament's power to enact criminal offences includes the power to repeal offences, but divided, *inter alia*, on the question of whether Parliament's power to repeal the offence provisions in this case included the power to destroy the data collected for the purpose of the offence provision.

R v Hydro-Québec

[1997] 3 SCR 213, 1997 CanLII 318

[Hydro-Québec was charged with violation of an interim order made by the federal minister of the environment, restricting its emissions of PCBs. This order was made under part II of the *Canadian Environmental Protection Act*, RSC 1985, c 16 (4th Supp), which, in short, established a process for regulating the use of toxic substances. In its defence, Hydro-Québec claimed that the two sections of the Act that were crucial to the making of the interim order, and hence to the charge, ss 34 and 35, were *ultra vires*. This claim succeeded throughout the Quebec courts, and the federal government appealed to the Supreme Court. The federal government attempted to support the legislation under both the POGG and criminal law powers. A narrow majority of the Supreme Court of Canada, in a judgment written by La Forest J, found that the impugned legislation was a valid exercise of the criminal law power and that it was, therefore, unnecessary to address the POGG arguments. In a dissenting judgment, Lamer CJ and Iacobucci J found no basis for the legislation in either the criminal law or POGG powers. Only the portion of their judgment dealing with the criminal law power has been reproduced below; a discussion of their reasoning on the

POGG power can be found in Chapter 9, Peace, Order, and Good Government, under the heading "Note: The National Concern Doctrine from the Anti-Inflation Reference to the Greenhouse Pollution Pricing Act References."

The analysis in both the majority and dissenting reasons involves detailed references to the Act, which is both long and complex. The preamble, which provides some evidence of the government's intentions in enacting the legislation, reads as follows:

WHEREAS the presence of toxic substances in the environment is a matter of national concern;

WHEREAS toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice;

AND WHEREAS Canada must be able to fulfil its international obligations in respect of the environment

The scheme of the legislation was summarized as follows in the dissenting reasons of Lamre CJ and Iacobucci J.:]

[15] ... Part II of the Act, which contains ss. 34 and 35, is called "Toxic Substances" and deals with the identification and regulation of substances which could potentially pose a risk to the environment and/or to human health. According to s. 11 of the Act, a substance is toxic where "it is entering or may enter the environment" under conditions "having or that may have an immediate or long-term harmful effect on the environment," "constituting or that may constitute a danger to the environment on which human life depends," or "constituting or that may constitute a danger in Canada to human life or health." Section 3 broadly defines a "substance" as "any distinguishable kind of organic or inorganic matter, whether animate or inanimate" and the "environment" as "the components of the Earth." "Harmful effect" and "danger" are not defined.

[16] The Act instructs the Ministers of the Environment and Health to compile and maintain four lists: the Domestic Substances List (DSL), the Non-Domestic Substances List (NDSL), the Priority Substances List (PSL) and the List of Toxic Substances (LTS). The DSL includes all substances in use in Canada since 1986 (some 21,700 substances as of January 1991). The NDSL contains all other substances. ... There is a blanket restriction on importing NDSL substances into Canada until they are approved (s. 26).

[17] Sections 12 and 13 of the Act require the Ministers to compile a "Priority Substances List" specifying those substances to which priority should be given in determining whether or not they should be placed on the List of Toxic Substances.

[18] Once a priority listed substance is found to be toxic within the meaning of s. 11, the Ministers may recommend adding it to the List of Toxic Substances. After a federal-provincial advisory committee (established under s. 6) has been given an opportunity to provide its advice, the Governor in Council may add the substance to the list and bring it under the regulatory control of s. 34.

[19] Section 34 provides for the regulation of substances on the List of Toxic Substances. The Governor in Council is given extensive powers to prescribe regulations dealing with every conceivable aspect of the listed substance, including: the quantity or concentration in which [a substance] can be released; the commercial or manufacturing activity in the course of which it can be released; the quantity ... that can be manufactured, imported, owned, sold, or used—including total prohibitions on its manufacture, importation, ownership, use or sale—and likewise the manner

in and purposes for which it can be manufactured, imported, processed, used, offered for sale or sold; the manner and conditions in which the substance may be advertised, stored, displayed, handled, transported or offered for transport; the manner ... of disposal of the substance; the maintenance ... records in respect of the substance; and the extent to which reports must be made to the Minister regarding the monitoring of the substance. Section 34(1)(x) allows the Governor in Council to regulate "any other matter necessary to carry out the purposes of this Part."

[20] Where a substance is not on the List of Toxic Substances (or where it is listed, but the Ministers believe that it is not adequately regulated), and where the Ministers believe that immediate action is necessary in respect of that substance, s. 35 allows for the making of "interim orders" without going through the usual procedure. ...

• • •

[22] Finally, the Act prescribes a number of civil and criminal penalties. ... [In particular, s 113(f) makes it an offence (punishable by fines or imprisonment) to contravene regulations made under s 34, while s 113(i) similarly makes it an offence to violate an order made under s 35.]

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La FOREST J (L'Heureux-Dubé, Gonthier, Cory, and McLachlin JJ concurring):

• • •

[110] ... [I]n my view, the impugned provisions are valid legislation under the criminal law power—s. 91(27) of the *Constitution Act, 1867*. It thus becomes unnecessary to deal with the national concern doctrine, which inevitably raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power.

[Justice La Forest first reviewed the manner in which the Supreme Court has approached environmental issues under the division of powers.]

• • •

[116] ... The general thrust of [*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110] is that the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution. ...

[117] I have gone on at this length to demonstrate the simple proposition that the validity of a legislative provision (including one relating to environmental protection) must be tested against the specific characteristics of the head of power under which it is proposed to justify it. For each constitutional head of power has its own particular characteristics and raises concerns peculiar to itself in assessing it in the balance of Canadian federalism. ... [I]t is all too easy ... to overlook the characteristics of a particular power and overshoot the mark or, again, in assessing the applicability of one head of power to give effect to concerns appropriate to another head of power when this is neither appropriate nor consistent with [the jurisprudence] ... respecting the ambit and contours of that other power. In the present case, ... [t]here was a marked attempt to raise concerns appropriate to the national concern doctrine under the peace, order and good government clause to the criminal law power in a manner that ... is wholly inconsistent with the nature and ambit of that power as set down by this Court from a very early period and continually reiterated since

The Criminal Law Power

[118] Section 91(27) of the *Constitution Act, 1867* confers the exclusive power to legislate in relation to criminal law on Parliament. The nature and ambit of this power has recently been the subject of a detailed analytical and historical examination in

[*RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 1995 CanLII 64] ... where it was again described, as it has [been] for many years, as being "plenary in nature" (emphasis added). ... I add that Professor Leclair in an excellent article, "Aperçu des virtualités de la compétence fédérale en droit criminel dans le contexte de la protection de l'environnement" (1996), 27 R.G.D. 137, has very recently analysed all the relevant cases and has come to the same conclusion about the general scope of the criminal law power and its application to the environment, and in particular the Act here in question.

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[121] The Charter apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably. Like other legislative powers, it cannot, as Estey J. put it in *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237, "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence." To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J. noted in *Scowby*, at p. 237, since the *Margarine Reference* [*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1, 1945 CanLII 2], it has been "accepted that some legitimate public purpose must underlie the prohibition." ...

[122] ... [T]he listed purposes [in the *Margarine Reference*] by no means exhaust the purposes that may legitimately support valid criminal legislation. ... [T]his is, of course, consistent with the view, most recently reiterated in *RJR-MacDonald*, at pp. 259-61, that criminal law is not frozen in time.

[123] During the argument in the present case, however, one sensed, at times, a tendency ... to seek justification solely for the purpose of the protection of health specifically identified by Rand J. Now I have no doubt that that purpose obviously will support a considerable measure of environmental legislation, as perhaps also the ground of security. But I entertain no doubt that the protection of a clean environment is a public purpose within Rand J.'s formulation in the *Margarine Reference*, ... sufficient to support a criminal prohibition. It is surely an "interest threatened" which Parliament can legitimately "safeguard," or to put it another way, pollution is an "evil" that Parliament can legitimately seek to suppress. Indeed, ... it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time. It would be surprising indeed if Parliament could not exercise its plenary power over criminal law to protect this interest and to suppress the evils associated with it by appropriate penal prohibitions.

[Excerpts from statements by public bodies, both Canadian and international, about the urgent need to protect the environment have been omitted.]

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[127] What the foregoing underlines is ... that the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels. And, as is stated in the preamble to the Act under review, "Canada must be able to fulfil its international obligations in respect of the environment." I am confident that Canada can fulfil its international obligations, in so far as the toxic substances sought to be prohibited from entering into the environment under the Act are concerned, by use of the criminal law power. The purpose of the criminal law is to underline and protect our fundamental values. ... [T]he stewardship of the environment is a fundamental value of our society and ... Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values.

[128] In saying that Parliament may use its criminal law power in the interest of protecting the environment or preventing pollution, there again appears to have been confusion during the argument between the approach to the national concern doctrine and the criminal law power. The national concern doctrine operates by assigning full power to regulate an area to Parliament. Criminal law does not work that way. Rather it seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health. In the criminal law area, reference to such broad policy objectives is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress and so is not a colourable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction.

[129] The legitimate use of the criminal law I have just described in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit. . . .

[131] . . . [T]he use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action. The situation is really no different from the situation regarding the protection of health where Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power. This has not prevented the provinces from extensively regulating and prohibiting many activities relating to health. The two levels of government frequently work together to meet common concerns. . . .

The Provisions Respecting Toxic Substances

[133] The respondent, the *mis en cause* and their supporting interveners primarily attack ss. 34 and 35 of the Act as constituting an infringement on provincial regulatory powers conferred by the Constitution. This they do by submitting that the power to regulate a substance is so broad as to encroach upon provincial legislative jurisdiction. That is because of what they call the broad "definition" given to toxic substances under s. 11

[134] I cannot agree with this submission. As I see it, the argument focusses too narrowly on a specific provision of the Act and for that matter only on certain aspects of it, and then applies that provision in a manner that I do not think is warranted by a consideration of the provisions of the Act as a whole and in light of its background and purpose. I shall deal with the latter first. . . .

[Justice La Forest then commented that broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject, and must be kept in mind in interpreting the relevant legislation.]

[135] I turn then to the background and purpose of the provisions under review. Part II does not deal with the protection of the environment generally. It deals simply with the control of toxic substances that may be released into the environment under certain restricted circumstances, and does so through a series of prohibitions to which penal sanctions are attached. . . .

[138] There was no intention that the Act should bar the use, importation or manufacture of all chemical products, but rather that it should affect only those

substances that are dangerous to the environment, and then only if they are not regulated by law. ...

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[141] The impugned Act appears to me to respond closely to these objectives. ... The subject of toxic substances is dealt with principally in Part II of the Act. It begins, we saw, with s. 11, which has been described as a "definition" in argument. While the provision has some properties of a definition, to speak of it in this way is misleading [The provision is not one that] describes with finality what the defined concept means. Rather, it sets forth that a substance can only be toxic, *for the purposes of Part II*, if it is entering or may enter the environment in a quantity or concentration or under conditions that result in the detrimental effects on the environment, human life and human health As well, the provision underlines that toxic as used in the Act includes substances that are not *per se*, toxic, but that may, when released into the environment in a certain quantity, concentration or condition, become toxic.

[142] I add that the determination of whether the various components of s. 11 are satisfied in respect of particular substances is by no means an easy task. Whether substances enter or may enter the environment in a quantity, concentration or conditions sufficient to have the effects set forth in that provision are not matters that are generally known. Rather these are matters that must be ascertained by assessments or tests set forth in s. 15, and in accordance with a procedure that requires consultation with the provinces, the informed community and the general public with a view to determining whether certain substances "are toxic or capable of becoming toxic," In light of this, it is difficult to believe "toxic" is not given its ordinary meaning in the Act, and that s. 11 is, therefore, simply a drafting tool for the demarcation of those aspects of toxicity that are to be considered in the tests required in the sections that follow.

[143] What the assessments described in Part II are aimed at is the selection of new items to add to the List of Toxic Substances set forth in Schedule I. Thus s. 11 is the first of a series of provisions respecting testing or assessment for toxicity.

[A long account of the process of decision-making has been omitted.]

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[146] In summary, as I see it, the broad purpose and effect of Part II is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule I and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation.

[147] This, in my mind, is consistent with the terms of the statute, its purpose, and indeed common sense. It is precisely what one would expect of an environmental statute—a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm. Specific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers. Having regard to the particular nature and requirements of effective environmental protection legislation, I do not share my colleagues' concern that the prohibition originates in a regulation, the breach of which gives rise to criminal sanction. The careful targeting of toxic substances is borne out by practice.

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[149] I turn now to a more detailed examination of the provisions of the Act impugned in the present case, i.e. ss. 34 and 35. I mentioned earlier that the testing phase provided for under Part II ends with s. 32. Up to that point, Part II deals with the testing of substances that may be toxic when released into the environment as described in s. 11. The remainder of Part II, beginning with s. 33, however, is no longer addressed at substances that may be toxic in that broad sense. Rather it is more narrowly addressed at substances specifically listed in the List of Toxic Substances in Schedule I of the Act. In particular, s. 34 authorizes the Governor in Council to make regulations setting forth the restrictions imposed on those using or dealing with such substances. ...

[150] ... [Section] 34 precisely defines situations where the use of a substance in the List of Toxic Substances in Schedule I is prohibited, and these prohibitions are made subject to penal consequences. This is similar to the techniques Parliament has employed in providing for and imposing highly detailed requirements and standards in relation to food and drugs, which control their import, sale, manufacturing, labelling, packaging, processing and storing. ...

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[152] ... [T]his kind of legislation does not constitute an invasion of provincial regulatory power As noted earlier, we are dealing with prohibitions accompanied by penal sanctions, so that we are really not concerned with whether these may incidentally affect property and civil rights but whether the prohibitions are directed at a public evil. ...

• • •

[154] In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from ... protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power. ...

[155] Turning then to s. 35, I mentioned that it is ancillary to s. 34. It deals with emergency situations. The provision, it seems to me, indicates even more clearly a criminal purpose, and throws further light on the intention of s. 34 and of the Act generally. It can only be brought into play when the Ministers believe a substance is not specified in the List in Schedule I or is listed but is not subjected to control under s. 34. In such a case, they may make an interim order in respect of the substance if they believe "immediate action is required to deal with a significant danger to the environment or to human life or health."

LAMER CJ and IACOBUCCI J (Sopinka and Major JJ concurring) (dissenting):

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The Pith and Substance of the Legislation

[30] ... [W]e cannot, with respect, agree with our colleague, La Forest J., that the criteria found in s. 11 are simply a "drafting tool" or that to speak of s. 11 as a definition is "misleading." The purpose of this section is to delineate from the category of "substances" (as defined by s. 3) those particular substances which qualify for regulation under ss. 34 and 35. It does so by specifying that "toxic" substances are, for the purposes of Part II, those which are capable of posing one of the threats listed above. This seems to us a clear statement of Parliament's intentions in this area. ...

[31] Nothing in the Act suggests that "toxic" is to be defined by any criteria other than those given in s. 11. ... If a substance (which can be essentially anything) poses or may pose a risk to human life or health, or to the environment upon which human life depends, or to any aspect of the environment itself, it qualifies as toxic according to the Act and may be made the subject of comprehensive federal regulation.

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[33] In light of these factors, we believe the pith and substance of Part II of the Act lies in the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health. That is, the impugned provisions are in pith and substance aimed at protecting the environment and human life and health from any and all harmful substances by regulating these substances. ...

The Criminal Law Power

[34] Parliament has been given broad and exclusive power to legislate in relation to criminal law by virtue of s. 91(27). ... This power has traditionally been construed generously. ...

[35] Nevertheless, the criminal law power has always been made subject to two requirements: laws purporting to be upheld under s. 91(27) must contain prohibitions backed by penalties; and they must be directed at a "legitimate public purpose." ...

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[38] The next step is therefore to examine the impugned provisions and determine whether they meet these criteria. In our view, they fall short. While the protection of the environment is a legitimate public purpose which could support the enactment of criminal legislation, we believe the impugned provisions of the Act are more an attempt to regulate environmental pollution than to prohibit or proscribe it. As such, they extend beyond the purview of criminal law and cannot be justified under s. 91(27).

[With respect to the requirement of a "legitimate public purpose," Lamer CJ and Iacobucci J found that, given the broad definition of "toxic" in s 11(a), which does not require a finding of danger to human life or health and could, for example, include a substance that affected groundhogs but had no effect on people, the legislation could not be supported as relating to health. However, they agreed with La Forest J that the protection of the environment was itself a legitimate criminal public purpose, analogous to those cited in the *Margarine Reference*.]

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[44] However, we still do not feel that the impugned provisions qualify as criminal law under s. 91(27). While they have a legitimate criminal purpose, they fail to meet the other half of the *Margarine Reference* test. The structure of Part II of the Act indicates that they are not intended to prohibit environmental pollution, but simply to regulate it. As we will now explain in further detail, they are not, therefore, criminal law. ...

[45] Ascertaining whether a particular statute is prohibitive or regulatory in nature is often more of an art than a science. ...

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[47] ... [A] criminal law does not have to consist solely of blanket prohibitions. It may, as La Forest J. noted in *RJR-MacDonald, supra*, at pp. 263-64, "validly contain exemptions for certain conduct without losing its status as criminal law." ... These exemptions may have the effect of establishing "regulatory" schemes which confer a measure of discretionary authority without changing the character of the law, as was the case in *RJR-MacDonald*.

[48] Determining when a piece of legislation has crossed the line from criminal to regulatory involves, in our view, considering the nature and extent of the regulation it creates, as well as the context within which it purports to apply. A scheme which is fundamentally regulatory, for example, will not be saved by calling it an "exemption." As Professor Hogg suggests [PW Hogg, *Constitutional Law of Canada*, 3rd ed, vol 1 (Toronto: Carswell, 1992) (loose-leaf)], at p. 18-26, "the more elaborate [a] regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal." At the same time, the subject matter of the impugned law may indicate the appropriate approach to take in characterizing the law as criminal or regulatory.

[49] Having examined the legislation at issue in this case, we have no doubt that it is essentially regulatory in nature, and therefore outside the scope of s. 91(27). In order to have an "exemption," there must first be a prohibition in the legislation from which that exemption is derived. Thus, the *Tobacco Products Control Act*, S.C. 1988, c. 20, at issue in *RJR-MacDonald*, *supra*, contained broad prohibitions against the advertising and promotion of tobacco products in Canada. ...

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[51] In the legislation at issue in this appeal, on the other hand, no such prohibitions appear. ...

[52] [Section 34] is not ancillary to existing prohibitions found elsewhere in the Act or to exemptions to such prohibitions. It is not itself prohibitory in nature. ...

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[54] Moreover, as Professor Hogg notes, *supra*, at p. 18-24:

A criminal law ordinarily consists of a prohibition which is to be self-applied by the persons to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is "administered" by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of punishment after the prohibited conduct has occurred.

[55] In this case, there is no offence until an administrative agency "intervenes." Sections 34 and 35 do not define an offence at all: which, if any, substances will be placed on the List of Toxic Substances, as well as the norms of conduct regarding these substances, are to be defined on an on-going basis by the Ministers of Health and the Environment. It would be an odd crime whose definition was made entirely dependent on the discretion of the Executive. ...

• • •

[57] Moreover, this process is further complicated by the equivalency provisions in s. 34(6) of the Act. Under this provision, the Governor in Council may exempt a province from the application of regulations made under ss. 34 or 35 if that province already has equivalent regulations in force there. This would be a very unusual provision for a criminal law. Provinces do not have the jurisdiction to enact criminal legislation, nor can the federal government delegate such jurisdiction to them. ... Any environmental legislation enacted by the provinces must, therefore, be of a regulatory nature. Deferring to provincial regulatory schemes on the basis that they are "equivalent" to federal regulations made under s. 34(1) creates a strong presumption that the federal regulations are themselves also of a regulatory, not criminal, nature.

[58] ... [In contrast to *RJR-MacDonald*, t]he impugned provisions in this case ... involve no ... general prohibition. In our view, they can only be characterized as a broad delegation of regulatory authority to the Governor in Council. The aim of these provisions is not to prohibit toxic substances or any aspect of their use, but simply

to control the manner in which these substances will be allowed to interact with the environment.

[59] *RJR-MacDonald, supra*, may be further distinguished, in our view. The *Tobacco Products Control Act* addressed a narrow field of activity: the advertising and promotion of tobacco products. The impugned provisions here deal with a much broader area of concern: the release of substances into the environment. This Court has unanimously held that the environment is a subject matter of shared jurisdiction, that is, that the Constitution does not assign it exclusively to either the provinces or Parliament . . . A decision by the framers of the Constitution not to give one level of government exclusive control over a subject matter should, in our opinion, act as a signal that the two levels of government are meant to operate in tandem with regard to that subject matter. One level should not be allowed to take over the field so as to completely dwarf the presence of the other. This does not mean that no regulation will be permissible, but wholesale regulatory authority of the type envisaged by the Act is, in our view, inconsistent with the shared nature of jurisdiction over the environment. . .

[60] . . . Granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are "toxic" would not only inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power assigned to the provinces. . .

Peace, Order and Good Government

[Only the national concern branch of the POGG power was in issue, and the legislation was found to fail the test of "singleness, distinctiveness and indivisibility" from *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 1988 CanLII 63 because it was not confined to a narrow range of toxic chemical substances such as PCBs, which have a severely harmful effect on human health and the environment and whose pollutant effects persist in the environment and are diffuse, but potentially covered a broader range of harmful substances whose effects may be temporary and more local in nature.]

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Appeal allowed.

NOTES

1. David Beatty is extremely critical of the Court's ruling in *Hydro-Québec*, arguing that it unjustifiably expands the federal government's criminal law power by removing the constraint of prohibition and penalty and undermines the federal–provincial equilibrium that previous decisions of the Supreme Court had established in the environmental area:

Because the outcome in the case is so congenial with most people's political instincts, it is easy to overlook or forgive the fact that jurisprudentially, *Hydro-Québec* poses a serious threat to the integrity of the country's federal structure and to the rule of law. The decision of the majority puts at risk the federal principle and the idea that both levels of government have a role to play in protecting the environment. If Parliament can justify everything it does under its power to make criminal law, provincial authority over even the local aspects of the environment will depend upon the sufferance of federal officials. Such a sweeping authorization of law making power, combined with a paramountcy rule which gives precedence to federal enactments whenever they conflict with parallel provincial laws, effectively would allow the federal government to dictate to the provinces what their environmental policies

would be. As a practical matter it would reverse the Court's earlier rulings on the environment and give the federal government exclusive jurisdiction in the field.

See David M Beatty, "Polluting the Law to Protect the Environment" (1998) 9:2 *Const Forum Const* 55 at 58. Beatty argues that a more principled (and preferable) approach would have been to uphold the legislation under the POGG power by demonstrating provincial inability to effectively control the spread of toxic substances.

For a contrasting opinion on *Hydro-Québec*, see Jean Leclair, "The Supreme Court, the Environment, and the Construction of National Identity: *R v Hydro-Québec*" (1998) 4 *Rev Const Stud* 372. Leclair notes that even Quebec environmentalists strongly encourage federal involvement in environmental matters, given the general lack of interest shown by the provinces in protection of the environment. Leclair finds no difficulty with the Court's treatment of the criminal law power, arguing that, based on prior jurisprudence, s 91(27) need not be confined to traditional modes of sanctions so long as the law is aimed at the regulation of "public evils"—that is, conduct that endangers either the safety of the public or the integrity of the environment. On the issue of impact on provincial jurisdiction, he reasons (at 374):

Such an approach does not preclude the possibility of shared environmental jurisdiction. The provinces can still intervene to protect the environment. Under the criminal law power, Parliament can only prevent evils which offend against certain fundamental values, such as the protection of health and the protection of the environment. A province can regulate the very same activity or conduct, so long as it pursues an objective falling within its constitutional jurisdiction. In so doing, it will not be enacting criminal legislation.

Leclair goes on to express pessimism about the practical effect of the judgment in improving the quality of environmental protection in Canada, recognizing that the federal government may be unwilling to seriously assume its responsibilities to protect the environment. Nevertheless, he argues that even if it fails to accomplish anything for the environment, the *Hydro-Québec* decision is an important one from the perspective of nation-building and national identity (at 377-78):

In recognizing very extensive powers to Parliament in matters such as the protection of health (*Imperial Tobacco*) and the protection of the environment (*Hydro-Québec*), two highly sensitive issues for all Canadians, the Court participates in a process of legitimization of the Canadian state and in the construction of national identity. Not only do protection of health and the environment represent two values perceived by many as traditionally and typically "Canadian" values, but they also have the singular ability of enabling us to transcend the issues which constantly divide us (language, ethnic origin, etc.). In other words, they are values about which we can all agree. Thus they operate as symbols of what being Canadian really means. ... In identifying and defining [the "fundamental values of our society"] the Court actively participates in the construction of "Canadian identity."

2. As noted previously, in *R v Malmo-Levine; R v Caine*, [2003 SCC 74](#), the Court upheld the prohibition of possession of marijuana in the *Narcotic Control Act* as a valid exercise of the criminal law power. In *obiter*, it added:

[72] We do not exclude the possibility that the NCA might be justifiable under the "national concern" branch on the rationale adopted in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at p. 432, where we held that concerted action amongst provincial and federal entities, each acting within their respective spheres of legislative jurisdiction, was essential to deal with Canada's international obligations regarding the environment. In our view, however, the Court should decline in this case to revisit Parliament's residual authority to deal with drugs in general (or marihuana in particular) under the POGG power. If ... Parliament removes marihuana entirely from the criminal law framework, Parliament's continuing

legislative authority to deal with marihuana use on a purely regulatory basis might well be questioned. ... Our conclusion that the present prohibition against the use of marihuana can be supported under the criminal law power makes it unnecessary to deal with the Attorney General's alternative position under the POGG power, and we leave this question open for another day.

NOTE: REFERENCE RE FIREARMS ACT (CAN)

In 1995, the federal government passed new gun control legislation. In addition to banning or restricting the use of certain types of firearms, the *Firearms Act*, SC 1995, c 39, which amended the existing *Criminal Code* provisions related to firearms, established a comprehensive licensing system for the possession and use of firearms and a national registration system for all firearms. Failure to comply with the licensing and registration requirements was made an offence under the *Criminal Code*. While licensing requirements for the use of certain firearms had for many years been found in part III of the *Criminal Code*, the new scheme extended the reach of the regulation to all firearms (thus including what are often referred to as "long guns" or "ordinary firearms," such as rifles and shotguns). It also provided for much more detailed regulation of licence conditions, including, for example, the specific locations at which firearms may be stored and used. Under the licensing provisions, applicants with criminal records involving drug offences or violence, or a history of mental illness, could be denied a licence. The national firearms registration system, requiring registration of all firearms, was a completely new addition. Registration of a firearm would not be permitted unless the applicant was licensed to possess that type of firearm.

In 1996, the province of Alberta challenged the federal government's power to enact the new gun control law by a reference to the Alberta Court of Appeal. The essence of the challenge was that the scheme was regulatory rather than criminal legislation because of the complexity of the legislation and the discretion given to the chief firearms officer. The province argued that the gun control scheme was indistinguishable from existing provincial property regulation schemes such as automobile and land title registries. The Court of Appeal upheld the legislation by a 3–2 majority, a result confirmed on appeal by the Supreme Court of Canada in *Reference re Firearms Act (Can)*, 2000 SCC 31. In a unanimous judgment, the Court found that the gun control law fell within Parliament's jurisdiction over criminal law, thus continuing the trend in the Court's recent judgments toward an expansive interpretation of the criminal law power. The following paragraph provides a summary of the Court's reasons:

[4] We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

The Court had little difficulty finding a criminal law purpose:

[33] Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. ... The law is limited to restrictions which are directed at safety purposes. As such, the regulation of guns as dangerous products is a valid purpose within the criminal law power.

With respect to the more difficult issue of the requirement of criminal form, the Court focused on the *Criminal Code* prohibition of the possession of firearms without a licence and registration certificate. As a result of this method of analysis, the Court was not required to

resort to the necessarily incidental doctrine to uphold the licensing and registration provisions as sufficiently integral to a larger scheme of criminal prohibition:

[34] The finding of a valid criminal law purpose does not end the inquiry, however. In order to be classified as a valid criminal law, that purpose must be connected to a prohibition backed by a penalty. The 1995 gun control law satisfies these requirements. Section 112 of the *Firearms Act* prohibits the possession of a firearm without a registration certificate. Section 91 of the *Criminal Code* (as amended by s. 139 of the *Firearms Act*) prohibits the possession of a firearm without a licence and a registration certificate. These prohibitions are backed by penalties: see s. 115 of the *Firearms Act* and s. 91 of the *Code*.

The complex, regulatory nature of the legislation was found not to preclude a finding of criminal prohibition:

[36] The first objection [of Alberta] is that the *Firearms Act* is essentially regulatory rather than criminal legislation because of the complexity of the law and the discretion it grants to the chief firearms officer. These aspects of the law, the provinces argue, are the hallmarks of regulatory legislation, not the criminal law

[37] Despite its initial appeal, this argument fails to advance Alberta's case. The fact that the Act is complex does not necessarily detract from its criminal nature. Other legislation, such as the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), are legitimate exercises of the criminal law power, yet highly complex. Nor does the Act give the chief firearms officer or Registrar undue discretion. The offences are not defined by an administrative body, avoiding the difficulty identified in the dissenting judgment in *Hydro-Québec* They are clearly stated in the Act and the *Criminal Code*: no one shall possess a firearm without a proper licence and registration. While the Act provides for discretion to refuse to issue ... a registration certificate under s. 69, that discretion is restricted by the Act. ...

Gun control was distinguished from provincial regulatory schemes for the registration of motor vehicles and land titles because of the inherently dangerous nature of firearms:

[42] [The provincial] argument overlooks the different purposes behind the federal restrictions on firearms and the provincial regulation of other forms of property. Guns are restricted because they are dangerous. While cars are also dangerous, provincial legislatures regulate the possession and use of automobiles not as dangerous products but rather as items of property and as an exercise of civil rights, pursuant to the provinces' s. 92(13) jurisdiction

[43] The argument that the federal gun control scheme is no different from the provincial regulation of motor vehicles ignores the fact that there are significant distinctions between the roles of guns and cars in Canadian society. Both firearms and automobiles can be used for socially approved purposes. Likewise, both may cause death and injury. Yet their primary uses are fundamentally different. Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions. ... Thus Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms. Parliament did not enact the *Firearms Act* to regulate guns as items of property. The Act does not address insurance or permissible locations of use. Rather, the Act addresses those aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse.

Finally, in an interesting doctrinal development, the Court explicitly considered the question of whether its holding would upset the federal–provincial balance of power:

[48] ... Alberta and the provincial intervenors submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism. ... [It] is beyond debate that an appropriate balance of power must be maintained between the central and provincial levels of government, as this court affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 The question is not whether such a balance is necessary, but whether the 1995 gun control law upsets that balance.

The Court went on to find that the gun control law did not upset the balance of power because its effects on property rights were incidental—the Act did not hinder the ability of the provinces to regulate the property and civil rights aspects of guns, nor did the law precipitate the federal government's entry into a new field, given that gun control had been the subject of federal legislation since Confederation.

In 2012, Parliament introduced legislation to abolish the long-gun registry. Among the opponents to abolition was the government of Quebec, which announced plans to create its own registry and asked the federal government to turn over data pertaining to guns connected to Quebec. After the federal government refused and amended its bill to provide for the destruction of all data pertaining to long guns, Quebec referred the question of the constitutionality of the federal plan to destroy the data to the courts. In *Quebec (AG) v Canada (AG)*, [2015 SCC 14](#), excerpted near the end of this chapter, a narrow majority of the Supreme Court of Canada upheld the constitutionality of the federal action. The Court unanimously reiterated that form requirements are not applicable when legislation repeals a criminal offence. By a narrow majority, however, it also held that principles of cooperative federalism do not impose constraints on how one level of government exercises its powers on matters that fall within its exclusive jurisdiction.

Reference re Assisted Human Reproduction Act

[2010 SCC 61](#)

[In 2004, Parliament enacted the *Assisted Human Reproduction Act*, SC 2004, c 2 [AHRA]. The principles underlying the Act were set out in s 2:

2. The Parliament of Canada recognizes and declares that
 - (a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;
 - (b) the benefits of assisted human reproductive technologies ... can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in [their] use ... ;
 - (c) while all persons are affected by these technologies, women more than men are directly and significantly affected ... ;
 - (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;
 - (e) persons who seek to undergo assisted reproduction procedures must not be discriminated against ... ;
 - (f) trade in [reproductive capabilities] and ... exploitation of [persons] for commercial ends raise health and ethical concerns that justify their prohibition; and
 - (g) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.

The Act divided activities relating to human reproduction into "prohibited" and "controlled" activities. The first category, "prohibited activities," was contained in ss 5 to 9 of the Act:

- s 5 prohibited, *inter alia*, human cloning, creating an *in vitro* embryo for any purpose other than creating a human being, and creating hybrids or chimeras for the purpose of transplanting them into a human being or a non-human life form;
- ss 6 and 7, reiterating the principle of non-commercialization of the human body, prohibited any form of payment to surrogate mothers as well as the purchase or sale of ova, sperm, *in vitro* embryos, and human cells or genes;
- s 8 prohibited the use or removal of human reproductive material for the purpose of creating an embryo, as well as the use of an *in vitro* embryo without the donor's consent; and
- finally, s 9 prohibited the removal or use of ova or sperm of a person under 18 years of age.

The prohibition of each of the activities in ss 5 to 9 was absolute.

The second category, "controlled activities," comprised ss 10 to 13 of the Act. Unlike those in the first category, these activities were prohibited only if they were not performed in accordance with the regulations and under a licence issued by the Assisted Human Reproduction Agency of Canada (the Agency). The controlled activities included manipulation of reproductive material to create embryos, combining human and other species' genomes, and paying donors and surrogate mothers.

These "controlled activities" targeted both clinical practice and research in assisted reproduction. Section 13 provided that these controlled activities could only be exercised at a facility that had been licensed by the Agency.

The remainder of the Act, ss 14 to 68, contained provisions regarding the collection of information about persons who used assisted reproductive technology and the administration and enforcement of the Act. The latter provisions included a licensing scheme for the controlled activities under the authority of the Agency and provisions concerning penalties, regulations, and equivalency agreements with provinces.

The Quebec government accepted that ss 5 to 7 of the AHRA were valid criminal law but referred the question of the validity of much of the rest of the Act to the Quebec Court of Appeal, which struck down those other provisions. The Attorney General of Canada appealed to the Supreme Court of Canada.

The Attorney General of Quebec argued that the pith and substance of the impugned provisions was regulation of all aspects of medical practices related to assisted human reproduction, invaded provincial powers, and were accordingly invalid. By contrast, the Attorney General of Canada submitted that the Act was valid pursuant to both the federal criminal law power and the double aspect doctrine, according to which two levels of government may make laws on different aspects of a single field.

By a narrow majority, the Supreme Court struck down most of the AHRA. Four members of the Court would have upheld the Act in its entirety. Four characterized the law's matter as an attempt to regulate a health service and invalidated ss 8 and 9 of the prohibited activities and almost all the provisions relating to the controlled activities. The decisive opinion, written by Cromwell J, characterized the matter of the legislation as regulation of virtually every aspect of assisted human reproduction, and thus an infringement of provincial powers, but he upheld all the provisions dealing with prohibited activities, and also some of those relating to controlled activities, as within the federal criminal law power.

The two major sets of reasons—those of McLachlin CJ and those of LeBel and Deschamps JJ—engaged in a wide-ranging review of federalism principles and doctrine, including the double aspect doctrine, the ancillary powers doctrine, the scope of the criminal law power, especially in relation to health, the principle of subsidiarity, and provincial powers over local matters and property and civil rights.]

McLACHLIN CJ (Binnie, Fish, and Charron JJ concurring):

[1] ... Among the most important moral issues faced by this generation are questions arising from technologically assisted reproduction The question on appeal is whether this law represents a proper exercise of Parliament's criminal law power. I conclude that it does.

[2] Since time immemorial, human beings have been conceived naturally. Human beings have sought to enhance this process, to be sure; fertility rites, prayers and various medical and quasi-medical prescriptives to enhance fertility are part of human history. Human beings have also sought to constrain the process, through rules governing sexual conduct and marriage. ... Through morality, often abetted by the criminal law, society has traditionally found collective answers to reproductive issues. Yet, until recently, the fundamental processes by which new human beings were conceived remained largely beyond technological manipulation.

[3] This changed in the latter part of the 20th century [S]cientists found ways to disassemble and recombine genetic material within the ovum. Implantation techniques allowed couples and surrogate mothers to carry pregnancies created in a petri dish to term. At the far end of the spectrum lay the possibility of combining animal and human forms or reproducing an individual through cloning.

[4] These new techniques raise important moral, religious and juridical questions. The new questions do not fit neatly within the traditional legal frameworks that have developed in a world of natural conception. ... Traditional criminal law imposed no obvious restraints and offered no clear answers to these questions.

[Chief Justice McLachlin described the consultations that preceded enactment of the AHRA and the challenge brought by the Attorney General of Quebec, noting that the constitutionality of ss 5 to 7 of the Act as valid criminal law had been conceded.]

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[10] My colleagues LeBel and Deschamps JJ. conclude that the impugned sections of the Act ... are *ultra vires* the federal Parliament. I respectfully disagree. The prohibitions in ss. 5 to 7 are conceded to be valid criminal legislation. In my view, the remaining prohibitions in ss. 8 to 13 are also valid criminal law.

[After outlining the Act, McLachlin CJ listed three issues: (1) the validity of the legislative scheme as a whole, (2) the validity of the "controlled activities" prohibitions, and (3) the validity of the administrative provisions under the ancillary powers doctrine.]

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A. The Validity of the Legislative Scheme as a Whole

[16] Since the Attorney General of Quebec is challenging individual provisions of the federal scheme, this Court must examine the whole scheme and the impugned provisions separately (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 666). Ordinarily, this Court would begin by examining the impugned provisions in order to determine if and to what extent they intrude on the provincial sphere of competence

[17] However, in the case at bar it is necessary to examine the whole scheme first before we can make sense of the challenged provisions. ... In this case, the Attorney

General of Quebec is challenging the bulk of the *Assisted Human Reproduction Act* ... [I]t is impossible to meaningfully consider the provisions at issue without first considering the nature of the whole scheme.

[18] Therefore, the first question is whether the matter of the statutory scheme, viewed as a whole, is a valid exercise of federal power. The second question is whether its individual provisions are also valid. If the scheme as a whole is valid, but some of its provisions invalid, the invalid provisions are severed, leaving the remaining provisions intact. ...

(1) Characterizing the Legislative Scheme

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[21] The issue is as follows: Is the *Assisted Human Reproduction Act* properly characterized as legislation to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk, as the Attorney General of Canada contends? Or should it be characterized as legislation to promote positive medical practices associated with assisted reproduction, as the Attorney General of Quebec contends? ...

[22] To determine which characterization is correct, ... [o]ne must ask, "[w]hat in fact does the law do and why?"

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[24] The text of the Act suggests that its dominant purpose is to prohibit inappropriate practices, rather than to promote beneficial ones. It is true that the Act establishes a scheme to control assisted reproduction on a national level, and this initiative necessarily touches on provincial jurisdiction over medical research and practice. However, the dominant thrust of the Act is prohibitory, and the aspects that concern the provision of health services do not rise to the level of pith and substance. As s. 2 of the Act explains, the purpose of the Act is to *safeguard against* practices that may offend fundamental values and rights and harm human health, safety and dignity. The emphasis is on *preventing* practices that offend these values and produce this harm.

[25] ... The Act is essentially a series of prohibitions, followed by a set of subsidiary provisions for their administration.

[26] The Attorney General of Quebec concedes that the prohibitions in ss. 5 to 7 of the Act are valid criminal law. In my view, the prohibitions in ss. 8 to 13 advance the same criminal law purpose. Sections 8 to 13, viewed in context, are not aimed at promoting the beneficial aspects of assisted reproduction. While they distinguish the beneficial from the reprehensible, it is only for the purpose of carving out the latter. In this sense, the prohibitions in ss. 5 to 13 all advance a common purpose, but do so in a manner tailored to the conduct that they address. Conduct that is always reprehensible is prohibited absolutely (ss. 5 to 9). Conduct that is reprehensible in particular situations is prohibited selectively [ss. 10 to 13] The scheme of the Act is to carve out from the broader field of assisted reproduction conduct that Parliament considers criminal. These prohibitions give the Act its content and define its purpose.

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[28] My colleagues rely on the Baird Report [*Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993)] as proof of Parliament's intention to impose national medical standards under the guise of criminal law, e.g., at para. 206:

It is clear that the Baird Commission wanted certain activities to be denounced and prohibited because, in its view, there was a consensus that they were reprehensible. But the Commission also wanted assisted human reproduction and related research activities to be regulated for the purpose of establishing uniform standards that would

apply across Canada. Thus, it can be seen that the *distinction* drawn in the [Act] between prohibited activities and controlled activities corresponds to the two distinct categories of activities for which the Baird Commission recommended two *distinct approaches with different purposes*. [Emphasis added.]

... [According to my colleagues, t]he Act impermissibly gathers both purposes under the broad umbrella of the criminal law. ... [I]t follows[, they say,] that large parts of the Act are invalid.

[29] [My colleagues treat] the Baird Report as proof of the purpose behind the *Assisted Human Reproduction Act*. But ... [t]he Baird Commission was writing a policy analysis (not a constitutional law paper) on a subject thought to raise serious issues of morality. ... [T]he fact that the Baird Commission may have referred to positive aspects of assisted reproduction technology—benefits all acknowledge—does not establish that these benefits were the focus of Parliament's efforts.

[30] [Second, this argument] ... rests on an artificial dichotomy between reprehensible conduct and beneficial practices. ... Prohibiting or regulating bad conduct may in fact produce benefits. This is a common consequence of many criminal laws. What matters for purposes of constitutionality is not whether a criminal law has beneficial consequences, but whether its *dominant purpose* is criminal

[31] Turning to the effects of the Act, this legislation clearly has an impact on the regulation of medical research and practice, and hospital administration. Researchers, practitioners and hospitals will be subject to both the Act and the regulations it contemplates.

[32] However, the doctrine of pith and substance permits either level of government to enact laws that have "substantial impact on matters outside its jurisdiction" The issue in such cases is to determine the *dominant effect* of the law. Viewed as a whole, the dominant effect of the Act is to prohibit a number of practices which Parliament considers immoral and/or which it considers a risk to health and security, not to promote the positive aspects of assisted reproduction.

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[34] I conclude that the pith and substance of the Act is properly characterized as the prohibition of negative practices associated with assisted reproduction.

(2) Does the Matter of the Act Come Within Section 91(27)?

[35] Having characterized the matter to which the Act relates, the next question is whether it comes within the scope of the federal criminal law In order to answer this question, we must consider whether the matter satisfies the three requirements of valid criminal law: (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose

[36] As already discussed, the Act, properly characterized, imposes prohibitions backed by penalties, thereby fulfilling the first two requirements of a valid criminal law. Admittedly, some of the provisions permit exceptions. However, the criminal law does not require absolute prohibitions To be sure, a large portion of the scheme is regulatory. However, it is open to Parliament to create regulatory schemes under the criminal law power, provided they further the law's criminal law purpose.

[37] My colleagues LeBel and Deschamps JJ. [view] the provisions of the Act that prohibit activities unless conducted in accordance with federal regulations [as] designed to promote beneficial practices, while I view them as carve-outs from prohibition. They further argue that since the doctrine of paramountcy allows federal legislation to prevail over provincial legislation in the case of conflicts, finding the regulatory provisions *intra vires* would effectively oust provincial power over health.

[38] In my view, the requirement that a criminal law contain a prohibition prevents Parliament from undermining the provincial competence in health. The federal criminal law power may only be used to prohibit conduct, and may not be employed to promote beneficial medical practices. Federal laws (such as the one in this case) may involve large carve-outs for practices that Parliament does not wish to prohibit. However, the use of a carve-out only means that a particular practice is *not* prohibited, not that the practice is positively *allowed* by the federal law. This has important implications for the doctrine of federal paramountcy. If a province enacted stricter regulations than the federal government, there would be no conflict in operation between the two sets of provisions since it would be possible to comply with both. ... There may be a conflict between a criminal law and a *less* strict provincial scheme. However, in such a case, Parliament's stricter scheme would be acting as a prohibition. In this way, the prohibition requirement for criminal laws acts as a major limitation on the effect of s. 91(27).

(3) Does the Act Serve a Valid Criminal Law Purpose?

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[43] ... The criminal law must be able to respond to new and emerging matters of public concern that go to the health and security of Canadians and the fundamental values that underpin Canadian society. ... To constitute a valid criminal law purpose, a law's purpose must address a public concern relating to peace, order, security, morality, health, or some similar purpose. At the same time, extensions that have the potential to undermine the constitutional division of powers should be rejected.

[44] Whether a federal law falls within Parliament's criminal law power ... is a question of *which level* of government has jurisdiction to enact this law. ... The degree to which the Act may impact on individual liberties is not relevant to this inquiry. ...

[45] It follows that this case does not require us to balance the impact of the Act on liberty against the importance of Parliament's legislative objective. ... I differ from my colleagues LeBel and Deschamps JJ., who argue that there is insufficient societal consensus to justify the restrictions that the Act imposes on individual liberties. With respect, the language of justification has no place in the pith and substance analysis.

[46] Criminal law objectives, such as peace, order, security, morality, and health do not occupy separate watertight compartments. ... Criminal laws will often engage more than one objective, and the objectives may overlap with each other.

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[48] ... I conclude that upholding morality is the principal criminal law object of the Act. What is at stake is ... Parliament's power to enact general norms for the whole of Canada to meet the pressing moral concerns raised by the techniques of assisted reproduction. The objects of prohibiting public health evils and promoting security play supporting roles with respect to some provisions. Taken together, these objects confirm that the Act serves valid criminal law purposes. ...

(a) Morality

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[50] ... Moral disapprobation is itself sufficient to ground criminal law when it addresses issues that are integral to society. ... Parliament need only have a reasonable basis to expect that its legislation will address a moral concern of fundamental importance, even if hard evidence is unavailable on some points because "the jury is still out": *Malmo-Levine*, at para. 78. Whether the law violates the *Canadian Charter of Rights and Freedoms* guarantees of individual liberty is another issue.

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(b) Health

[52] ... In order to preserve the balance of powers, Parliament's ability to pass criminal laws on the basis of health must be circumscribed. To this end, criminal laws for the protection of health must address a "legitimate public health evil"

[53] It has proven difficult to articulate a precise definition of a legitimate public health evil

[54] Behind the diversity in the cases that have upheld criminal laws on the basis of public health evils lie three constant features. In each of these cases, the criminal law was grounded in (1) human conduct (2) that has an injurious or undesirable effect (3) on the health of members of the public.

[55] Human conduct causing harm is the fundamental stuff of the criminal law.

[56] No constitutional threshold level of harm, as such, constrains Parliament's ability to target conduct causing these evils. ... This said, the need to establish a reasonable apprehension of harm means that conduct with little or no threat of harm is unlikely to qualify as a "public health evil": *Malmo-Levine*, at para. 212, *per* Arbour J., dissenting, but not on this point.

[57] My colleagues LeBel and Deschamps JJ. argue that there is little to distinguish assisted reproduction from any other emerging field of medical practice. All medical practices come with risks. This, they argue, does not bring those practices within the federal criminal law power. The answer to this argument, confirmed by the cases, is that, provided it is not a colourable intrusion upon provincial jurisdiction (i.e. one not supported by a valid criminal law purpose), Parliament is entitled to use the criminal law power to safeguard the public from [injurious or undesirable] conduct

[The discussion of the protection of personal security, relied on only peripherally in this case, has been omitted. Chief Justice McLachlin went on to conclude that the AHRA, viewed as whole, was grounded in valid criminal law purposes.]

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[64] I conclude that the legislative scheme ... addresses legitimate criminal law objects. As discussed above, the other two elements of criminal law, prohibition and penalty, are established on the face of the Act. I therefore conclude that the *Assisted Human Reproduction Act*, viewed as a whole, is valid criminal legislation.

[65] It may be appropriate at this point to address the arguments relied on by LeBel and Deschamps JJ. in support of their view that the criminal law must be circumscribed to prevent trenching on provincial powers to regulate health.

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[67] My colleagues' conclusion takes them into untravelled constitutional territory. "Double occupancy" of a field of endeavour, such as health, is a permanent feature of the Canadian constitutional order. ... In holding that the double aspect doctrine does not apply to this field of double occupancy, my colleagues assert a new approach of provincial exclusivity that is supported by neither precedent nor practice.

[68] The *Constitution Act, 1867*, allocates to Parliament jurisdiction over the criminal law precisely to permit Parliament to create uniform norms. Circumscription of the ambit of the criminal law to avoid trenching on provincial regulation runs counter to this purpose.

[69] ... [M]y colleagues repeatedly refer to the principle of subsidiarity (e.g., para. 273). ... Since the provincial governments are closest to health care, the argument goes, they should exercise power in this area, free from interference of the criminal law. Subsidiarity therefore favours provincial jurisdiction.

[70] ... [T]his argument misconstrues the principle of subsidiarity. As L'Heureux-Dubé J. explained in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3, in an area of jurisdictional overlap, the level of government that is closest to the matter will often introduce complementary legislation to accommodate local circumstances [but that law will complement rather than frustrate federal legislation.] ...

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[72] More fundamentally, subsidiarity does not override the division of powers Subsidiarity might permit the provinces to introduce legislation that complements the *Assisted Human Reproduction Act*, but it does not preclude Parliament from legislating on the shared subject of health.

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[76] As I explained earlier, I do not share the view that the Act can be characterized as legislation in relation to the positive aspects of assisted reproduction. However, my colleagues' argument on this point raises a more fundamental issue. Their reasoning, with respect, substitutes a judicial view of what is good and what is bad for the wisdom of Parliament. ... My colleagues break new ground in enlarging the judiciary's role in assessing valid criminal law objectives. It is ground on which I respectfully decline to tread.

[77] For the foregoing reasons, I cannot subscribe to the picture of Canadian federalism painted by my colleagues, where the federal criminal law power would be circumscribed by provincial competencies. I share their view that the criminal law cannot be used to eviscerate the provincial power to regulate health. Our Constitution prevents this from occurring, however, by requiring that criminal laws further a valid criminal law objective, and that they adopt the form of a prohibition. These requirements allow for the nationwide criminal norms that the Constitution intended, while ensuring adequate space for provincial regulation.

B. Do the Prohibitions in Sections 8 to 13 of the Act Constitute Valid Criminal Law?

[78] ... Even if a law is in pith and substance criminal legislation, it may nevertheless contain provisions which are neither valid criminal prohibitions, nor ancillary to valid criminal prohibitions. An invalid legislative provision is not rendered valid merely because it is included in a legislative scheme that, viewed globally, is valid: *General Motors*. In each case, the question is whether the provision, considered in the context of the larger scheme of the Act, is valid criminal legislation, in terms of prohibition, penalty and criminal law purpose.

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[80] The challenged prohibitions in ss. 8 to 13 generally engage the same morality, health, and security issues as the prohibitions in ss. 5 to 7, as discussed more fully below. Sections 10 and 11 amplify the scope of the prohibitions in s. 5, and s. 12 addresses the pecuniary issues that arise in ss. 6 and 7.

[81] ... [T]he cases establish that criminal prohibitions may permit exceptions, and that the exceptions may take the form of a regulatory scheme. Thus, the form of ss. 8 to 13 is itself insufficient to remove these sections from the scope of the federal criminal law power.

[82] The Attorney General of Quebec's argument appears to be that the extent of the regulation and the *unpublished nature of the regulations* distinguishes this case from cases like *RJR-MacDonald* and the *Firearms Reference*, where regulatory schemes were upheld as valid criminal law.

[83] I turn first to the fact that the regulations have not yet been published.

[84] ... Any regulations passed under the enabling statute will be valid only insofar as they further valid criminal law goals

[85] ... [T]he extent or comprehensiveness of a criminal law regulatory scheme does not affect its constitutionality. Provided a regulatory scheme reflects and furthers proper criminal law goals, it remains securely anchored in the federal criminal law power. Extensive and comprehensive regulatory schemes were found to be valid criminal law in *RJR-MacDonald* and the *Firearms Reference*.

[86] The Attorney General of Quebec's real point appears to be that the regulatory scheme imposed by ss. 8 to 13 is of such magnitude that medical and research regulation becomes the dominant character, or pith and substance, of these provisions,

[87] This argument, ... requires that the prohibitions in ss. 8 to 13 be viewed in isolation from the rest of the Act

[88] Viewed in the context of the legislative scheme as a whole, the dominant character of the prohibitions in ss. 5 to 7 is to criminalize conduct that Parliament has found to be fundamentally immoral, a public health evil, a threat to personal security, or some combination of these factors.

[Chief Justice McLachlin proceeded to analyze ss 8 to 13 in detail. The excerpts below focus on ss 10 and 13, both of which are in the part of the Act dealing with controlled activities.]

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[95] ... Section 10 of the Act is the most problematic of the impugned provisions. By prohibiting all the listed medical procedures unless they are performed by a licence holder in compliance with regulations, this section allows for federal oversight of research and medical practice. The ultimate impact of the provision will be determined by the future regulations. If the federal government were to implement regulations enacting a complete code of conduct for doctors, and regulating every component of the delivery of fertility services, the regulations would be *ultra vires*. However, as noted above, a finding that s. 10 is *intra vires* would not mean that the future regulations promulgated under this section will necessarily be valid as well. Should future regulations go too far, they will be *ultra vires*. The only question before us now is whether s. 10 itself falls under the criminal law power.

[96] ... The Attorney General of Canada contends that licensing is the only means of identifying where suspect practices are performed, and by whom. In turn, the regulations introduced under s. 10 provide a flexible means with which to carve out those aspects of genetic manipulation that are unacceptable from the perspective of morality, health, or security.

[97] The Attorney General of Canada identifies a number of health risks that it seeks to target with s. 10. [A detailed account of these is omitted.] Conduct that creates a serious risk of these problems arguably rises to the level of a public health evil, and Parliament is entitled to criminalize it.

[98] The health aspects of s. 10 are buttressed by morality concerns. ... Social mores have changed over time on these issues, but that is not the point. The point is simply that s. 10 touches on important moral concerns that have long been held to fall within the s. 91(27) criminal law power

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[100] These [new] developments raise the prospect of novel harms to society, as the Baird Report amply documents. The "commodification of women and children" (p. 718); sex-selective abortions (p. 896); cross-species hybrids; ectogenesis with the potential to "dehumanize motherhood"; "baby farms" (p. 637); saviour siblings (a child whose primary purpose is to cure another child suffering from a genetic disorder); devaluation of persons with disabilities; discrimination based on ethnicity or genetic

status (p. 28); and exploitation of the vulnerable—these are but some of the moral concerns raised in the Report. ... [I]t cannot be seriously questioned that Parliament is able to prohibit or regulate them.

[101] Had Parliament wished to prohibit absolutely the practices targeted in s. 10—the altering, manipulation and treatment of human reproductive material—it could have done so

[102] Section 10 must also be read in light of s. 68 of the Act, which lifts the application of the federal law in any province [pursuant to federal–provincial agreement.] ... This provision suggests that Parliament's object when enacting s. 10 was to establish "minimum federal safety and ethical standards" for fertility services, while leaving the provinces in charge of regulating and monitoring the medical profession

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[105] I conclude that s. 10 is valid criminal legislation.

[Chief Justice McLachlin had the following to say about s 13, which absolutely prohibited licensed activities in unlicensed premises:]

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[117] The location where assisted reproduction takes place is important. ... The suitability of assisted reproduction facilities is vital to avoiding harms related to morality and health. In turn, these facilities must be identified so that they can be subject to inspection and control. As with ss. 10 to 12, licensing provides the only practical means of enacting a prohibition on substandard facilities.

[118] The production of human life in clandestine facilities may well constitute a public health evil.

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[120] The prohibition on unlicensed facilities does not oust the ability of the provinces to designate the facilities in which assisted reproduction procedures are performed. ... Section 13 does not displace this provincial oversight, but merely requires a supplementary federal licence

[121] I conclude that s. 13 addresses serious harms both to society and the individuals involved in assisted reproduction procedures. It is valid criminal law.

[Having concluded that the prohibitions in ss 8 to 13 were valid criminal law, McLachlin CJ then addressed the constitutionality of ss 14 to 61 and 65 to 68, which provided for the administration and enforcement of the Act. These sections established a system of information management, created the Agency, authorized the agency to issue licences and generally enforce the Act, provided for penalties and promulgation of regulations, and permitted equivalency agreements with provinces. Chief Justice McLachlin concluded that even though many of these provisions did not fall within the criminal law power, they were valid under the ancillary powers doctrine.

Applying the test from *General Motors*, she held first that the impugned provisions were a minor intrusion on the provincial powers because: (1) the provincial powers of ss 92(13) and 92(16) were broad, thus making any federal intrusion more tolerable; (2) the impugned provisions related only to the Act's administration and enforcement, and thus they affected only "a small corner of the vast topography of provincial powers over health" (at para 135); and (3) history supported Parliament's use of its criminal law power to address issues of morality, health, and security. Second, McLachlin CJ found that, because the intrusion was minor, the "rational and functional connection" branch of the ancillary powers doctrine was the appropriate standard. Third, she applied that standard and concluded that it was satisfied—the ancillary provisions were rationally and functionally connected to the valid criminal

law provisions in ss 5 to 13 of the Act. In sum, the Act was upheld as constitutional in its entirety.]

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LeBEL and DESCHAMPS JJ (Abella and Rothstein JJ concurring):

[Justices LeBel and Deschamps reviewed the history of the Act and described its structure and contents, noting the two categories of prohibited and controlled activities.]

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[176] We will return to the different parts of the *AHR Act* below. For now, we will simply note that substantive and formal distinctions are drawn between prohibited activities and controlled activities. The dichotomy ... appears clearly from Parliament's statement of principles in s. 2 and from the titles used in the Act itself. ...

[177] In sum, the ... distinctions between controlled activities and activities ... stem from the legislative history, from the nature of the activities and from how they are presented in the *AHR Act*. The Chief Justice interprets the *AHR Act* very differently. She disregards its legislative history, even criticizing us for attaching importance to the Baird Report. ... We can only emphasize that there is no factual basis whatsoever for the Chief Justice's interpretation. ...

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[182] ... Of particular interest to us in the case at bar is [the unwritten constitutional principle of] federalism. According to this principle, the powers of the different levels of government in a federation are co-ordinate, not subordinate, powers. ...

[183] ... [T]he proper operation of Canadian federalism sometimes requires the application of a principle of subsidiarity in the arrangement of relationships between the legislative powers of the two levels of government. According to this principle, legislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to the citizen's concerns (on the application of this principle in public law, see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3). In *Reference re Secession of Quebec*, ... the Court recognized the possibility inherent in a federal system of applying the principle of subsidiarity, thereby enhancing its democratic dimension and democratic value added. ... This principle is therefore an important component of Canadian federalism.

[184] In performing their function as interpreters of the law in the context of Canada's federal system, the Canadian courts have developed a number of doctrines based on constitutional principles, two of which could apply in the instant case: the double aspect doctrine and the ancillary powers doctrine. Because it can be difficult to legislate effectively within a rigid, formal framework, these two doctrines introduce a measure of flexibility that enables governments at different levels to cooperate in pursuing their legislative mandates. The constitutional analysis required by these two doctrines involves identifying the *pith and substance* of the impugned statute or provisions. ... We will use the expression "dominant purpose," which incorporates all the necessary nuances.

[185] Activities, acts or conduct can sometimes be viewed from different normative perspectives, one relating to a federal power and the other to a provincial power. Where this is the case, the double aspect doctrine is engaged. ...

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[188] As a result of some clarifications made in *Canadian Western Bank*, at para. 32, ... we now prefer—rather than speaking of an "encroachment" ... to use the word "overflow" when discussing the ancillary powers doctrine. ...

[Justices LeBel and Deschamps described the ancillary powers doctrine, stressing that the first step is to identify the pith and substance of each impugned provision as precisely as possible, avoiding vague or general characterizations. In the course of this discussion, they drew an analogy to Charter analysis.]

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[190] ... The identification of the pith and substance of a provision or a statute is ... subject to the same requirement of precision as the identification of the purpose ... under s. 1 of the [Charter]. ... If vague characterizations of the pith and substance of provisions were accepted, this could lead not only to the dilution of and confusion with respect to [constitutional doctrine] ... but also to an erosion of the scope of provincial powers

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[192] Despite its importance, the identification of the pith and substance remains only one part of the first step in applying the ancillary powers doctrine. It is also necessary to assess the extent of the overflow. ... [I]f the provisions—considered in isolation—would be *ultra vires* the legislature that enacted them, the court must review the extent to which they are integrated into the otherwise valid statute of which they form a part. ... There are two applicable concepts: rationality—or simple functionality, to use the language from *General Motors*—and necessity.

[193] The need to maintain the balance resulting from the division of legislative powers ... justifies the adoption of a variable test. ... [T]he more necessary the provisions are to the effectiveness of the rules set out in the part of the statute that is not open to challenge, the greater the acceptable overflow will be.

[194] ... Since the purposes and effects of a statute's many provisions can be different, it is important to consider the impugned provisions separately before considering their connection with the other provisions of the statute.

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[196] ... [Clare must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis. ...

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VII. Analysis of the Impugned Provisions

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A. Pith and Substance of the Impugned Provisions

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(1) Purpose of the Provisions

[202] The words of the statute itself can of course be of assistance in the identification of the purpose of impugned provisions. However, the context of the enactment of the statute often reveals as much as, if not more than, the words used. ... We must therefore go back to the Baird Commission's studies and the extensive work that followed, as well as to the bills that preceded the enactment of the *AHR Act*. ...

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[206] It is clear that the Baird Commission wanted certain activities to be denounced and prohibited because, in its view, there was a consensus that they were reprehensible. But the Commission also wanted assisted human reproduction and related research activities to be regulated for the purpose of establishing uniform standards that would apply across Canada. Thus, it can be seen that the distinction drawn in the *AHR Act* between prohibited activities and controlled activities corresponds to the two distinct categories of activities for which the Baird Commission recommended two distinct approaches with different purposes.

[Justices LeBel and Deschamps reviewed the 1995 moratorium on certain reproductive practices; the 1995 report of a federal discussion group on embryo research; the first three bills introduced in Parliament, which dealt only with the prohibited activities; and the scheme of the 2004 Act, with its distinction between prohibited and controlled activities, to conclude that Parliament had adopted the Baird Commission's recommendation of two distinct approaches.]

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[213] In short, while it is true that certain groups in Canadian society are opposed to assisted human reproductive technologies ... , the evidence shows that assisted human reproduction is usually regarded as a form of scientific progress that is of great value to individuals dealing with infertility problems. ... [I]t is clear from the evidence that research into such technologies is considered to be not only desirable, but necessary.

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[217] We therefore cannot agree with the Attorney General of Canada that the impugned provisions concerning the controlled activities have the same purpose as the unchallenged provisions concerning the prohibited activities. Parliament responded to what was presented to it as a consensus that some of the prohibited activities are reprehensible. ... It showed no such intention with respect to the activities that are not prohibited completely

(2) Effect of the Provisions

[Justices LeBel and Deschamps then considered at length the "actual impact of the application of the provisions." They concluded that the Act's provisions seriously affected the practice of medicine, and overlapped or conflicted with many provisions of Quebec law. In their view, the Act would have a considerable impact on the practice of medicine and everyone who participates in assisted human reproduction.]

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[227] [Therefore,] the purpose and effects of the provisions in question related to the regulation of a specific type of health services provided ... to individuals who ... need help to reproduce. Their pith and substance must be characterized as the regulation of assisted human reproduction as a health service.

B. Connecting the Pith and Substance of the Provisions with Heads of Power

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(1) Scope of the Federal Criminal Law Power

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[232] [In the *Margarine Reference*,] Rand J. stressed that a substantive component was needed to justify the exercise of the federal criminal law power. However, the most frequently quoted passage from his opinion does little to clarify the content of this substantive component:

Is the prohibition ... enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law [p. 50]

Health, which Rand J. mentioned, cannot always justify action by Parliament in relation to the criminal law. This passage must therefore also be considered in the context of Rand J.'s definition of the criminal law. :

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly *look for some evil or injurious or undesirable effect upon the public against which the law is directed*. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. [Emphasis added; p. 49.]

In our view, therefore, it is not enough to identify a public purpose that would have justified Parliament's action. ... Where its action is grounded in the criminal law, the public purpose must involve suppressing an evil or safeguarding a threatened interest.

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[234] The formal component—establishing a prohibition and accompanying it with a penalty—supports a finding that a regulatory scheme, even one that takes the form of exemptions from a prohibitory scheme, falls within the field of criminal law. However, the substantive component, the justifiable criminal law purpose—the prohibition of a real or apprehended evil, and the concomitant protection of legitimate societal interests—must also be present. ...

[235] These components permit the federal government to deal with and make laws with regard to new realities, such as pollution, and genetic manipulations that are considered undesirable. Thus, Parliament retains flexibility in making decisions to prohibit conduct it considers reprehensible and to prevent the undesirable effects of such conduct.

[236] ... [T]he evil or threat must be real. In the context of the *Charter*, the recognized threshold is that of the reasoned apprehension of harm Although the instant case does not involve the application of the *Charter*, referring to a threshold illustrates what form a substantive component might take and helps give concrete form to the substantive component of the criminal law. ...

[237] It must be possible to describe the risk of harm precisely enough that a connection can be established between the apprehended harm and the evil in question. ...

[A review of case law, including *RJR-MacDonald*, *Hydro Québec*, and the *Firearms Reference*, has been omitted.]

[238] The requirement of a concrete basis and a reasoned apprehension of harm applies with equal force where the legislative action is based on morality. ... [T]he Chief Justice relies heavily on the purpose of upholding public morality. In her view, ... Parliament need only have a reasonable basis to expect that its legislation will address a concern of fundamental importance (para. 50). If her interpretation were adopted, the decision to bring certain conduct within the criminal law sphere would never be open to effective review by the courts. ... This approach in effect totally excludes the substantive component that serves to delimit the criminal law. ...

[239] In our opinion, this goes further than any previous judicial interpretation. ... It is true that the criminal law often expresses aspects of social morality Yet care must be taken not to view every social, economic or scientific issue as a moral problem. ... [W]hen Parliament criminalizes an act, its decision remains subject to review by the courts, which will take society's attitude into account. And it must be borne in mind in this area that a broad range of philosophical and religious ideas coexist in a society as diverse as contemporary Canadian society. ... The coming into force of the *Charter*, for example, resulted in fundamental changes that affected offences related to sex, pornography and prostitution and demonstrated the importance of the explosion of the former conceptual framework The judgments on the

application of the *Charter* ... clearly illustrate what is considered to be an evil, which is a question the Chief Justice does not deal with in her analysis relating to morality. ...

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(2) Lack of a Connection Between the Pith and Substance of the Impugned Provisions and the Federal Criminal Law Power

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[250] To find that the pith and substance of the impugned provisions relates to the prohibition of reprehensible conduct is ... problematic in two ways. First, from the standpoint of morality, no evil has been identified. Second, all activities related to assisted human reproduction are regulated, not just specific ones that Parliament could theoretically have considered—but in fact did not consider—reprehensible. ...

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[254] ... Although assisted human reproduction raises moral and ethical questions, this does not necessarily mean that exercising the criminal law power is justified on the basis that there is an evil to be suppressed. Rather, both those who testified before the Baird Commission and those who participated in the parliamentary debates acknowledged that the development of assisted human reproduction amounts to a step forward for the constantly growing number of people dealing with infertility. Moreover, it represents the only option for homosexuals who wish to reproduce. The risks for the health and safety of people who resort to these technologies do not distinguish the field of assisted human reproduction from other fields of medical practice

[Reference is made to many other medical procedures, such as heart bypass surgery, that raise issues related to health, safety, and ethics.]

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[256] In the end, if we were to adopt the Attorney General of Canada's interpretation ... , nearly every new medical technology could be brought within federal jurisdiction. This view of the criminal law is incompatible with the federal nature of Canada

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[258] As we explained above, in determining whether a provision is valid, the court must examine, *inter alia*, the overflow from the exclusive jurisdiction of the government that enacted it. ... We will now therefore turn to the connection between the impugned provisions and the exclusive provincial power.

(3) Connection with Provincial Powers

[259] ... It is clear from the record that the impugned statutory provisions fall under various provincial heads of power.

[260] ... [I]t is inconceivable that assisted reproductive technologies could be employed without the support of institutions under provincial jurisdiction

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[265] In reviewing the effects of the impugned provisions, we observed that the provisions affect essential aspects of the relationship between a physician and persons who require assistance for reproduction. ... [T]he provisions lie at the very core of the provinces' jurisdiction over civil rights and local matters.

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[267] ... [T]he fact that the impugned provisions have a significant effect on activities that generally fall within the exclusive jurisdiction of the provinces confirms

that those provisions represent an overflow of the exercise of the federal criminal law power. At this point, ... it is necessary to complete the analysis and consider whether the ancillary powers doctrine applies. [Here, the judges discuss double aspect. This portion of the judgment is excerpted in Chapter 8, Interpreting the Division of Powers.]

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[272] Insofar as the provisions ... are purely ancillary ... we need not go into greater detail in order to conclude that they are invalid. However, we wish to point out that the constitutional defects are not remedied by s. 68 of the *AHR Act*, which authorizes the Governor in Council to declare certain provisions inapplicable if the federal minister and the government of a province so agree. The jurisdictional overflow remains just as great as long as regulation of the activities in question remains dependent on the will of the federal government. ... The federal government alone is to determine whether the two schemes are consistent. Subordinating the statutes and regulations in question in this way would be possible only if the federal legislation were itself valid because it was anchored in a specific federal power

[273] In sum, ... the impugned provisions, far from falling under the federal criminal law power, relate instead to the provinces' jurisdiction over hospitals, property and civil rights and matters of a merely local or private nature... . If any doubt remained, this is where the principle of subsidiarity could apply ... as an interpretive principle ... that serves as a basis for connecting provisions with an exclusive legislative power. ... [Subsidiarity] would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power

[Justices LeBel and Deschamps then considered the application of the ancillary powers doctrine to the impugned provisions. In light of their finding that the overflow was serious, they applied the "necessity" test and determined that it was not met. The absolute prohibitions could stand on their own, and there was no legislative history that connected those prohibitions with the criminal law. They concluded that the impugned provisions were not valid, thus upholding the decision of the Quebec Court of Appeal.]

CROMWELL J:

[In a very brief opinion, Cromwell J disagreed with the results proposed by the other justices. He characterized the "matter" of Act as regulation of virtually every aspect of research and clinical practice relating to assisted human reproduction. He then classified this matter as being in relation to provincial powers in ss 92(7), (13), (16), stating that he mostly agreed with the reasons proffered by LeBel and Deschamps JJ. However, unlike Justices LeBel and Deschamps, he upheld ss 8, 9, and 12 as validly enacted under the federal criminal law power because they prohibited negative practices, which fell within the "traditional ambit of the federal criminal law power." He upheld the constitutionality of the remaining provisions only to the extent that they dealt with enforcement of the constitutionally valid provisions.]

Appeal allowed in part.

NOTES AND QUESTIONS

1. In 2012, the Act was amended to conform with the pivotal and brief decision of Cromwell J: see the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19, ss 713-25.
2. The two main opinions differ both as to the characterization of the impugned legislation and as to the criteria for classifying legislation as coming within s 91(27).

With respect to characterization, McLachlin CJ describes the pith and substance of the Act, including each of ss 5 through 13, as "the prohibition of negative practices associated with assisted reproduction" (at para 34). By contrast, Lebel and Deschamps JJ characterize some of the provisions (ss 8–13) differently: "their pith and substance ... [is] the regulation of assisted human reproduction as a health service" (at para 227). Do the justices' respective characterizations predetermine the outcome of the validity analysis, insofar as the prohibition of harmful practices obviously aligns with the criteria for validity under s 91(27), while the regulation of health services obviously comes within s 92(13) or s 92(16)? By what objective standard can one decide whether the dominant character of a legal provision is to "prohibit negative practices" as opposed to "regulating" an otherwise licit activity? See Ian Lee, "Case Comment" (2011) 90 Can Bar Rev 469 at 475, 485.

With respect to scope of the federal criminal law power, the LeBel and Deschamps JJ opinion would require that legislation enacted under s 91(27) be directed at a "real evil" and that there be "a reasonable apprehension of harm" (at para 240). By contrast, the McLachlin CJ opinion views the criminal law power as "plenary," subject only to the three requirements of prohibition, penalty, and criminal law purpose. What are the implications of each view for the judicial function in federalism cases?

3. As noted in the discussion of the ancillary powers doctrine in Chapter 8, Interpreting the Division of Powers, the McLachlin CJ and Lebel and Deschamps JJ opinions take different positions on the order in which to apply the steps in the ancillary powers doctrine, with McLachlin CJ beginning her analysis by considering the legislation as a whole, and LeBel and Deschamps JJ beginning their analysis by looking only at the impugned provision. What difference, if any, does it make in what order these steps are undertaken?

4. The two main opinions also disagree about the appropriate role of the principle of subsidiarity—that is, the principle that decisions should be made at the level of government closest to the citizens affected. The LeBel and Deschamps JJ opinion regards the principle as an interpretive aid that, in the context of doubt about classification, "would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law" (at para 273). By contrast, McLachlin CJ stresses that while the principle of subsidiarity may allow complementary legislation by the provincial government, it does not prevent the national government from using its heads of power, nor is the exercise of a power constrained by concerns of subsidiarity (at para 72). Further discussion of the principle of subsidiarity, including its origins in European Union law and suggestions for further reading, can be found in Chapter 9 (see Note 6 following the *References Re Greenhouse Gas Pollution Pricing Act* excerpt in Chapter 9).

5. As you have read, the AHRA contained an equivalency provision, s 68, which permitted the governor in council to declare provisions of the Act inapplicable in a province with a similar provincial law, pursuant to an agreement with that province. Chief Justice McLachlin characterized this provision as follows:

[152] ... This provision recognizes the fact that assisted human reproduction is an area of overlapping jurisdiction, and it provides for harmonization and the avoidance of duplication where provincial laws cover the same matters as the Act. Section 68 provides a flexible approach to federal–provincial cooperation, which is appropriate to modern federalism, where matters will frequently attract concurrent legislative authority.

In response to Quebec's argument that the inclusion of s 68 indicated the "predominantly regulatory nature" of the Act, McLachlin CJ replied:

[153] ... This is an old argument, and it has been soundly rejected in the jurisprudence. The mere fact that a matter comes within provincial jurisdiction does not preclude it from coming under federal jurisdiction as well. As noted above, this Court has upheld as constitutional

provisions that allow the provinces to limit the scope of federal legislation under cooperative schemes.

How does this characterization of the equivalency provision compare to the treatment of similar provisions in the legislation at issue in *Hydro-Québec*, excerpted above, and the *Reference re Securities Act*, [2011 SCC 66](#), excerpted in Chapter 10.

Reference Re Genetic Non-Discrimination Act 2020 SCC 17

[The *Genetic Non-Discrimination Act*, enacted by Parliament in 2017, does three things. First, in ss 1-7, the Act prohibits any person, under penalty of a fine or imprisonment, from requiring an individual to undergo or disclose the results of a genetic test as a condition of contracting with or providing goods and services to that individual, or to collect and use such results without the individual's consent. Second, s 8 of the Act amends the *Canada Labour Code*, RSC 1985, c L-2 to protect the right of the employees in industries within federal jurisdiction not to be required to undergo genetic testing or disclose the results of a genetic test. Third, ss 9-10 of the Act add "genetic characteristics" as a listed ground of discrimination under the *Canadian Human Rights Act*, RSC 1985, c H-6 (which applies within the federal public sector and to businesses in federally regulated industries).]

Unusually, the Act originated as a private member's bill. The federal government had expressed opposition to the bill on the ground that ss 1-7 fell within provincial jurisdiction. Nevertheless, the bill was approved unanimously by the Senate and by a large majority in a free vote in the House of Commons. Soon after its enactment, the validity of ss 1-7 was challenged in a reference proceeding brought by the Quebec government.]

KARAKATSANIS J (Abella and Martin JJ, concurring):

A. Characterization

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[30] Identifying a law's pith and substance requires considering both the law's purpose and its effects: *Firearms Reference*, at para. 16....

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[34] To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications: *Firearms Reference*, at para. 17.

[35] A law's title, especially its long title, is an important form of intrinsic evidence, as both titles are an integral part of the law: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 440-41. Here, both the short title—the *Genetic Non-Discrimination Act*—and the long title—*An Act to prohibit and prevent genetic discrimination*—suggest that the Act's purpose is twofold. They suggest that the Act seeks to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place.

[36] Turning to the Act's text and structure, the prohibitions created by ss. 3 to 5 apply to a wide range of circumstances (obtaining goods and services and entering into contracts) in which individuals might be treated adversely based on their decision whether to undergo genetic testing and based on test results. The prohibitions

are of general application, as they do not target a particular activity or industry. Instead, they target specific behaviour related to genetic testing, namely forcing individuals to undergo testing and disclose test results, and using test results without consent. The prohibitions target conduct that enables genetic discrimination.

[37] The definition of "genetic test" in s. 2 of the Act is broad and captures analyses of DNA, RNA or chromosomes performed with a wide range of ends in mind. Section 2 defines a genetic test as "a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis."

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[39] ... Health-related genetic tests reveal highly personal information—details that individuals might not wish to know or share and that could be used against them. The prohibitions target a broad range of conduct that creates the opportunity for genetic discrimination based on intimate personal information revealed by health-related tests. Parliament saw genetic test results relating to health as particularly vulnerable to abuse and discrimination. The intrinsic evidence suggests that the purpose of the provisions is to combat discrimination based on information disclosed by genetic tests by criminalizing compulsory genetic testing, compulsory disclosure of test results, and non-consensual use of test results in a broadly-defined context (the areas of contracting and the provision of goods and services). The extrinsic evidence points largely in the same direction.

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[47] Parliament's decision to [amend] the *Canada Labour Code* and the *Canadian Human Rights Act* in conjunction with its enactment of the Act's substantive provisions suggests that Parliament was looking to take a coordinated approach to tackling genetic discrimination based on test results, using different tools. It was not only targeting genetic discrimination directly through human rights and labour legislation, but was also targeting precursors to such discrimination, namely forced genetic testing and disclosure of the results of such testing. The fact that Parliament did not criminalize genetic discrimination does not belie Parliament's purpose of combatting genetic discrimination in this context. The relative breadth, directness or efficacy of the means Parliament chooses to address a problem is not the court's concern in its pith and substance inquiry.

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[51] Both legal and practical effects are relevant to identifying a law's pith and substance. Legal effects "flow [directly] from the provisions of the statute ... itself," whereas practical effects "flow from the application of the statute [but] are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54, citing *Morgentaler* (1993), at pp. 482-83.

[52] Starting with legal effects, ss. 3 to 5 of the *Genetic Non-Discrimination Act* prohibit genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances. Section 7 imposes significant penalties for contravening these prohibitions.

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[54] The most significant practical effect of the Act is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the results of any genetic testing they choose to undergo. The Act does so by preventing genetic testing requirements from being imposed on individuals as a condition of access to goods, services and contracts, and by preventing individuals' genetic test results from being used non-consensually when they seek to obtain goods and services and enter into contracts. Even if an individual voluntarily discloses the results of a genetic test in such circumstances, the Act prevents the

recipient of the information from using the information in any manner that has not been consented to in writing or from further disclosing the information. The activities to which the Act applies are broad and fundamentally structure Canadians' interactions with the world around them. The control that ss. 1 to 7 of the Act gives to individuals over genetic testing and genetic test results is equally significant and broad in scope.

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[56] By protecting choices about who has access to such information, the legislation reduces the risk of genetic discrimination. And by removing the fear of some of the negative consequences that could flow from genetic testing, the Act may encourage individuals to undergo genetic testing. Additional testing may in turn produce health benefits, including by enabling earlier detection of health problems or predispositions, providing for more accurate and sometimes life-saving diagnoses and improving the health care system's ability to provide maximally beneficial care.

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[63] In enacting the *Genetic Non-Discrimination Act*, Parliament acted to combat genetic discrimination and the fear of genetic discrimination based on genetic test results. ...

[64] Crucially, Parliament's purpose in enacting the provisions in question is borne out in the provisions' effects. The most direct and significant practical effect of the prohibitions is to give individuals control over the decision of whether to undergo genetic testing and over access to the results of genetic testing. This practical effect is a direct result of the prohibitions' legal effects.

[65] I accordingly conclude that, in pith and substance, ss. 1 to 7 of the Act protect individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address fears that individuals' genetic test results will be used against them and to prevent discrimination based on that information.

G. Classification

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[67] ... Sections 1 to 7 of the *Genetic Non-Discrimination Act* will be valid criminal law if, in pith and substance: (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose: *Firearms Reference*, at para. 27; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50 (*Margarine Reference*), aff'd [1951] A.C. 179 (P.C.).

[68] There is no dispute that the challenged provisions meet the first two requirements. They prohibit specific conduct and impose penalties for violating those prohibitions. The only issue is whether the matter of ss. 1 to 7 of the Act is supported by a criminal law purpose. ...

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[74] ... A law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest.

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[79] Taken together, the requirements established in the *Margarine Reference* and subsequently applied in this Court's jurisprudence mean that a law will have a criminal law purpose if its matter represents Parliament's response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm

need be proved before it can make criminal law. The court does not determine whether Parliament's criminal law response is appropriate or wise. The focus is solely on whether recourse to criminal law is *available* under the circumstances.

[80] ... In my view, the essential character of the prohibitions represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy and the fundamental social value of equality, as well as public health.

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[85] In particular, forced genetic testing (prohibited in s. 3 of the *Act*) poses a clear threat to autonomy and to an individual's privacy interest in not finding out what their genetic makeup reveals about them and their health prospects. People may not want to learn about their "genetic destiny," or risk the psychological harm that can result from obtaining unfavourable genetic test results. ... Forced disclosure of genetic test results (prohibited in s. 4) and the collection, use or disclosure of genetic test results without written consent (prohibited in s. 5) threaten autonomy and privacy by compromising an individual's control over access to their detailed genetic information. Such threats to autonomy and personal privacy are threats to human dignity.

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[90] Protecting fundamental moral precepts or social values is an established criminal law purpose: *Margarine Reference*, at p. 50; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, at pp. 932-33; *Reference re AHRA*, at paras. 49-51 and 250. Parliamentarians considered discrimination on the basis of health-related genetic test results to be morally wrong. They viewed such genetic discrimination to be antithetical to the values of equality and human dignity. ... In acting to suppress a threat of that nature, Parliament acted with a criminal law purpose.

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[96] Parliament is entitled to use its criminal law power to respond to a reasoned apprehension of harm, including a threat to public health.

[97] ... Testimony before Parliament demonstrated that fear of genetic discrimination leads patients to forego beneficial testing, results in wasted health care dollars and may deter patients from participating in research that could advance medical understanding of their conditions. Genetic discrimination is a barrier to accessing suitable, maximally effective health care, to preventing the onset of certain health conditions and to participating in research and other initiatives serving public health. Parliament accordingly apprehended individuals' vulnerability to and fear of genetic discrimination based on test results as a threat to public health.

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[103] Parliament took action in response to its concern that individuals' vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address Canadian's fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fall within Parliament's criminal law power because they consist of prohibitions accompanied by penalties, backed by a criminal law purpose.

MOLDAVER J (Côté J concurring):

A. Characterization

[114] ... [T]he pith and substance of ss. 1 to 7 of the Act is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. This is borne out by the purpose and effects of these provisions.

[115] ... I do not agree with Justice Karakatsanis that preventing discrimination forms part of the pith and substance of the challenged provisions. While I accept that ss. 1 to 7 of the Act reduce the opportunities for discrimination based on one's genetic test results, thereby mitigating individuals' fear of genetic discrimination, they do so by giving people control over the information revealed by genetic tests in furtherance of the purpose of protecting health. With respect, preventing or combating genetic discrimination is not the "dominant purpose or true character" of these provisions (see *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29).

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[125] Unlike the changes to the *Canada Labour Code* and the *Canadian Human Rights Act*, the provisions in issue do not prohibit genetic discrimination—that is, differential treatment "on the basis of the results of a genetic test" or based on one's "genetic characteristics." Sections 1 to 7 could have included such a prohibition, but they do not. In my view, the different approach taken by Parliament in the amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* as compared to the impugned provisions indicates that where Parliament's dominant objective was to prevent and prohibit genetic discrimination, it did so directly. This supports my conclusion that the dominant purpose of ss. 1 to 7 is not preventing and prohibiting genetic discrimination, but rather prohibiting conduct that deprives individuals of control over their genetic test results in order to protect health. It follows that I am unable to agree with Justice Karakatsanis's conclusion that the three parts of the Act are all part of "a multi-pronged approach to combatting genetic discrimination" (para. 48). With respect, that conclusion is too broad and fails to place adequate weight on the important differences between ss. 1 to 7 and ss. 8 to 10.

[126] The parliamentary record bolsters my conclusion regarding the purpose of the provisions in question. On my reading of the debates and the testimony heard by the Senate and House of Commons committees tasked with reviewing Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017, the focus was clearly directed at the devastating health consequences that were resulting from people foregoing genetic testing out of fear that the personal health information revealed by such testing could be used against them, including in discriminatory ways. ...

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[136] For these reasons, I conclude that the pith and substance of ss. 1 to 7 of the Act is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. These provisions prohibit compulsory genetic testing, compulsory disclosure of genetic test results, and the non-consensual collection, disclosure and use of those results in a wide array of contexts that govern how people interact with society. By giving people control over this information, ss. 1 to 7 of the Act mitigate their fears that it will be used against them. Such fears lead many to forego genetic testing, to the detriment of their own health, the health of their families, and the public healthcare system as a whole.

B. Classification

[Discussion of criminal law form has been omitted.]

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[139] Sections 1 to 7 of the Act are backed by a criminal law purpose because they are directed at suppressing a threat to health. ...

[140] The threat to health that Parliament targeted by enacting ss. 1 to 7 of the Act was real—in every sense of the word. Parliament had ample evidence before it that people were refraining from undergoing genetic testing out of fear as to how their genetic test results could be used, thereby suffering significant harm or putting themselves at risk of significant and avoidable harm. The debates and committee testimony are saturated with examples of the life-saving, life-extending, and life-enhancing potential of genetic testing—all of which individuals felt they had to forego because they could not control the ways in which the results of such testing would be used in various contexts.

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[143] ... [Sections] 1 to 7 are not directed at the mere "promotion of beneficial health services or practices" (Kasirer J.'s reasons, at para. 240), but rather at protecting people from severe harms to their health caused by foregoing genetic testing out of fear that their information will be used against them (e.g., by way of non-consensual collection, disclosure, or use of genetic test results). While it is no doubt true that not dying of a preventable disease is a "better health outcom[e]" than dying from that disease (Kasirer J.'s reasons, at para. 239), I believe it makes more sense to describe measures directed at preventing such outcomes as being protective of health.

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[150] In sum, as I see it, by enacting ss. 1 to 7 of the Act, Parliament targeted conduct that was having an injurious effect on health. ... Parliament was constitutionally entitled to address [this threat to health], pursuant to s. 91(27) of the *Constitution Act, 1867* ...

KASIRER J (Wagner CJ and Brown and Rowe JJ concurring) (dissenting):

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[154] On my understanding, the pith and substance of ss. 1 to 7 is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians. ...

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A. Characterization: What Is the Pith and Substance of Sections 1 to 7 of the Act?

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[174] In my view, neither the long title of this statute—*An Act to prohibit and prevent genetic discrimination*—nor its short title—*Genetic Non-Discrimination Act*—can be said to reflect clearly the impugned provisions' true purpose. With respect, I disagree that these titles reveal that the provisions' purpose is to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place. To my mind, genetic non-discrimination cannot be said to be the primary objective of the impugned provisions.

[175] ... While the long title explicitly refers to the prohibition of genetic discrimination, it must be borne in mind that this long title speaks to the entirety of the Act, which includes amendments to the *CLC* and the *CHRA*. [T]he amendments to the *CLC* and the *CHRA* purport to prohibit genetic discrimination directly whereas the

prohibitions in ss. 1 to 7 do not. As a result, the long title does not support the conclusion that the impugned provisions—the focus of the pith and substance inquiry—seek to prohibit genetic discrimination, as the “prohibition” in the long title could easily be referring to the *CLC* and *CHRA* amendments, but not to ss. 1 to 7. ...

[176] This then brings us to the prevention of discrimination on genetic grounds, which is also explicitly referred to in the long title. While I accept that ss. 1 to 7 do seek to curtail circumstances in which genetic discrimination can occur, and thus prevent such circumstances from arising in connection with contracts and the provision of goods and services, the provisions leave open the possibility that genetic information may be legitimately used—thereby not precluding use for drawing distinctions based on genetic characteristics—when it has been disclosed voluntarily or obtained through other means than a genetic test. In that sense, even “preventing genetic discrimination” cannot be properly understood to be the main objective of the contested provisions. At most, preventing some circumstances from arising that could facilitate genetic discrimination is one of the many consequences of ss. 1 to 7, but an unconvincing way to describe its dominant purpose.

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[184] As the Court of Appeal explained in its reasons, taken together, ss. 1 to 7 aim to prohibit making the provision of goods and services or the making, continuing, or offering of specific terms or conditions of a contract conditional upon an individual undergoing or disclosing the results of genetic testing (paras. 8 and 10). The provisions do not prohibit the use of genetic information that may be disclosed voluntarily or that may be required or obtained through other means, such as family history or other medical tests, and they do not prohibit genetic discrimination. It is clear that the purpose of ss. 1 to 7 is different from the veritable prohibitions against discrimination based on genetic characteristics set forth in the amendments made to the *CHRA* and to the *CLC* in ss. 8 to 10 of the *Act*, which are extrinsic to the impugned provisions, to which I turn in the next section.

[Justice Kasirer next discusses the amendments to the *CHRA* and *CLC* that prohibit genetic discrimination.]

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[193] The contrast between the amendments to the *CHRA* and the *CLC*, which create prohibitions against discrimination, and the impugned provisions, which do not, shows that the purpose of ss. 1 to 7 is different from that of these amendments. If Parliament had attempted to take a coordinated approach to genetic discrimination in the *Act*, discrimination on the basis of genetic characteristics would have been directly prohibited in the impugned provisions, and not only in the *CHRA* and *CLC*. ...

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[196] ... [Moreover, the legislative] debates generally reveal that genetic tests were considered to be beneficial and viewed as a means of opening avenues to improved health treatment, as they allow Canadians to be aware of risks and change their behaviour. ...

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[202] ... [T]hese debates emphasize that while the amendments to the *CLC* and *CHRA* prohibit genetic discrimination, ss. 1 to 7 of the *Act* were included as a way to encourage Canadians to undergo genetic tests, by mitigating their fears that they would be misused, in particular in respect of insurance and employment.

[203] When considering the whole of the record, ... it is plain that the main goal of ss. 1 to 7 is not to combat discrimination based on genetic characteristics. Genetic discrimination may have been on the mind of parliamentarians, but it is not prohibited in the impugned provisions. Nor is their objective to control the use of private

information revealed by genetic testing, which is secondary to the true purpose of the provisions. Rather, the true aim of the provisions is to regulate contracts, particularly contracts of insurance and employment, in order to encourage Canadians to undergo genetic tests without fear that those tests will be misused so that their health can ultimately be improved.

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B. Classification: Does the Pith and Substance of the Impugned Provisions Fall Under the Section 91(27) Criminal Law Power?

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[230] As the parties all agree, the impugned provisions satisfy the formal requirements of a criminal law. The only issue concerns whether they are supported by the third requirement, a valid criminal law purpose. My colleague Justice Karakatsanis and I have different views of this requirement, and we accordingly reach different conclusions on whether it is satisfied. Our respective views of the matter—which find echo in the disagreement at the heart of the *AHRA Reference*—cannot be said to have no impact on the result of this case.

[231] In the *Margarine Reference*, Rand J., whose reasoning was adopted by the Privy Council in *Canadian Federation of Agriculture v. Attorney-General for Quebec*, [1951] A.C. 179, explained the substantive “criminal law purpose” requirement:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. ...

Accordingly, it is not sufficient that Parliament merely wishes to legislate with respect to some public purpose. Rather, the impugned legislation must also be directed at an “evil or injurious or undesirable effect upon the public.”

[232] I disagree with the appellant that the word “evil”—the traditional measure of the criminal law in this context—is unhelpful in the classification analysis. Rather, the concept of “evil” is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose, contrary to my colleague’s suggestion (see Karakatsanis J.’s reasons, at para. 76). ...

[233] The words “some evil or injurious or undesirable effect upon the public against which the law is directed” point to a more precise idea than the protection of central moral precepts, in a broad sense: Parliament cannot act unless it seeks to suppress some threat. This threat itself must be well-defined and have ascertainable contours to constitute the valid subject-matter of criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*. It must also be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm. To suggest otherwise would be to render the substantive requirement so vague as to be impractical as a measure of what amounts to criminal law for constitutional purposes.

[234] I draw from the *Margarine Reference* and LeBel and Deschamps JJ.’s reasons in the *AHRA Reference* that three questions must be confronted when determining whether a law rests upon a valid criminal law purpose. First, does the impugned legislation relate to a “public purpose,” such as public peace, order, security, health, or morality? Second, did Parliament articulate a well-defined threat to be suppressed or prevented by the impugned legislation (i.e. the “evil or injurious or undesirable effect upon the public”)? Third, is the threat “real,” in the sense that Parliament had

a concrete basis and a reasoned apprehension of harm when enacting the impugned legislation? I will discuss each question in turn.

[Justice Kasirer agrees that the legislation relates to a “public purpose”—namely, health—and that the first question is therefore answered in the affirmative. However, he would answer the second and third questions in the negative.]

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[237] ... [The second question requires Parliament to] clearly articulate and define the scope of the threat it seeks to suppress. That is, it must articulate a precise threat with ascertainable contours. This requirement ensures that the scope of Parliament’s actions is limited to a specific problem, and it is particularly important in relation to matters that have provincial aspects, such as health, in order to preserve the balance of federal and provincial powers.

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[242] [T]he “promotion of health” in and of itself will simply not suffice at this stage. ... The record must reveal a well-defined threat (i.e. the “evil or injurious or undesirable effect upon the public”) to be suppressed or prevented by the impugned legislation. As my colleague Justice Karakatsanis notes, such threats may be as diverse as tobacco (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199); dangerous food products (*R. v. Wetmore*, [1983] 2 S.C.R. 284); illicit drugs (*Malmo-Levine*); firearms (*Firearms Reference*); and toxic substances (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213).

[243] My colleague Justice Moldaver writes that the impugned provisions are directed not at the promotion of health, but at the protection of individuals from health-related harms. In his view, the impugned provisions protect against deleterious effects on health that have resulted from Canadians foregoing genetic testing (paras. 116 and 140-43). In the circumstances of this case, however, any protection from health-related harms is present solely because it is a consequence of another objective: the promotion of better health outcomes for all Canadians. Contrary to McLachlin C.J.’s conclusion in the *AHRA Reference*, beneficial practices in our case are not “incidentally” permitted; rather, they are at the very core of the impugned legislation (para. 30). In other words, Parliament viewed genetic tests as beneficial, and therefore sought to remove barriers so Canadians could access them.

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[247] As explained above, ss. 1 to 7 do not prohibit genetic discrimination. While they may be said to have an indirect effect of preventing genetic discrimination from occurring in the first place, the primary objective of the provisions is not to prohibit or even to prevent genetic discrimination. Rather, the impugned provisions prohibit requiring a genetic test or the disclosure or use of the results in the conclusion of a contract or in the provision of goods and services, except where consent is given. Nothing in the record suggests that these prohibited activities should be regarded as conduct that is a threat to health.

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[249] Of course, Parliament can use indirect means in the exercise of its criminal law power, as was the case in *RJR-MacDonald*. [But in] that case, the threat targeted by Parliament was the detrimental effects caused by tobacco, which was supported by a copious body of evidence demonstrating that tobacco poses a serious threat to Canadians’ health. ... In this case, the impugned provisions are designed to encourage the use of genetic tests, which is a beneficial health practice as opposed to an inherently harmful substance, in an attempt to improve Canadians’ health. Since Parliament did not target a threat to health, there is simply no public health evil present here.

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[267] [The third substantive requirement is that] the threat Parliament seeks to suppress must be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm.

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[270] In this case, had I concluded there is a well-defined threat, I would also conclude that there is no evidentiary foundation of harm. Rather, Parliament seeks to improve the health of Canadians by making them aware of underlying conditions they may have and does so by attempting to encourage the use of genetic tests. Just as in the *AHRA Reference*, this advance in technology and health services is beneficial to Canadians, and has always been perceived as such.

[271] From the foregoing, I conclude that the contested provisions do not satisfy the substantive component of criminal law. While they do relate to a public purpose, Parliament has neither articulated a well-defined threat that it intended to target, nor did it provide any evidentiary foundation of such a threat. It matters little to the present task whether the impugned provisions constitute good policy: they are *ultra vires* Parliament's criminal law power.

[272] In my view, ss. 1 to 7 of the Act rather fall within provincial jurisdiction over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. As explained above, the impugned provisions substantially affect the substantive law of insurance as well as human rights and labour legislation in all provinces. There is no question that the provinces could enact the impugned provisions in their own jurisdiction, if they so desired (see *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.)).

NOTES AND QUESTIONS

1. The divergent characterizations of Moldaver and Kasirer JJ illustrate the difficulty, also encountered in the *AHRA Reference*, of ascertaining whether a given provision is concerned with "prohibiting negative practices" or with "regulating" an activity, and the related difficulty of determining whether the purpose of a provision is to prevent deleterious outcomes or to promote beneficial ones.

2. Additionally, as in the *AHRA Reference*, the validity analysis would seem to be predetermined by the characterization adopted. To be sure, there is a disagreement between Kasirer J and Karakatsanis and Moldaver JJ as to the legal requirements for valid criminal law. Yet, once Moldaver J has found that the dominant character of a law is to prohibit conduct because of its negative health consequences, it seems difficult to avoid the conclusion that the law is "criminal law" within the meaning of s 91(27); similarly, Kasirer J's determination that the pith and substance of which is to "regulate contracts and the provision of goods and services" seems to make it inevitable that the legislation is in relation to property and civil rights.

II. PROVINCIAL POWER TO REGULATE MORALITY AND PUBLIC ORDER

In our federal system, Parliament's power over criminal law exists not only in tension with provincial powers over property and civil rights but also with provincial imperatives to respond to local conditions of public order, safety, and morality. In many federations, national standards for defining and prosecuting criminal conduct are seen as serving important goals of instilling shared values and guaranteeing common standards and procedures for individuals. At the same time, local conditions may vary considerably and require local responses and

solutions to protect the public interest in order and morality. As noted above, in some federal systems, the local interest in criminal matters has been perceived as sufficiently strong to justify assigning jurisdiction over criminal law matters to regional units. While Canada did not make that choice, various mechanisms permit recognition of local interests in criminal law matters. First, as a result of s 92(14) of the *Constitution Act, 1867*, which gives the provincial legislatures jurisdiction over the administration of justice in the province (including provincial policing), combined with federal delegation to the provinces of the power to prosecute *Criminal Code* offences, much of the federal *Criminal Code* is provincially enforced. A degree of responsiveness to local conditions may thus inform decisions about the investigation and prosecution of criminal offences.

Second, in some cases, the federal government itself has, through the mechanism of conditional legislation (discussed further in Chapter 12, Instruments of Flexibility in the Federal System), drafted its criminal laws in ways that allow them to be shaped by the provinces to respond to local conditions. For example, Sunday observance laws were found to be a federal matter under the criminal law power in *AG Ont v Hamilton Street Railway*, [\[1903\] CanLII 121](#), [\[1903\] AC 524 \(UKJCPC\)](#), which declared provincial legislation on the subject *ultra vires*. However, the federal *Lord's Day Act* recognized the need for responsiveness to local values by following its general prohibition of work on Sunday with an exculpatory clause, "except as provided in any Provincial Act or law." Similarly, the *Criminal Code* prohibition on lotteries is followed by an exemption for provincial lotteries conducted in accordance with terms and licences issued by the lieutenant governor: see *R v Furtney*, [\[1991\] 3 SCR 89](#), [1991 CanLII 30](#).

The third way in which local interests in matters of public order and morality may be given expression is through judicial recognition of concurrent provincial jurisdiction in matters that may also be the subject of criminal law. This option is facilitated by the broad scope of provincial power over property and civil rights and the tendency in modern times to permit concurrency. But "double aspect" has its limits, as noted by the preceding discussion in *Reference re Assisted Human Reproduction Act*. The extent to which concurrency has been allowed and, conversely, the extent to which the federal criminal law power has operated as a brake on provincial attempts to regulate matters of public order and morality is explored in the materials that follow. Section 92(15) of the *Constitution Act, 1867* allows the provinces to enact penal sanctions, but the power is understood as an "ancillary" one, authorizing the use of penal sanctions to enforce provincial regulatory schemes that are validly anchored elsewhere in the s 92 list of provincial powers. The cases that follow typically turn on the issue of what constitutes a valid provincial anchor and the extent to which the courts are willing to recognize a double aspect with respect to matters covered by the *Criminal Code*. Just as the criminal law power has proven difficult to define with precision, so too has the scope of the limitation it imposes on provincial powers. The issue has been the source of ongoing litigation since Confederation, as the provinces have attempted to regulate local conditions of public order and morality and devise various ways of addressing public problems, such as driving while under the influence of alcohol.

In general, a fair amount of concurrency has been allowed by the courts, following the early precedent set in the battle over liquor regulation detailed in Chapter 4, The Late Nineteenth Century: The Courts Set an Initial Course, where the end result was a recognition that both the federal and provincial governments could legislate prohibition. However, from time to time, as in *Westendorp* and *Morgentaler*, both excerpted below, the courts have found that provinces have exceeded their jurisdiction and intruded into the federal criminal law power. As you read these cases, try to think about the factors that make a provincial law vulnerable to attack. Does it make a difference if the province is supplementing an existing criminal law or legislating in the absence of criminal prohibitions?

Nova Scotia Board of Censors v McNeil[1978] 2 SCR 662, 1978 CanLII 6

[The Nova Scotia *Theatres and Amusements Act*, RSNS 1989, c 466 and the regulations enacted under it established a system for licensing and regulating the showing of films. The regulations required that all films be submitted to the provincial censor board prior to their exhibition, the censor board having an unfettered power to permit or prohibit the showing of the film, or to permit its showing with directed changes. Sanction for breach of the regulations was a monetary penalty and revocation of a theatre owner's licence. After the censor board banned the film *Last Tango in Paris* from public viewing in theatres or other places in the province, McNeil, a private citizen, sought a declaration that the provisions of the Act and the regulations that authorized the ban were *ultra vires* the provincial legislature. The Appeal Division of the Nova Scotia Supreme Court granted the declaration. The Attorney General of Nova Scotia then appealed to the Supreme Court of Canada.]

LASKIN CJ (Judson, Dickson, and Spence JJ concurring) (dissenting):

What is involved [here] is an unqualified power in the Nova Scotia Board to determine the fitness of films for public viewing on considerations that may extend beyond the moral and may include the political, the social and the religious. Giving its assertion of power the narrowest compass, related to the film in the present case, the Board is asserting authority to protect public morals, to safeguard the public from exposure to films, to ideas and images in films, that it regards as morally offensive, as indecent, probably as obscene.

The determination of what is decent or indecent or obscene ... , what is morally fit for public viewing, whether in films, in art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under ... the criminal law. This has been recognized in a line of cases in which ... the criminal law power has been held to be as much a brake on provincial legislation as a source of federal legislation. For example, in *Switzman v. Elbling*, [[1957] SCR 285, 1957 CanLII 2] the Supreme Court invalidated a provincial statute which not only made it illegal for the possessor or occupier of a house to use or permit it to be used to propagate communism or bolshevism (which were not defined), but also made it unlawful to print, publish or distribute any newspaper or writing propagating or tending to propagate communism or bolshevism. ...

• • •

It is beside the point to urge that morality is not co-extensive with the criminal law. Such a contention cannot of itself bring legislation respecting public morals within provincial competence. Moreover, the federal power in relation to the criminal law extends beyond control of morality, and is wide enough to embrace anti-social conduct or behaviour and has, indeed, been exercised in those respects.

• • •

This is not a case where civil consequences are attached to conduct defined and punished as criminal under federal legislation ... but rather a case where a provincially authorized tribunal itself defines and determines legality, what is permissible and what is not. This, in my view, is a direct intrusion into the field of criminal law. At best, what the challenged Nova Scotia legislation is doing is seeking to supplement the criminal law enacted by Parliament, and this is forbidden

It was contended, however, by the appellant and by supporting intervenants that the Nova Scotia Board was merely exercising a preventive power, no penalty or punishment being involved, no offence having been created. ... [I]t is ingenuous to

say that no offence is created when a licensee who disobeyed the order would be at risk of a cancellation of his licence and at risk of a penalty and anyone else who proposed to exhibit the film publicly would likewise be liable to a penalty. Indeed, the contention invites this Court to allow form to mask substance ... [permitting the province to do] by prior restraint what it could not do by defining an offence and prescribing *post facto* punishment. ...

It does not follow from all of the foregoing that provincial legislative authority may not extend to objects where moral considerations are involved, but those objects must in themselves be anchored in the provincial catalogue of powers and must, moreover, not be in conflict with valid federal legislation. It is impossible in the present case to find any such anchorage in the provisions of the Nova Scotia statute that are challenged

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RITCHIE J (Martland, Pigeon, Beetz, and de Grandpré JJ concurring):

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When the Act and the Regulations are read as a whole, I find them to be primarily directed to the regulation, supervision and control of the film business within the Province of Nova Scotia, including the use and exhibition of films in that Province. To this end the impugned provisions are, in my view, enacted for the purpose of reinforcing the authority vested in a provincially appointed Board to perform the task of regulation which includes the authority to prevent the exhibition of films which the Board, applying its own local standards, has rejected as unsuitable for viewing by provincial audiences. This legislation is concerned with dealings in and the use of property (i.e., films) which take place wholly within the Province and in my opinion it is subject to the same considerations as those which were held to be applicable in such cases as *Shannon v. Lower Mainland Dairy Products Board*, [1938] CanLII 250, [1938] AC 708; *Home Oil Distributors Limited v. A-G of British Columbia*, [1940] SCR 444, 1940 CanLII 46] and *Caloil Inc. v. Attorney General of Canada* [1971] SCR 543, 1970 CanLII 194].

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It will be seen that, in my opinion, the impugned legislation constitutes nothing more than the exercise of provincial authority over transactions taking place wholly within the Province and it applies to the "regulating, exhibition, sale and exchange of films" whether those films have been imported from another country or not.

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Simply put, the issue raised by the majority opinion in the Appeal Division is whether the Province is clothed with authority under s. 92 of the *British North America Act* to regulate the exhibition and distribution of films within its own boundaries which are considered unsuitable for local viewing by a local board on grounds of morality or whether this is a matter of criminal law reserved to Parliament under s. 91(27).

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Under the authority assigned to it by s. 91(27), the Parliament of Canada has enacted the *Criminal Code*, a penal statute the end purpose of which is the definition and punishment of crime when it has been proved to have been committed.

On the other hand, the *Theatres and Amusements Act* is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performances which do not comply with the standards of propriety established by the Board.

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I share the opinion [expressed by Lord Atkin in *Proprietary Articles Trade Association v Canada (AG)*, 1931 CanLII 385, [1931] AC 310 (UKJCPC)] that morality and criminality are far from coextensive and it follows in my view that legislation which authorizes the establishment and enforcement of a local standard of morality in the exhibition of films is not necessarily "an invasion of the federal criminal field" as Chief Justice MacKeigan thought it to be in this case.

Even if I accepted the view that the impugned legislation is concerned with criminal morality, it would still have to be noted that it is preventive rather than penal and the authority of the Province to pass legislation directed towards prevention of crime is illustrated by the case of *Bedard v. Dawson* [[1923] SCR 681, 1923 CanLII 43],

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As I have already said, however, I take the view that the impugned legislation is not concerned with criminality. The rejection of films by the Board is based on a failure to conform to the standards of propriety which it has itself adopted and this failure cannot be said to be "an act prohibited with penal consequences" by the Parliament of Canada. ... This is not to say that Parliament is in any way restricted in its authority to pass laws penalizing immoral acts or conduct, but simply that the provincial Government in regulating a local trade may set its own standards which in no sense exclude the operation of the federal law.

There is, in my view, no constitutional barrier preventing the Board from rejecting a film for exhibition in Nova Scotia on the sole ground that it fails to conform to standards of morality which the Board itself has fixed notwithstanding the fact that the film is not offensive to any provision of the *Criminal Code*; and, equally, there is no constitutional reason why a prosecution cannot be brought under s. 163 of the *Criminal Code* in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety.

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As I have said, I take the view that the legislation here in question is, in pith and substance, directed to property and civil rights and therefore valid under s. 92(13) of the *British North America Act*, but there is a further and different ground on which its validity might be sustained. In a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable for public exhibition on moral grounds may be viewed as a matter of a "local and private nature in the Province" within the meaning of s. 92(16) of the *B.N.A. Act*, and as it is not a matter coming within any of the classes of subject enumerated in s. 91, this is a field in which the Legislature is free to act.

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Appeal allowed.

NOTES AND QUESTIONS

1. While upholding most of the Act and regulations as they applied to film censorship, Ritchie J did invalidate one particular regulation (reg 32), applicable to both films and live performances, which provided that: "No theatre owner ... shall permit any indecent or improper performance in his theatre." Given the similarity of wording, reg 32 was found to be indistinguishable from the *Criminal Code* provision making it an offence to publicly exhibit an indecent show, with the result that the regulation impermissibly authorized the censor board to define what constituted a *Criminal Code* offence. Is this a satisfactory justification for invalidation? Are the differences between reg 32 and the rest of the censorship scheme significant, or was Ritchie J perhaps confusing the issues of validity and paramountcy?

2. In *McNeil*, reference is made to an earlier decision delineating the limits imposed on provincial powers by the federal criminal power: *Bédard v Dawson*, [1923] SCR 681, 1923 CanLII 43. *Bédard* involved a challenge to Quebec legislation providing for the closure of premises being used as a "disorderly house." The legislation was primarily concerned with premises in respect of which there had been *Criminal Code* convictions for prostitution and gambling. The five members of the Supreme Court of Canada who heard the case upheld the legislation. Some of the judgments emphasized that the law was in relation to property use and drew an analogy to the control of nuisance. Others relied on the broader ground of a provincial power to suppress conditions favouring the development of crime—hence giving rise to the arguments made in *McNeil* that the scheme of censorship was "preventive" rather than penal. It is also clearly established that provinces can legislate with respect to the civil consequences of crime—for example, provincial highway traffic legislation providing for suspension of a provincial driver's licence after conviction for certain *Criminal Code* offences has been held valid: see *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5, 1973 CanLII 176, excerpted in Chapter 8.

3. The pattern of sympathy to provincial interests in regulating local conditions of morality and public order demonstrated by the majority judgment in *McNeil* was continued in *Dupond v City of Montreal*, [1978] 2 SCR 770, 1978 CanLII 201, decided shortly thereafter. In 1969, after a period of numerous public demonstrations, many of which were accompanied by violence, vandalism, and looting, the city of Montreal passed a by-law prohibiting parades or other gatherings that "endanger tranquillity, safety, peace or public order" in public places and thoroughfares. One section of the by-law gave the city's executive committee the power to make an ordinance prohibiting public gatherings if there were reasonable grounds to believe that the gatherings would endanger "safety, peace or public order." The penalties provided for violation of the by-law and ordinance were fines and imprisonment. Acting under the authority of the by-law, the executive council imposed a prohibition on all public demonstrations for 30 days. Dupond, as a ratepayer of the city, challenged both the by-law and ordinance. Justice Beetz, writing for a majority of the Court that also included Martland, Judson, Ritchie, Pigeon, and de Grandpré JJ, found that the by-law and ordinance were *intra vires* as a regulation of the municipal public domain, a pre-eminently local matter. In contrasting the challenged enactments with the *Criminal Code* provisions dealing with breach of the peace, Beetz J emphasized the preventive character of the municipal regulations. Chief Justice Laskin, who dissented, Spence and Dickson JJ concurring, viewed the by-law and ordinance as an *ultra vires* attempt to reinforce the criminal law. He characterized the law as a "mini-criminal code, dealing with apprehended breach of the peace, apprehended violence and the maintenance of public order" (at 774-75). In the course of his reasons, Laskin CJ emphasized the Draconian nature of the law in barring all gatherings, even those for innocent purposes, and the striking departure from the basic criminal law principle that the police are expected to enforce the law against violators and not against innocents. He concluded with the following comment: "This is the invocation of a doctrine which should alarm free citizens" (at 780).

4. Chief Justice Laskin's dissenting judgments in both *McNeil* and *Dupond* are informed by a concern to protect civil liberties by means of the federal criminal power. Although he failed to gain majority support in these cases, such concerns had in the past, through combined reliance on the federal criminal power and a doctrine called the "Implied Bill of Rights," led to the invalidation of provincial laws viewed as seriously threatening civil liberties: see the cases and materials found in Chapter 15, Antecedents of the Charter, including *Switzman v Elbling*, [1957] SCR 285, 1957 CanLII 2, which Laskin CJ relied on in *McNeil*. Did the enactment of the *Charter of Rights* in 1982 eliminate the need for the indirect use of federalism doctrines to protect civil liberties? For an argument that Laskin CJ's view of the criminal power led him to undervalue provincial claims to an anchor in s 92, see Katherine E Swinton, "Bora Laskin and Federalism" (1985) 35 UTLJ 353 at 367-72.

In *Westendorp v The Queen*, immediately below, the Supreme Court of Canada reversed the trend established in *McNeil* and *Dupond* and struck down a municipal by-law regulating public order and morality as an intrusion into the federal criminal law power. How can *Westendorp* be distinguished from *McNeil* and *Dupond*?

Westendorp v The Queen

[1983] 1 SCR 43, 1983 CanLII 1

[Westendorp had been charged with being on a street for the purpose of prostitution in contravention of s 6.1(2) of by-law 9022 of the City of Calgary. The by-law dealt generally with the regulation of the use of city streets and included provisions controlling soliciting or carrying on businesses, trades, or occupations on any street. The penalties provided for breach of the provisions of the by-law (other than s 6.1) were fines ranging from \$20 to \$300 and imprisonment for up to 10, 30, 45, or 60 days, according to the gravity of the infractions. In June 1981, city council had amended the by-law, by means of by-law 25M81, to add s 6.1, an explicit provision dealing with prostitution, which provided in s 6.1(2) that “[n]o person shall be or remain on a street for the purpose of prostitution,” and in s 6.1(3) that “[n]o person shall approach another person on a street for the purposes of prostitution.” The penalties provided for contravention of the provisions of s 6.1 were fines ranging from \$100 to \$500 and imprisonment of up to six months.

The recitals that introduced the amendment and explained its necessity referred to the fact that prostitutes “often collect in groups on city streets and attract crowds on city streets, vehicular and pedestrian ... [which] activities are a source of annoyance and embarrassment to members of the public and interfere with their right and ability to move freely and peacefully upon the city streets.”

In her defence, Westendorp challenged the constitutionality of s 6.1 of the by-law on the ground that it invaded federal authority in relation to criminal law. She was successful at trial, but her acquittal was set aside by the Alberta Court of Appeal, which found no invasion of the criminal law power.]

LASKIN CJ (Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer, and Wilson JJ concurring):

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[15] I have referred, however briefly, to the types of regulations and prohibitions and accompanying penalties which the by-law encompasses beyond s. 6.1. ... [T]here is nothing in the by-law which has any relation to s. 6.1 or to the scale of penalties prescribed for breach of s. 6.1 compared with those in the general penalty provisions of the by-law to which I have referred. Section 6.1 stands as an intruded provision of By-law 9022 which might just as well have been left in its original form in By-law 25M81. In short, there is nothing in By-law 9022 which invigorates s. 6.1 which must stand on its own merit as a valid municipal by-law.

[16] It is patent, from a comparison of s. 6.1 with ss. 3, 4 and 5 of the by-law, that s. 6.1 is of a completely different order from its preceding sections and, certainly, from all those succeeding it. It is specious to regard s. 6.1 as relating to control of the streets. If that were its purpose, it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do. As the by-law stands and reads, it is activated only by what is said by a person, referable to the offer of sexual services. For persons to converse together on a street, as did the two women and the police officer here, and

to discuss a recent or upcoming sporting event or a concert or some similar event would not attract liability. It is triggered only by an offer of sexual services or a solicitation to that end. There is no violation of s. 6.1 by congregation or obstruction *per se*; the offence arises only by proposing or soliciting another for prostitution. To remain on a street for the purpose of prostitution or to approach another for that purpose is so patently an attempt to control or punish prostitution as to be beyond question. ... There is no property question here, no question even of interference with the enjoyment of public property let alone private property.

[17] Nor can any comparison be made between this case and the judgment of this court in *Attorney General for Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 770, which related to a municipal anti-demonstration by-law which was also emphasized as being of a temporary nature. That by-law related plainly to parades and assemblies on the streets, different from s. 6.1 of the present case.

[18] The question remains, however, whether ... there is none the less constitutional scope for the valid enactment of the challenged by-law. This brings me to consider the reasons given by Kerans JA for upholding the by-law. He construed it as an attempt to deal with a public nuisance. This is not how the offence under the by-law is either defined or charged. ...

[Reference was then made to Kerans JA's assessment of the by-law as "an attempt, by preventive measure, to regulate the activities of the prostitutes and their customers on the streets. It is, as it were, a pre-emptive strike" (at para 20).]

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[21] What appears to me to emerge from Kerans JA's consideration of the by-law is to establish a concurrency of legislative power, going beyond any double aspect principle and leaving it open to a Province or to a municipality authorized by a Province to usurp exclusive federal legislative power. If a Province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control!

[22] However desirable it may be for the municipality to control or prohibit prostitution, there has been an over-reaching in the present case which offends the division of legislative powers. I would, accordingly, allow the appeal, set aside the judgment of the Alberta Court of Appeal and restore the acquittal directed by the Provincial Court Judge.

Appeal allowed.

NOTES AND QUESTIONS

1. A similar by-law enacted by the City of Montreal was also found *ultra vires*—*Goldwax v Montréal*, [1984] 2 SCR 525, 1984 CanLII 125. Municipalities such as Calgary and Montreal were led to enact anti-prostitution by-laws because of dissatisfaction with the operation of the existing *Criminal Code* provision prohibiting solicitation in a public place for the purposes of prostitution. As a result of the Supreme Court of Canada's interpretation of the Code provision as requiring that soliciting had to be "pressing or persistent" in order to be a crime: see *Hutt v The Queen*, [1978] 2 SCR 476, 1978 CanLII 190, the control of street prostitution became much more difficult. Some municipalities reacted by imposing more stringent controls on the nuisance aspects of prostitution. When these municipal controls were found to be unconstitutional, as in *Westendorp*, the federal government decided to repeal the existing *Criminal Code* provision, replacing it with one making it an offence to communicate or

attempt to communicate with any person in a public place for the purpose of engaging in prostitution. The new Code provision was challenged under the Charter as a violation of ss 2(b) (freedom of expression) and 7 (life, liberty, and security of the person), but was upheld by the Supreme Court of Canada in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 1990 CanLII 105 [Prostitution Reference]. However, that decision was effectively set aside in *Canada (AG) v Bedford*, 2013 SCC 72, in which the Court invalidated the provision, along with several others relating to prostitution, as a violation of the right to security in s 7 of the Charter. Excerpts from *Bedford* are reproduced in Chapter 22, The Right to Life, Liberty, and Security of the Person.

2. Subsequent cases at the Supreme Court of Canada level have continued the general pattern of upholding provincial laws dealing with public order and morality through generous use of the doctrine of double aspect rather than finding them to be an intrusion on the federal criminal law power. Occasionally, however, no valid provincial purpose is found, and instead the provincial law is found to constitute an invalid attempt to duplicate, stiffen, or undermine the operation of the criminal law. To what extent might the number of litigated cases have been affected by the availability, since 1982, of the Charter as a means to challenge provincial laws that appear to restrict traditional civil liberties, such as freedom of association?

3. *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59, 1987 CanLII 72, conforms to the dominant pattern of concurrency. In this case, the Supreme Court of Canada upheld provisions of the New Brunswick *Liquor Control Act*, RSNB 1973, c L-10, which gave the Liquor Licensing Board the power to attach conditions to liquor licences regulating and restricting the nature and conduct of live entertainment in licensed premises. On the facts of the case, a licence had been issued to a hotel owner with a condition precluding nude performances. The hotel owner argued that the condition related to public morality and therefore fell within the exclusive jurisdiction of the federal Parliament under s 91(27), noting that Parliament had enacted numerous provisions in the *Criminal Code* relating directly or indirectly to public nudity. The Supreme Court of Canada confirmed the province's ability to prohibit nude entertainment as part of a liquor licensing scheme notwithstanding the related provisions in the *Criminal Code*. The main judgment, written by Dickson CJ, emphasized the integration of the provincial prohibition in a comprehensive scheme of regulation and licensing in distinguishing the case from *Westendorp*, where the challenged by-law was described as an "intruded provision" (at para 7).

4. In contrast, in *R v Morgentaler*, [1993] 3 SCR 463, 1993 CanLII 74, excerpted in Chapter 8, the Supreme Court of Canada struck down a provincial law prohibiting the performance of certain designated medical services, in particular abortion, anywhere other than in a hospital. Penal sanctions were imposed for breach of the prohibition. The legislation was enacted in the wake of the Supreme Court of Canada decision in *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90, excerpted in Chapter 22, which ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated s 7 of the Charter. Although the province attempted to uphold its legislation as a valid exercise of its jurisdiction to regulate health and hospitals, the Supreme Court of Canada, like the courts below, concluded that the legislation was in pith and substance in relation to criminal law. Heavy reliance was placed on excerpts from Hansard that demonstrated that the proposed law was understood to be about preventing the establishment of free-standing abortion clinics that were viewed as a "public evil." How is *Morgentaler* distinguishable from *Rio Hotel*? Are there similarities between *Morgentaler* and *Westendorp*? Is it possible to view *Morgentaler* as a case in which issues of rights indirectly influenced the federalism analysis?

Complicated issues about the interaction between the federal criminal law power and provincial powers over property and civil rights may arise when provinces seek to stiffen criminal

penalties or replace them with administrative or civil sanctions. Because criminal prohibitions are enforced using criminal procedures, also within federal jurisdiction, a province's deployment of civil sanctions can circumvent the protections afforded by criminal procedures. These alternative schemes may also have an effect on the jurisdiction of s 96 judges, discussed in Chapter 13, The Role of the Judiciary.

Chatterjee v Ontario (AG)

2009 SCC 19

[At issue was the constitutionality of Ontario's Civil Remedies Act, SO 2001, c 28 [CRA], which authorizes the forfeiture of proceeds of unlawful activity. The CRA does not require an allegation or proof that any particular person committed any particular crime. Property may be forfeited under the CRA if, on a balance of probabilities, it is demonstrated that the property constituted the proceeds of crime in general, without further specificity. The police arrested the appellant, Chatterjee, for breach of probation and, in a search of his car incidental to the arrest, discovered \$29,020 in small bills and items associated with the illicit drug trade (items that smelled of cannabis), but they did not find any drugs. The appellant was never charged with any offence in relation to the money and items or with any drug-related activity. The Attorney General of Ontario applied under ss 3 and 8 of the CRA for forfeiture of the seized cash as proceeds of unlawful activity. Chatterjee challenged the CRA's constitutionality, arguing that its forfeiture provisions were *ultra vires* the province because they encroach on the federal criminal law power.]

BINNIE J (McLachlin CJ and LeBel, Deschamps, Fish, Abella, and Rothstein JJ concurring):

[1] ... In my view, the *CRA* is valid provincial legislation.

[2] The argument that the *CRA* is *ultra vires* is based in this case on an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation. Resort to a federalist concept of proliferating jurisdictional enclaves (or "interjurisdictional immunities") was discouraged by this Court's decisions in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, and should not now be given a new lease on life. As stated in *Canadian Western Bank*, "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (para. 37 (emphasis in original)).

[3] The present appeal provides an opportunity to apply the principles of federalism affirmed in those recent cases. The *CRA* was enacted to deter crime and to compensate its victims. The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it. The latter purpose falls squarely within provincial competence. Crime imposes substantial costs on provincial treasuries. Those costs impact many provincial interests, including health, policing resources, community stability and family welfare. It would be out of step with modern realities to conclude that a province must shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it.

[4] Moreover, the *CRA* method of attack on crime is to authorize *in rem* forfeiture of its proceeds and differs from both the traditional criminal law which ordinarily couples a prohibition with a penalty (see *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783) and criminal procedure which in general refers to the means by which

an allegation of a particular criminal offence is proven against a particular offender. The appellant's answer, however, is that the effect of the *CRA* *in rem* remedy just adds to the penalties available in the criminal process, and as such the *CRA* invalidly interferes with the sentencing regime established by Parliament. It is true that forfeiture may have *de facto* punitive effects in some cases, but its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime and to help compensate private individuals and public institutions for the costs of past crime. These are valid provincial objects. There is no operational conflict between the forfeiture provisions of the *Criminal Code* ... and the *CRA*. It cannot reasonably be said that the *CRA* amounts to colourable criminal legislation. Accordingly, I would dismiss the appeal.

[Justice Binnie described the facts, the relevant legislation, and the judgments of the Courts below.]

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[15] Crime imposes significant costs at every level of government: federal, provincial and municipal. Impaired driving is a *Criminal Code* offence but carnage on the roads touches numerous matters within provincial jurisdiction including health, highways, automobile insurance and property damage. The cost associated with drug abuse is another example. Each level of government bears a portion of the costs of criminality and each level of government therefore has an interest in its suppression. ...

[Justice Binnie first examined the purpose and effects of the Act to determine its pith and substance.]

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[23] In essence, therefore, the *CRA* creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. The practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators.

B. Assignment to Heads of Legislative Power

[24] Once the "pith and substance" is ascertained, it is necessary to classify that essential character of the law by reference to the provincial and federal "classes of subjects" listed in ss. 91 and 92 ... to determine if the law comes within the jurisdiction of the enacting legislature. Clearly, the *CRA* relates to property but, of course, much of the *Criminal Code* is dedicated to offences involving property. To characterize a provincial law as being in pith and substance related to property is therefore just a starting point. A good deal of overlap in measures taken to suppress crime is inevitable

C. The Provincial Aspect

[25] As stated, the *CRA* fits neatly into the provincial competence in relation to Property and Civil Rights in the Province (*Constitution Act, 1867*, s. 92(13)) or Matters of a merely local or private Nature in the Province (s. 92(16)). The Attorneys General rely on *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, for the proposition that "civil mechanisms include the seizure as forfeit of goods and conveyances" (para. 27).

[26] Our jurisprudence offers many examples of the interplay between provincial legislative jurisdiction over property and civil rights and federal legislative jurisdiction over criminal law and procedure. In *Bédard v. Dawson*, [1923] S.C.R. 681, for example, the Court upheld the validity of a provincial law that authorized a judge to

close a "disorderly hous[e]" for up to one year. The Court held that the law was directed to the enjoyment of property rights not criminal law. ... Idington J., in words relevant to the disposition of the present appeal, said that:

As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense *it is the duty of the legislature to do the utmost it can within its power* to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime; [Emphasis added; p. 684.]

[27] ... [T]he CRA does not define a new offence or clearly take aim at any particular category of criminal conduct. ...

[28] In *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770, the Court upheld a municipal ordinance regulating public demonstrations with a view to the prevention of "conditions conducive to breaches of the peace and detrimental to the administration of justice" (p. 791). The Court held the municipal law to be in relation to "Matters of a merely local or private Nature" under s. 92(16) and stated at p. 792 that "[i]t is now well established that the suppression of conditions likely to favour the commission of crimes falls within provincial competence" The Attorney General of Ontario also argues that the CRA in a sense operates as a substitute for civil litigation by victims against criminal offenders, a notoriously difficult and costly exercise.

[29] The question, however, is at what point does a provincial measure designed to "suppress" crime become itself "criminal law"? There will often be a degree of overlap between measures enacted pursuant to the provincial power (property and civil rights) and measures taken pursuant to the federal power (criminal law and procedure). In such cases it is necessary for the Court to identify the "dominant feature" of an impugned measure. If, as is argued by the Attorneys General here, the dominant feature of the CRA is property and civil rights, it will not be invalidated because of an "incidental" intrusion into the field of criminal law.

[30] For the reasons that follow I agree that the CRA was enacted "in relation to" property and civil rights and may incidentally "affect" criminal law and procedure without doing violence to the division of powers.

D. The Federal Aspect

[In response to the appellant's argument that the pith and substance of the CRA was criminal law because it imposed an additional penal regime in relation to federal offences and could, on occasion, conflict with the *Criminal Code*'s forfeiture provisions, Binnie J considered *Johnson v AG Alberta*, [1954] SCR 127, 1954 CanLII 68, in which an Alberta law providing for forfeiture of slot machines was invalidated as an invasion of the federal criminal law power. He distinguished *Johnson* on several grounds, including its application of the now obsolete "covering the field" test for federal paramountcy, and its factual circumstances, specifically that the person suffering forfeiture under the Alberta law had also committed federal offences, whereas forfeiture pursuant to the CRA is independent of the sentencing process.]

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E. Overlapping Effects

[40] The Constitution permits a province to enact measures to deter criminality and to deal with its financial consequences so long as those measures are taken in relation to a head of provincial competence and do not compromise the proper functioning of the *Criminal Code* including the sentencing provisions. In *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, it was held that a province

could validly impose automatic suspension of a provincial driver's licence after conviction for impaired driving under the *Criminal Code*. ... [Reference is also made to *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5, 1973 CanLII 176.] There is no general bar to a province's enacting civil consequences to criminal acts provided the province does so for its own purposes in relation to provincial heads of legislative power.

[41] In *Egan* and *Ross*, the provincial laws were clearly aimed at deterring impaired driving, notwithstanding its status as a federal offence, and with good reason. Drunk drivers create public safety hazards on provincial highways and their accidents impose costs by way of examples on the provincial health system and provincial police and highway services. Similarly, the fact the *CRA* aims to deter *federal* offences as well as provincial offences and indeed offences committed outside Canada, is not fatal to its validity. On the contrary, its very generality shows that the province is concerned about the effects of crime as a generic source of social ill and provincial expense, and not with supplementing federal criminal law as part of the sentencing process.

F. Interference with the Criminal Code Forfeiture Provisions

[42] The argument arises in this case, as it did in *Johnson*, that the provisions of the provincial Act should be set aside as they "introduce an interference with the administration of [the *Criminal Code* forfeiture] provisions" (p. 138). If such operational interference were demonstrated, of course, or if it were shown that the *CRA* frustrated the federal purpose underlying the forfeiture provisions of the *Criminal Code*, the doctrine of federal paramountcy would render inoperative the *CRA* to the extent of the conflict or interference

[43] Consideration must therefore be given to Part XII.2 of the *Criminal Code* which in s. 462.37(1) provides as follows:

... where an offender is convicted, ... of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

[44] The *Criminal Code* also provide[s] that if the court is satisfied beyond a reasonable doubt that the property in question represents the proceeds of crime, the court may order forfeiture even without a showing that the offence was committed in relation to that property (s. 462.37(2)).

[45] Parliament's legislative authority to bring about property consequences that are not directly connected with the offence for which an accused is being sentenced is not before the Court. I do not suggest any infirmity with any aspect of *Criminal Code* forfeiture. I say only that we have heard no argument on these provisions.

[46] On the other hand ... it is clear that [the provisions of the *CRA*] are not part of any "sentencing process." The *CRA* does not require an allegation or proof that a particular person committed a particular crime. For example, a drug dealer might, in a fit of conscience, gift the proceeds of a drug sale to a charity. Under the *CRA*, the money would constitute the proceeds of unlawful activity, and the charity would not be a "legitimate owner" within the scope of s. 2 because the charity would have acquired the property after the unlawful activity occurred and would not have given "fair value" for it. The money would, thus, be subject to forfeiture. In the present case, the *CRA* judge could have accepted wholeheartedly the appellant's claim that he was entirely innocent of any involvement with marijuana cultivation, yet still ordered forfeiture.

[47] Even when the owner has gained the property by means of crime, the *CRA* forfeiture proceeding does not require, and may not involve, identifying the owner with a particular offence. This would be the case, for example, if cash were seized from a gang safe house. In such a case, the Attorney General may be able to show on a balance of probabilities that money constituted the proceeds of crime *in general* without identifying any particular crime or criminal.

G. Interference in the Sentencing Process

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[49] The concern has been that the federal forfeiture provisions will be displaced by the *CRA* with its lower threshold of proof This may be true, but where no forfeiture is sought in the sentencing process, I see no reason why the Attorney General cannot make an application under the *CRA*. Where forfeiture is sought and refused in the criminal process, a different issue arises.

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[51] I believe the various doctrines of *res judicata*, issue estoppel and abuse of process are adequate to prevent the prosecution from re-litigating the sentencing issue. Detailed consideration must await a case where the clash of remedies is truly in issue. . . .

[52] Accordingly, procedural options are available where a *CRA* judge considers that the conduct of the Attorney General is abusive of the processes of the Court. Furthermore, if in particular circumstances a conflict arises with the *CRA* to the extent that dual compliance is impossible, then the doctrine of paramountcy would render the *CRA* inoperable to the extent of the conflict.

[53] In summary, the *CRA* is valid provincial legislation. It does not "introduce an interference with the administration of [the *Criminal Code*] provisions" within the scope of the mischief identified by Rand J. in *Johnson*. . . . [T]here is no necessary operational conflict between the *Criminal Code* and the *CRA* such as to invalidate the latter.

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Appeal dismissed

NOTES AND QUESTIONS

1. Do the valid provincial interests in suppressing crime justify requiring individuals to prove that they have not acquired property by illegal means? Why did the Court not give more attention to the presumption of innocence? Does *Chatterjee* allow a province to presume that a person is guilty of a criminal offence so long as the province uses civil sanctions rather than criminal ones?

2. At para 45, Binnie J noted that the constitutionality of the federal provisions that permit forfeiture of the proceeds of crime, even if those proceeds are not connected to an offence before a sentencing court, was not before the Court. Earlier in this chapter, in our discussion of the requirement of a criminal law form, you were asked if these provisions were constitutionally suspect. After reading *Chatterjee*, have you changed your view?

3. In *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, [2015 SCC 46](#), the Supreme Court of Canada upheld a provincial scheme of roadside testing for impaired driving from a challenge on a division of powers grounds. British Columbia, as part of its long-standing effort to combat impaired driving using administrative prohibitions such as licence suspensions, created the automatic roadside prohibition (ARP) program, under which drivers who failed a roadside breathalyzer test that was administered by police officers would have

their licences suspended immediately for 90 days, their vehicles immediately impounded for the suspension's duration, and be liable for penalties and costs of \$4,000 and over. Drivers who refused to take the roadside test incurred the same penalties. A "warn reading" would result in a shorter period of immediate suspension and impoundment. Drivers could apply to the superintendent of motor vehicles for a review of suspensions, but only on very limited grounds, which did not include challenging the accuracy of the roadside breathalyzer. Drivers who had their licences suspended under the ARP would not be charged with violations of the *Criminal Code* provisions relating to impaired driving; one consequence of police officers deciding to enforce the ARP rather than the *Criminal Code* provisions was a noticeable reduction in the number of trials in provincial courts.

Justice Karakatsanis, writing for a unanimous Court on the issues pertaining to the division of powers, upheld the program as a valid exercise of provincial power over property and civil rights. In rejecting the appellant's argument that the provincial purpose was to provide a punitive, criminal law response to drunk driving without engaging the Charter and its procedural protections, she characterized the ARP scheme as "the licensing of drivers, the enhancement of highway traffic safety, and the deterrence of persons from driving on highways when their ability is impaired by alcohol" (at para 29), valid purposes under the province's power over property and civil rights. However, Karakatsanis J went on to hold (with McLachlin CJ dissenting on this point) that the ARP violated the right to be free from unreasonable search and seizure under s 8 of the Charter because it did not permit review of the accuracy of the roadside breathalyzer. On this point, the BC legislature had already amended the Act to give the driver a right to ask for a second breathalyzer test, to be administered immediately after the first, with the lower result forming the basis of the suspension.

Modern law enforcement often requires considerable cooperation between federal and provincial authorities, including interlocking legislative schemes, to effectively address the complex problems generated by modern technologies and globalization. Consider, for example, the extensive cooperation necessary for the investigation and prosecution of crimes committed using the Internet. The need for federal–provincial cooperation in law enforcement raises issues that are common to instruments of cooperative federalism across all subject matters. This chapter thus appropriately concludes with *Quebec v Canada*, which involved the criminal law power and introduced some issues pertaining to cooperative federalism that are discussed in Chapter 12. Specifically, it addressed the question of what happens when Parliament decides to dismantle a cooperative scheme while a province wishes to continue with the scheme on its own accord.

Quebec (AG) v Canada (AG)

2015 SCC 14

CROMWELL and KARAKATSANIS JJ (McLachlin CJ and Rothstein and Moldaver JJ concurring):

I. Introduction

[1] Fifteen years ago, this Court determined that Parliament, acting under its power to legislate in relation to criminal law, had the constitutional authority to establish a nationwide gun control scheme. Parliament's decision to do so was a contentious policy choice that was contested on constitutional grounds. Three years ago, Parliament reversed in part that earlier policy choice: it repealed the legislation

that had established the long-gun registry within the gun control scheme, and provided for the destruction of the data it contained. This too was a contentious policy choice which is now contested on constitutional grounds.

[2] When the government tabled the bill abolishing the long-gun registry and providing for the destruction of the data it contained, Quebec expressed its intention to create its own provincial gun control scheme and asked Canada to give it the data on long guns connected with the province. The federal government refused. As a result, Quebec challenged the constitutionality of the federal law providing for destruction of the data and sought an order requiring the federal government to turn it over. The Superior Court of Quebec declared that Parliament's legislative jurisdiction with respect to criminal law does not allow it to legislate for the destruction of the long-gun registration records without first making this data available to provinces seeking to establish their own registries, and ordered the federal government to transfer the relevant data to Quebec. A five-member panel of the Quebec Court of Appeal disagreed. ... Quebec now appeals to this Court

[3] We agree with the conclusions of the Quebec Court of Appeal and would dismiss the appeal. The principle of cooperative federalism does not constrain federal legislative competence in this case, Quebec has no legal right to the data, and s. 29 of the *Act to amend the Criminal Code and the Firearms Act* (short title *Ending the Long-gun Registry Act* ("ELRA")) is a lawful exercise of Parliament's criminal law legislative power under the Constitution. We add this; to some, Parliament's choice to destroy this data will undermine public safety and waste enormous amounts of public money. To others, it will seem to be the dismantling of an ill-advised regime and the overdue restoration of the privacy rights of law-abiding gun owners. But these competing views about the merits of Parliament's policy choice are not at issue here. As has been said many times, the courts are not to question the wisdom of legislation but only to rule on its legality. In our view, the decision to dismantle the long-gun registry and destroy the data that it contains is a policy choice that Parliament was constitutionally entitled to make.

[4] We note that our conclusion in this case partly rests on the fact that the Canadian Firearms Registry ("CFR") flows directly from federal legislation and is not dependent on any provincial statutes. Different considerations might arise in a case involving a truly interlocking federal–provincial legislative framework. However, the CFR is not, in our respectful view, such a scheme. Therefore we need not consider what might follow if it were.

[The facts and the decisions of the courts below were then reviewed.]

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III. Analysis

A. Does the Principle of Cooperative Federalism Prevent Parliament from Legislating to Dispose of the Data?

[15] Quebec invokes the principle of cooperative federalism in support of both its argument that s. 29 of the *ELRA* is *ultra vires* and its claim that Quebec has the right to receive the data contained in the CFR related to long guns connected to Quebec. In essence, Quebec is asking us to recognize that the principle of cooperative federalism prevents Canada and the provinces from acting or legislating in a way that would hinder cooperation between both orders of government, especially in spheres of concurrent jurisdiction.

[16] In our respectful view, Quebec's position has no foundation in our constitutional law and is contrary to the governing authorities from this Court.

[17] Cooperative federalism is a concept used to describe the "network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process": P.W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 5-46; see also W.R. Lederman, "Some Forms and Limitations of Co-Operative Federalism," in *Continuing Canadian Constitutional Dilemmas* (1981), 314. From this descriptive concept of cooperative federalism, courts have developed a legal principle that has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity. It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action . . . With respect to interjurisdictional immunity, for example, the principle of cooperative federalism has been relied on to explain and justify relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government . . . [reference is made to *Canadian Western Bank v Alberta*, 2007 SCC 22].

[18] However, we must also recognize the limits of the principle of cooperative federalism. The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 53. This is especially the case with regard to the division of powers:

... [T]he text of the federal constitution as authoritatively interpreted in the courts remains very important. It tells us who can act in any event. In other words, *constitutionally it must always be possible in a federal country to ask and answer the question: What happens if the federal and provincial governments do not agree about a particular measure of co-operative action?* Then which government and legislative body has power to do what? [Emphasis added; footnote omitted.]

(Lederman, at p. 315)

[19] The principle of cooperative federalism, therefore, cannot be seen as imposing limits on the otherwise valid exercise of legislative competence . . . This was recently reiterated by this Court in its unanimous opinion in *Reference re Securities Act*, [2011] 3 S.C.R. 837, at paras. 61-62:

While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state. [Emphasis added.]

[20] In our respectful view, the principle of cooperative federalism does not assist Quebec in this case. Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government

adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.

[21] We conclude that the principle of cooperative federalism does not prevent Parliament from exercising legislative authority that it otherwise possesses to dispose of the data.

[Cromwell and Karakatansis JJ then rejected Quebec's submission that it had a right to obtain the data, on this point agreeing with the dissenting judges that Quebec had not established a legal basis for its claim to the data.]

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C. Is Section 29 Ultra Vires Parliament's Criminal Law Power?

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[28] To answer this question, we first characterize the law—that is, determine its subject matter or "pith and substance"—and then classify it as to whether it is in relation to the subject of criminal law and procedure.

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[30] Where the challenge concerns a particular provision which forms part of a larger scheme, the pith and substance analysis begins with the challenged provision However, the "matter" of the provision must be considered in the context of the larger scheme, as its relationship to that scheme may be an important consideration in determining its pith and substance

[31] Courts must be careful not to endorse a "colourable" statute, that is, one that in form appears to relate to a matter within the legislative competence of the enacting order of government, but in substance addresses a matter falling outside its competence The colourability doctrine simply means that "form is not controlling in the determination of essential character" Courts are, for good reasons, reluctant to find legislation to be colourable There is a danger that any broader application of the colourability doctrine may lead the courts to exceed their role of determining the constitutionality of legislation and, instead, express disapproval of either the policy of the statute or the means by which the legislation seeks to carry it out

[32] Once the subject matter has been identified, the next step ... consists of classifying the legislation or provision in relation to the division of legislative power in the Constitution. ... If the "matter" of the legislation comes within the "subject" of the head of power of the enacting order of government, the legislation is *intra vires* even if it has incidental effects on the other jurisdiction's legislative competence (subject to federal paramountcy in the case of provincial legislation)

[33] This point takes on special importance when considering the classification of a law, like this one, that undoes a previously enacted scheme. In classifying legislation that undoes an existing legislative scheme, due regard must be paid to the proper classification of *that scheme*. Consider the example of the repeal of a criminal offence. The scope of the criminal law power extends to laws that create a prohibition backed by a penalty for a criminal law purpose A law creating a true criminal offence clearly has these features, but a law repealing that same offence does not; the latter does not create a prohibition backed by a penalty for a criminal law purpose. The repealing enactment, however, is clearly criminal law because the "matter" of that law comes within the same criminal law subject as did the provision it seeks to repeal. This is why Quebec is clearly right in this case not to question Parliament's authority to repeal the long-gun registry scheme, and to restrict its challenge to s. 29 of the *ELRA*, which provides for the destruction of the data. The fatal flaw in Quebec's

analysis, however, is that in characterizing the pith and substance of s. 29, it ignores the place of the data gathering and retention provisions in the overall scheme.

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(a) The "Matter" of Section 29

[34] In essence, Quebec submits that the pith and substance of s. 29 of the *ELRA* is to prevent the long-gun registry from being continued through provincial legislation. Although Quebec does not suggest that this "matter" comes within any of the enumerated heads of provincial legislative power, it submits nonetheless that the federal legislation is not a valid exercise of the criminal law power because it [TRANSLATION] "encroaches massively on the ability of a provincial legislature to exercise as it sees fit its powers with respect to the administration of justice, public safety, [and] the prevention of crime and the social costs associated with crime" Quebec relies on several statements made by the Prime Minister and other federal cabinet ministers to the effect that Canada's objective is to put a definite end to the long-gun registry by destroying the data contained in the CFR connected to long guns, and that they will do nothing to support any province or territory who would like to create a local long-gun registry. Quebec also submits that the effect of the destruction of the data will be to make it prohibitively expensive and complicated for the province to create its own long-gun registry. Section 29 of the *ELRA* therefore constitutes an encroachment on the province's powers.

[35] Canada submits that the subject matter of s. 29 is the same as the rest of the *ELRA*: to abolish the long-gun registry and put an end to what it considers an unwarranted intrusion into the private lives of Canadian gun owners. Canada also asserts that the practical effects of the destruction of the data on provinces who want to create their own gun control scheme do not change the pith and substance of the impugned provision.

[36] In our respectful view, the proper characterization of the "matter" of s. 29 of the *ELRA* derives from that of the scheme that it is undoing. In the *Reference re Firearms Act*, this Court held that both the criminal prohibition on possessing an unregistered firearm and the registration scheme provided for in the *Firearms Act* were valid public safety measures. ... The Court rejected arguments from Ontario and Saskatchewan to the effect that the "matter" of the registration and data retention provisions, which s. 29 seeks to dismantle, was the regulation of property within the province. The Court concluded that the "matter" of these provisions was the same as the rest of the scheme—public safety—and that they should accordingly be classified as being in relation to the subject of criminal law

[37] Viewed in this light, the "matter" of s. 29 is simply to determine what will happen with the data collected under a now repealed legislative scheme. Given that the "matter" of the registration scheme, including data collection, was found to be public safety in the *Reference re Firearms Act*, dealing with the collected data following the repeal of the scheme must share that same characterization.

[38] Quebec's submissions, in our respectful view, confuse the subject matter of s. 29 of the *ELRA* with Canada's motives and the means employed by Parliament. In determining the true character of s. 29, we are not concerned with whether destroying the data is good policy, whether Canada's motives were sound, or whether the destruction of that data conflicts with the policy objectives of Quebec. We recognize that the federal government's ultimate goal may well have been to prevent Quebec from creating its own long-gun registry. We also accept that the destruction of the data is the means chosen by Canada because of its irremediable nature. That being said, these considerations are not indicative of a "colourable" purpose from a division of powers' perspective. An intention on the part of one level of government to prevent

another from realizing a policy objective it disagrees with does not, on its own, lead to the conclusion that there is an encroachment on the other level of government's sphere of exclusive jurisdiction. The fact that s. 29 of the *ELRA* has the practical effect of making it more difficult financially for Quebec to create its own gun control regime does not ... affect the pith and substance of the provision. ...

[Quebec's argument that s 29 is a colourable attempt to legislate in relation to property and civil rights in the province was rejected.]

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[41] In summary, this Court has already been called upon in the *Reference re Firearms Act* to determine the pith and substance of the scheme enacted by the *Firearms Act*. In our view, legislation repealing the part of that scheme relating to long guns, including a provision addressing what will happen to the data collected thereunder, must be characterized in the same way. We conclude that s. 29, in essence, relates to public safety—as did the long-gun registration scheme being repealed by the balance of the *ELRA*.

(b) Classification: Does Section 29 Come Within the Criminal Law Power?

[42] Quebec submits that s. 29 cannot be a valid exercise of Parliament's criminal law power because it is not aimed at preventing crime or at decriminalizing any conduct. We disagree and would hold that s. 29 of the *ELRA* falls under the criminal law head of power.

[43] It is not contested that the repeal of criminal provisions constitutes a valid exercise of the criminal law power The power to repeal a criminal law provision must logically be wide enough to give Parliament jurisdiction to destroy the data collected for the purpose of a criminal law provision. If a law establishing a scheme requiring collection of data is legislation "in relation to" criminal law, then legislation providing for the destruction of that data on the repeal of the scheme must also be legislation "in relation to" criminal law. This is the case here.

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[45] Therefore, we agree with the Quebec Court of Appeal that s. 29 of the *ELRA* should be characterized as being in relation to criminal law. It therefore falls within the legislative competence of Parliament.

LeBEL, WAGNER, and GASCON JJ (Abella J concurring) (dissenting):

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[50] We are of the opinion that the appeal should be allowed, but only in part. This conclusion is dictated by the exceptional circumstances in which long-gun regulation was implemented in Canada. In our opinion, ... both the collection of the data with respect to long guns and the broader initiatives aimed at regulating the use of such guns were the result of a partnership with the provinces, including Quebec. Where an integrated scheme such as this requires the exercise of both federal and provincial legislative powers, the analytical framework for questions related to the division of powers must be adapted and applied accordingly. Whether the means the federal government adopted to terminate this partnership were constitutional can be measured, in particular, in terms of the effect they will have on its partners' powers.

[51] The *ELRA* is the measure chosen by Parliament to end its participation in long-gun regulation. But s. 29 goes beyond the scope of that purpose, as it requires that the data in question be destroyed without providing for a possibility of their first being transferred to the provincial partners, which prevents the latter from using them in the exercise of their powers. This section has significant effects on Quebec's

legislative powers and is not necessary to the achievement of the *ELRA* 's purpose. Section 29 is therefore unconstitutional and should be declared to be invalid.

[52] Although we find that s. 29 is unconstitutional, the AGQ [Attorney General of Quebec] has nonetheless failed to establish a legal basis for his request for a compulsory transfer of the data. The conditions applicable to such a transfer are a matter for the governments concerned, not the courts.

[Justices LeBel, Wagner, and Gascon conducted a lengthy and detailed analysis of the various registry schemes created under the *Firearms Act* and the methods by which the information in each was gathered, stored, and accessed. They concluded that the trial judge was correct in his findings that Quebec had contributed to the data, and the evidence established a partnership between the federal government and Quebec with respect to implementing the *Firearms Act* and firearms control more generally.]

C. Analytical Framework Applicable to the Division of Powers

[The general principles governing a pith and substance analysis were reviewed, followed by a discussion of the ancillary powers doctrine.]

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[143] [This Court has] recognized that a government at one level can validly pass legislation on a matter within its jurisdiction even though the legislation intrudes upon the other level's jurisdiction. Yet the constitutional doctrines that make such an intrusion permissible—namely the pith and substance and ancillary powers doctrines—cannot be fully understood without considering the constitutional principles upon which they are based We will now turn to these principles, in particular that of federalism.

(3) Unwritten Principles: Federalism

[144] The Court has, while stressing that our written Constitution is paramount, recognized the importance of the unwritten principles that underlie it

[145] ... The principle of federalism requires that the constitutional division of powers be respected and that a balance be maintained between federal and provincial powers. One "power may not be used in a manner that effectively eviscerates another": *Reference re Securities Act*, at para. 7; *Reference re Secession of Quebec*, at paras. 57–58.

[146] According to the "classical" approach favoured by the Judicial Committee of the Privy Council until 1949, the heads of power constituted "watertight compartments," and overlaps between them were to be avoided to the full extent possible

[147] The modern view of federalism rejects this approach and ... "recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap" Such a conception thus facilitates intergovernmental co-operation Both in law and in the political arena, the concept of "co-operative federalism" has been developed to adapt the principle of federalism to this modern reality.

(4) Recognition of Co-operative Federalism

[148] Co-operative federalism reflects the realities of an increasingly complex society that requires the enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity From a legal perspective, it is by allowing for overlapping powers through the application

of the pith and substance and ancillary powers doctrines that co-operative federalism is able to meet those needs and, in this sense, to enable the goals of federalism to be realized.

[149] In our opinion, the federal – provincial partnership with respect to firearms control is consistent with the spirit of co-operative federalism. ...

[150] In the case at bar, this Court is not being asked to hold that a co-operative scheme based on the powers of both levels of government is valid. Rather, the AGQ is challenging the validity of a provision that contributes to the dismantling of a partnership that was created in the spirit of co-operative federalism. This situation is unique and novel.

(5) The End of a Partnership Based on “Co-operative Federalism”

[151] In the novel circumstances of this case, our analysis must be guided by the Constitution’s unwritten principles. In particular, we must be careful not to place the principle of federalism and its modern form – co-operative federalism – in jeopardy. ...

[152] The dominant tide with respect to the division of powers admits of overlapping powers and favours co-operation between the different levels of governments. It also supports the validity of schemes established jointly through partnerships developed between members of our federation. In our opinion, our courts must protect such schemes both when they are implemented and when they are dismantled. It would hardly make sense to encourage co-operation and find that schemes established in the context of a partnership are valid while at the same time refusing to take this particular context into account when those schemes are terminated.

[153] In our opinion, the dismantling of a partnership like the one established with respect to gun control must be carried out in a manner that is compatible with the principle of federalism that underlies our Constitution. Thus, Parliament or a provincial legislature cannot adopt legislation to terminate such a partnership without taking into account the reasonably foreseeable consequences of the decision to do so for the other partner. ...

[154] In other words, a co-operative scheme from which both the federal and provincial governments benefit cannot be dismantled unilaterally by one of the parties without taking the impact of such a decision on its partner’s heads of power into account. To conclude otherwise would be to accept a one-way form of co-operative federalism. ... The concern here is not to alter the separation of powers in our Constitution through the application of co-operative federalism, but to ensure that it is respected. ...

[155] We could not state these principles more clearly than the Court has already done in *Reference re Assisted Human Reproduction Act* [2010 SCC 61]:

In short, care must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis. Be it in identifying the pith and substance of a statute or a provision or in reviewing the limits of an assigned power or of the exercise of an ancillary power, the courts must bear the importance of the unwritten constitutional principles in mind and must adhere to them. [para. 196]

[156] Thus, subject to adherence to the above-mentioned principles, the courts nonetheless must not stray from the analytical framework applicable to the division of powers. To determine whether s. 29 of the *ELRA* is valid, it is therefore necessary to consider that framework and these principles.

D. Constitutionality of Section 29 of the ELRA

[157] ... It is true that Parliament can repeal or amend legislation it has validly enacted under one of its heads of power Nevertheless, the courts must consider the impugned provision or legislation to determine whether, in pith and substance, all that it does in fact is repeal or amend legislation that was validly enacted.

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[159] ... [A] statutory provision might be enacted to abolish a scheme that was incidental to the jurisdiction of the legislature that initially created it. In such a case, the legislature in question might in theory wish to eliminate an encroachment on a head of power that does not belong to it. But it is quite possible that what the legislature intends to do to eliminate that initial encroachment in fact encroaches to an even greater extent on that head of power. This is all the more likely to occur in the context of a partnership.

[160] As a result, whether s. 29 of the *ELRA* is constitutional must be determined in the same way as for any legislation enacted by Parliament. To do this, we must identify the pith and substance of that section and link it to a head of legislative power.

(1) Analysis Regarding the Pith and Substance of Section 29

[Justices LeBel, Wagner, and Gascon conducted an analysis of the purpose and effects of s 29, concluding that the trial judge was correct in his finding that the parliamentary intention in destroying the data was to hinder the provinces. In light of the extrinsic evidence, they also rejected the assertion by the Attorney General of Canada that the purpose of s 29 was to eliminate an invasion of privacy.]

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[176] In our opinion, in light of its purpose and its effect, s. 29 goes much farther than simply requiring that the data be destroyed [T]he section's true purpose is to ensure that the information on long guns can no longer be used for any provincial purposes. As we mentioned above, however, the regulation of long guns and the use of information about them fall primarily within the provinces' power to make laws in relation to property and civil rights. This is all the more true now that the failure to comply with the requirement to register has been decriminalized, because the use of the information has lost its federal aspect. As a result, the pith and substance of s. 29 relates to the provinces' power over property and civil rights.

[177] To be valid, therefore, s. 29 must be integrated into the *ELRA* as a whole. This conclusion makes sense to us, given that whether the CFR is constitutional in fact depends on its being ancillary to a criminal law purpose, as the Court found in the *FA Reference*.

(2) Ancillary Powers Analysis

[178] To determine whether s. 29 of the *ELRA* is constitutional on the basis of the ancillary powers doctrine, we must consider the seriousness, or extent, of its encroachment on provincial powers, bearing in mind that the provincial power to make laws in relation to property and civil rights is a head that should not be intruded upon lightly We should mention that s. 29 may also encroach on the provinces' powers in relation to the administration of justice, as can be seen from our analysis below.

[179] The seriousness of the encroachment of s. 29 must be analyzed on the basis of the specific factual and legal context of the instant case

[180] By enacting the *FA*, the federal government effectively took over the field of firearms regulation. The decision to do so had two major consequences. On the one hand, the provinces had to deal with a national registry. As a result, the creation of a provincial long-gun registry became unnecessary As well, Quebec passed legislation based upon this partnership with the federal government. The creation and management of a federal firearms registry thus led to the development of a provincial aspect. To destroy the registry unilaterally without taking this reality into account is to negate Quebec's financial, administrative and legislative participation.

[181] On the other hand, although the *FA* did not have a significant effect on the provinces' powers with respect to firearms at the time of its enactment, that is no longer true today in a context in which the data are to be destroyed without first being transferred to Quebec. The consequences of the loss of the information collected since 1998 will not be only financial in nature. The quality and usefulness of a restored registry created by Quebec would be diminished, since, to give one example, the chain of ownership of each weapon will have been lost. ... Quebec maintains that, if it does not obtain and cannot retain the data concerning the registrations of interest to it, it will lose track of more than one and one half million long guns Thus, the destruction of the data would compromise the creation and the usefulness of a future Quebec firearms registry.

[182] Furthermore, ... the partnership discussed above led to the enactment by Quebec of legislation that falls within its powers in relation to the administration of justice. Destruction of the data would therefore interfere with the use Quebec makes of them in the administration of certain provincial legislative schemes ... and with their use by the police in investigations in particular.

[183] Finally, the federal government could have implemented its vision of firearms control without involving the provinces in any significant way, but it did not choose to take that approach. Doubtless for the sake of efficiency, it instead developed a legislative scheme that required active provincial participation and took the form of a partnership. This cannot be disregarded in analyzing the seriousness of the encroachment on the powers of the other level of government and, consequently, in determining the scope and validity of s. 29.

[184] This leads us to conclude that in terms of both its nature and its effects, s. 29 causes a substantial encroachment on provincial jurisdiction. In such a case, the Court's past decisions tell us that for the encroachment of s. 29 to be found to be ancillary to the *ELRA*, the degree to which the section is integrated into the Act must be high, that is, it must satisfy the necessity or "integral part" criterion

[185] The purpose of the *ELRA* as a whole, with the exception of s. 29, is to abolish the requirement to register long guns. The fact that the "summary" of the *ELRA* refers to two purposes cannot serve on its own as proof of the true purpose of the *ELRA*. It goes without saying that the courts, in determining whether legislation is constitutionally valid, must look beyond the legislation's declared or apparent purpose. Were they not to do so, it would be possible for a legislature to shield statutory provisions from constitutional challenge simply by drafting a preamble. Furthermore, it is only s. 29 of the *ELRA* that is related to the supposed second purpose of the Act.

[186] In our opinion, the destruction of the data in question in s. 29 cannot be considered necessary to the abolition of the requirement to register long guns. These two purposes are distinct. Moreover, as we mentioned above, the earlier bills did not provide for the destruction of these data.

[187] We also doubt that s. 29 can be linked to the *ELRA* based upon a test of rationality. Although the destruction of data in which the federal government is no longer interested might seem rational at first glance, we find it hard to reconcile the

manner in which their destruction was provided for with the desire certain provinces might show to maintain a registry within the limits of their powers. The AGC in fact acknowledged at the hearing that what was problematic was not really the fact of transferring the data to the government of Quebec, but that of transmitting personal information about long-gun owners: transcript, at p. 55. ...

[188] Finally, we agree with Blanchard J. that Parliament's declared intention to cause harm to the other level of government cannot be disregarded. ...

[189] Although it is not necessary to take this into account for the purposes of our analysis, the intention to cause harm is all the more relevant in that it arises in a context in which Quebec and the federal government had agreed to act jointly, in the spirit of co-operative federalism . . . In this context, it is hard to imagine how a provision whose purpose is to put an end to this co-operation and that is enacted with an intention to cause harm to a partner can be rational.

[190] The foregoing analysis leads to an inescapable conclusion: because of its pith and substance, s. 29 of the *ELRA* does not fall within the federal criminal law power and is not ancillary to the *ELRA*, which is otherwise valid. The section has not therefore been shown to be constitutionally valid. In our opinion, a legislative measure cannot be found to be valid that (1) does not fall within the federal criminal law power and that (2) thwarts, by the substantial encroachment it causes, the corollary exercise of provincial powers that flowed from the partnership. To conclude otherwise would be inconsistent with the principles of federalism.

[191] Our conclusion does not necessarily mean that Parliament cannot enact legislation to destroy the data. What we are saying is merely that to destroy the data, as provided for in s. 29, without first offering to transfer them is unconstitutional. ...

[Justice LeBel, Wagner, and Gascon would have declared s 29 of the *Ending the Long-Gun Registry Act* to be invalid as it pertained to data with respect to long guns that have a connection with Quebec. However, because in their opinion Quebec had not established a legal basis for its claim to the data, they would not have issued a declaration that Quebec was entitled to receive the data.]

Appeal dismissed.

NOTES AND QUESTIONS

1. Why was the majority reluctant to apply the doctrine of colourability? What more would be needed to show that this was an appropriate set of facts for applying the doctrine?
2. Will this decision have consequences for the content of agreements negotiated between the federal and provincial governments?
3. Various formulations of a "duty of reciprocal loyalty" can be found in the constitutional law of many federations, sometimes explicitly in the constitutional text—e.g. s 41(1) of the South African constitution and art 143(1) of the Belgium constitution—and sometimes, as in Germany, as a doctrine developed by the judiciary to regulate intergovernmental relationships on the basis that loyalty is an inherent normative aspect of the very idea of federalism. Jean-François Gaudreault-DesBiens has argued that recognizing a duty of loyalty would "bridge the Court's increased reliance on the normative principle of federalism with the fact that intergovernmental cooperation has become a central feature of the federalism's daily life." Using the considerable German experience as a guide, Gaudreault-DesBiens describes the duty of loyalty, with its corollary of good faith, as encompassing negative duties on government actors to avoid exercising their powers in certain ways—for example, as actions that disproportionately impose negative externalities on others—and positive duties to remove obstacles to the lawful exercise of other actors' jurisdictions:

Federal loyalty provides a normative justification for occasional judicial interventions targeted either at preventing that trust be unduly undermined within the federation, or by facilitating the restoration of trust between federal actors. ... [T]he judicial identification of its normative contours could assuage fears raised by potential unprincipled and opportunistic uses of unwritten constitutional principles.

See Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 Const Forum Const 1 at 14-15. In light of the majority opinion in *Quebec v Canada*, what is now the future of the duty of loyalty?

CHAPTER TWELVE

INSTRUMENTS OF FLEXIBILITY IN THE FEDERAL SYSTEM

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I. INTRODUCTION

At this point in the materials, you might feel that the provisions relating to the distribution of powers have been interpreted by the courts in a manner that either denies the federal government the authority necessary to deal with important issues of public policy or imposes unjustified constraints on the provinces in dealing with issues of significance to them. However, it is important to be aware that the emphasis in the casebook is on the jurisdiction of federal and provincial governments to enact regulatory laws—or what some might call “command and control” legislation.

Before coming to any firm conclusions about the balance of power in the Canadian federal system, one should look beyond the “regulatory” jurisdiction of the federal and provincial governments to a number of policy instruments that have been used to alter the formal distribution of functions and the policy responsibilities of each level of government in many areas. These instruments include taxation, the spending power, public ownership, interdelegation, and intergovernmental agreements. In the materials that follow, you will see that the courts have placed few legal constraints on the use of these instruments, with the result that the actual distribution of functions is quite different from what we have studied so far.

At times, these instruments have permitted significant centralization of some functions. But more recently, with federal attempts to respond to both fiscal pressures and Quebecers’ demands for constitutional change, the federal role has been reduced in many policy areas. For example, as we will see, the spending power has been used both as means of centralization and decentralization.

Although the instruments we discuss below have been important in reshaping the Canadian Constitution, they do not reallocate regulatory jurisdiction over policy areas and, as a consequence, are always subject to legislative repeal. Only a constitutional amendment can securely shift the boundaries of federal and provincial regulatory jurisdiction. Amendment is dealt with in a separate chapter at the end of this book: see Chapter 26, Amending the Constitution.

II. THE SPENDING POWER

Keith G Banting, "The Past Speaks to the Future: Lessons from the Postwar Social Union"

in Harvey Lazar, ed, *Non-Constitutional Renewal* (Kingston, Ont: Institute of Intergovernmental Relations, 1998) at 39

Introduction

During the postwar years, Canadians built their own version of the welfare state, establishing a new social contract between citizens and the state. This process was underway throughout the western world, as all countries experienced similar pressures to protect citizens from the social insecurities inherent in industrial society. Canada, however, faced the additional challenge of fashioning its social programs in the context of a federal state and society divided along linguistic and regional lines. Constructing the welfare state therefore also involved building what would now be called a *social union*, a set of understandings about the balance between federal and provincial social programs, and a set of intergovernmental arrangements to give those understandings life.

The postwar generation had to decide whether there would be a *pan-Canadian* welfare state or a series of distinctive *provincial* welfare states. The social union that emerged in those years was a compromise between these two poles. The system was significantly more decentralized than that in many other federal systems, including countries such as Australia and the United States, but it did incorporate critical *pan-Canadian* dimensions. Major social programs operated across the country as a whole and established a set of social benefits that Canadians held in common, irrespective of the region in which they lived. ...

In the postwar social union, the *pan-Canadian* elements of the welfare state were associated strongly with the role of the federal government. As the political and economic strength of the federal government has declined in recent years, and as our constitutional tensions have grown, the original social union has come under strain. Increasingly, Canadians are being forced back to first principles in social debate. What is the appropriate balance between *pan-Canadianism* and regional diversity in the construction of the welfare state? If *pan-Canadianism* is an important value, are there mechanisms other than federal power through which it can be sustained? ...

Federal Instruments

The federal government utilized three critical policy instruments in developing *pan-Canadian* social programs: the provision of benefits directly to citizens, federal shared-cost programs in areas of provincial jurisdiction, and equalization grants to poorer provinces.

Direct Federal Programs

Although it is sometimes argued casually that social policy generally is a provincial responsibility, the federal government's own jurisdiction in social policy is substantial, especially in the area of income security. During the middle decades of this century, three formal amendments to the constitutional division of powers gave the federal government complete authority over Unemployment Insurance, and substantial authority in the area of pensions. In addition, under the doctrine of the

spending power, the federal government claimed an untrammeled right to make payments to individuals, institutions or other governments for any purpose, and argued that such transfers do not represent an invasion of provincial jurisdiction as long as they do not constitute regulation of the sector. Finally, the federal role in taxation constitutes a powerful instrument in redistributive policies, especially with the development of a fuller array of refundable tax credits and benefits.

On these constitutional footings, the federal government developed a significant direct presence in social policy. In 1940, it introduced Unemployment Insurance, which was later complemented by training and other labour market programs. The federal government also established two universal programs: Family Allowances (1944) which were paid to all families with dependent children; and Old Age Security (1951), which provided a basic pension to all elderly Canadians. In the mid-1960s, the federal government enriched pensions with two additional programs: the Canada Pension Plan, a contributory plan providing earnings-related pensions, and the Guaranteed Income Supplement, an income-tested benefit for the elderly poor. Finally, a Spouse's Allowance for younger spouses of pensioners was added in 1975.

These initiatives established a direct federal presence in the lives of Canadians, and made Ottawa the dominant government in income security. Provincial governments delivered Workers' Compensation and social assistance programs; and Quebec chose to operate its own Quebec Pension Plan, which is closely aligned with the Canada Pension Plan operating throughout the rest of the country. Nevertheless, the federal role was dominant. ... [T]he federal government paid out between 70 to 80 percent of all income security dollars directly to Canadians for the entire period from the late 1950s to the early 1990s. ...

Shared-Cost Programs

In other parts of the welfare state, the constitution and political realities pointed to provincial responsibility and delivery. In such areas as health care, social assistance and postsecondary education, the federal government therefore relied on the spending power to make shared-cost grants to provincial governments. Under these programs, Ottawa provided substantial financial support to any province mounting a program that met conditions or standards specified in federal legislation. In this way, the federal government stimulated the expansion of key social services, and established a common framework for program design from coast to coast.

The pan-Canadian nature of these programs turned to a significant degree on the terms and conditions attached to federal funding, especially in their developmental stages. The level of specificity in shared-cost programs varied considerably, both over time and from program to program. For example, some of the early shared-cost programs, such as the categorical social assistance programs that were the precursors to the Canada Assistance Plan, did establish relatively detailed conditions, including maximum shareable benefit levels. However, provincial resistance, especially from Quebec, changed that practice, and federal conditions became less detailed. Nevertheless, the federal conditions that were attached to shared-cost programs were important in giving broad shape to provincial programs. ...

Equalization Grants

Federal equalization grants to poorer provinces constituted the third instrument that sustained pan-Canadianism. These grants were designed to enable the seven poorer provinces to provide average levels of public services without having to resort to above-average levels of taxation. Equalization grants have always been unconditional, and in theory could be used to reduce provincial taxes rather than enhance

provincial programs. In practice, however, the equalizing of fiscal capacity among provincial governments led to a more common level of public services generally across the country than would have been possible if provinces had to rely on their own revenues alone.

NOTE: SHARED-COST PROGRAMS

In the extract above, Banting refers to the ability of the federal government to spend in areas outside its jurisdiction. This power is known as the federal spending power (which we refer to simply as the “spending power,” not to be confused with the power of provincial governments to spend in areas of federal jurisdiction, recognized by the Supreme Court in *Lovelace v Ontario*, 2000 SCC 37). As Banting notes, the spending power has been used in connection with three kinds of programs—direct federal programs, equalization grants, and shared-cost programs. Our focus in this note is on the last of these three.

The dominant legal instrument for the exercise of the spending power has been the shared-cost statute. However, the design of the programs created by these statutes may vary along a number of different dimensions. Indeed, much of the politics of social policy revolves around these issues of design. Historically, the level of the grant was set on a shared-cost basis, with the federal and provincial government providing a fixed percentage of funds (typically, 50–50). However, in recent years, the federal government has instead relied on a system of block grants, which are set at a level that is not tied to program expenditures. Closely related to the level of federal grants is the form of the federal transfer. Again, there has been a shift over time, from direct cash transfers to a mix of cash transfers and tax points—that is, a percentage of federal tax revenue. Finally, most shared-cost program grants come with conditions—for example, the prohibition on residency requirements for the receipt of social assistance in the *Canada Health Transfer, Canada Social Transfer and Wait Times Reduction Transfer Regulations* [SOR/2004-62] and the various conditions on the delivery of medical care set out in the *Canada Health Act*, RSC 1985, c C-6 [CHA], both discussed below. However, this need not be the case—for example, equalization grants are unconditional.

In the area of health insurance, the central pieces of legislation were the *Hospital Insurance and Diagnostic Services Act*, SC 1957, c 28, covering in-patient and out-patient hospital services; the 1966 *Medical Care Act*, SC 1966-67, c 64, covering non-hospital-based physician services; and, finally, the 1984 *Canada Health Act*, RSC 1985, c C-6, which consolidated and replaced the earlier two statutes and is still in force. The *Canada Health Act* requires provincial health plans to meet five national standards in order to qualify for federal funding:

1. accessibility (“reasonable access to health care without financial or other barriers”),
2. comprehensiveness (coverage of all medically necessary hospital and medical services),
3. universality (coverage of all residents of a province after three months’ residency),
4. portability (coverage when temporarily absent from the province), and
5. non-profit public administration.

As well, the Act contains specific bans on extra-billing by physicians and user charges by other providers—for example, hospitals—for insured services. The Act contains enforcement machinery for provincial non-compliance, imposing mandatory deductions for violations of the bans on extra-billing and user charges, and vesting a discretion in the federal Cabinet to withhold funds from provinces in breach of the five national standards, after consultation with the province in question. For a detailed discussion of these standards, see Sujit Choudhry, “The Enforcement of the Canada Health Act” (1996) 41 McGill LJ 461.

On the income assistance side, the central piece of legislation was the *Canada Assistance Plan*, SC 1966-67, c 45 [CAP], enacted in 1966, but since repealed, as explained below. The

CAP contained a series of national standards for provincial social assistance programs. Central among these was the requirement that provinces provide financial aid or other assistance to "any person in need," in an amount that met the "basic requirements" of that person. Other conditions required that there be no minimum residency requirement for the receipt of social assistance, and that provincial law provide for a right of appeal from decisions regarding social assistance. There was and is no shared-cost statute specifically directed at post-secondary education.

During the first wave of federal policy activism that created the social union, federal transfers for health insurance and social assistance were funded on a 50–50 basis. However, these arrangements have been altered in stages, in response to growing fiscal pressures on the federal government. In the health care context, this shift is described as follows:

The story of declining federal funding began in 1977, with the shift away from 50/50 cost-sharing to a block grant (the Established Programs Financing or EPF Grant) consisting of a mixture of cash and tax points, with the cash component tied to an escalator based on growth in per capita Gross National Product (GNP). In 1982, the escalator was applied to the entire EPF entitlement, not just the cash component, making the EPF cash transfer strictly residual. The escalator was then eliminated in stages, first in 1986 (when it was reduced to GNP less 2 per cent), then in 1990 (when the EPF per capita transfer was frozen).

See Sujit Choudhry, "Bill 11, the Canada Health Act, and the Social Union: The Need for Institutions" (2000) 38 Osgoode Hall LJ 39 at 62.

A similar story can be told about federal transfers for social assistance. First came the so-called cap on CAP. Until 1990, the federal government paid half the costs of social assistance in the provinces. In the 1990 budget, it unilaterally announced a 5 percent ceiling on the growth of payments to the three "have" provinces: Alberta, British Columbia, and Ontario. Coupled with a recession that increased the numbers on the welfare rolls, the province of Ontario was particularly hard hit, with the federal share of social assistance costs dropping from 50 percent to 28 percent in 1992-93, a reduction of \$1.7 billion.

These trends culminated in the creation of the Canada Health and Social Transfer (CHST) in 1995 (by the *Budget Implementation Act*, SC 1995, c 17, part V, especially ss 13-23.2). The CHST was a new global block grant, consisting of a mix of cash transfers and tax points to cover post-secondary education, medicare, and social assistance, that replaced both the EPF and CAP. Because it was a block grant that was not tied to actual program expenditures, it marked the final break with the shared-cost approach to federal shared-cost programs. The cash component of the CHST for 1996-97 was set at \$14.7 billion, a \$4.2 billion reduction from the 1995-96 total for transfers under the EPF and CAP (\$18.5 billion). Moreover, as a quid pro quo for reduced federal funding, the CHST eliminated all national standards in the CAP for social assistance programs, except for the prohibition on residency requirements. However, the national standards of the CHA remained.

In 2004, the CHST was split into the Canada Health Transfer (CHT) and Canada Social Transfer (CST) to provide greater accountability and transparency for federal health funding.

THE SPENDING POWER AND THE CONSTITUTION

The spending power has been central to the growth, development, and politics of post-war Canada. However, its constitutional foundations are unclear. The existence of the spending power was announced by Lord Atkin in *Canada (AG) v Ontario (AG)*, [1937 CanLII 363, \[1937\] AC 355 \(UKJCPC\)](#) [*The Employment and Social Insurance Act Reference*], excerpted in Chapter 6, The 1930s: The Depression and the New Deal, in the following famous passage (at 687):

That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals,

corporations or public authorities could not as a general proposition be denied. Whether in such an Act as the present, compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation, it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State, or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.

This brief passage has given rise to a host of interpretive questions. First and foremost is the constitutional source of the spending power. The spending power is not mentioned in s 91 of the *Constitution Act, 1867*. Commentators have suggested a variety of sources for the spending power: s 91A (federal jurisdiction over the public debt and property), s 91(3) (taxation), and s 106, the authority to make payments out of the Consolidated Revenue Fund. Others have turned to the royal prerogative, or even the legal rule that the Crown possesses the powers of a private person, including the power to spend its moneys as it chooses.

But there are other questions as well. In the Supreme Court of Canada's judgment in *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act (1935, c 48)*, [1936] SCR 427, 1936 CanLII 30 [*Unemployment Insurance Reference*], Kerwin J supported the ability of the federal government to spend in areas out of its jurisdiction by making a distinction between spending and "coercive" forms of regulation on the ground that the recipient of a grant, including one with conditions, is free to "decline the gift or to accept it subject to such conditions." Scholars have questioned the cogency of this distinction, however, given that the Constitution allocates jurisdiction on the basis of subject matter, not on the basis of policy instrument (a point made by the Privy Council in the *Labour Conventions* case in the context of treaties: see *Canada (AG) v Ontario (AG)*, 1937 CanLII 362, [1937] AC 326 (UKJCPC) [*Labour Conventions*], excerpted in Chapter 6).

Another issue is whether the spending power is subject to any justiciable limits. For example, is federal legislation enacted with the purpose of regulating an area of provincial regulatory jurisdiction *ultra vires*? Alternatively, can the degree of impact of a federal spending statute on areas of provincial jurisdiction rise to such a level as to take that statute out of federal jurisdiction? Lord Atkin's judgment clearly contemplated both kinds of limits on the exercise of the federal spending power.

In most areas of constitutional law, subsequent jurisprudence would be available to answer these questions. However, the spending power is an exception. Consider the following observation:

In the years after the New Deal, the question of the division of powers in relation to social policy almost never came before the Supreme Court. Thus, although handed down over six decades ago, the *UI Reference* decisions are still the leading judgments in the area. The contrast with other areas of public policy is striking. In the post-war period, the Court pronounced on the division of powers in a broad variety of policy contexts—including agricultural marketing, natural resources, inflation controls, the environment and broadcasting,

making social policy conspicuous by its absence from the Court's docket. The silence of the Court on social policy is all the more unusual because jurisdictional questions often ended up before the Supreme Court because of intense federal–provincial conflict. In the social policy arena, disputes over the source and scope of federal involvement have been the norm and have often been framed in jurisdictional terms, and yet the courts have rarely been given an opportunity to elaborate upon and clarify the Privy Council's holdings. By contrast, federal–provincial conflicts that raised fundamental questions about the Canadian constitutional order, such as the patriation of the Constitution and the potential secession of Quebec have landed before the Court.

Why did social policy not give rise to litigation under the division of powers? Although federal–provincial relations in this area were often acrimonious, in the end, both the federal and provincial governments likely concluded that the potential costs of a litigation strategy outweighed the potential benefits. The federal government, for example, has consistently asserted the federal spending power is a plenary power that allows it to spend in areas of provincial jurisdiction without constitutional limitation. The risk of bringing the spending power before the courts, however, was that a ruling might have imposed some limits on that power, for example, by holding that extremely intrusive conditions might amount to an unconstitutional attempt regulate matters in provincial jurisdiction. The provinces other than Quebec faced a similar dilemma. Given the existence of vertical fiscal imbalance, they did not oppose the federal spending power in principle, but wanted federal transfers to be unconditional. A court pronouncement, though, might have had the effect of legitimizing intrusive federal conditions. Even Quebec, which opposed even unconditional federal transfers, opted not to litigate, likely because it seemed exceedingly unlikely that its consistent demand—a right to opt-out with compensation—would not be granted by the Court. Not surprisingly, the cases in which the division of powers and social policy was litigated were brought by private parties. The first social policy case brought by a government did not come before the Supreme Court until 1990.

See Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52 UTLJ 163 at 198–99 (footnotes omitted).

As sparse as it is, subsequent case law appears to have departed from some of the limits imposed on the spending power by Lord Atkin. The focus of these cases has been on whether *conditions* attached to grants amount to a federal attempt to legislate in areas of provincial jurisdiction. In *Winterhaven Stables Limited v Canada (AG)*, [1988 ABCA 334](#), leave to appeal to SCC refused (1989), 95 AR 236, [1988] SCCA No 543 (QL), the Alberta Court of Appeal considered a constitutional challenge brought by a taxpayer to a number of statutes, including the CAP (since repealed) and the *Federal–Provincial Fiscal Arrangements and Established Programs Financing Act*, 1977, SC 1976–77, c 10 (which established funding arrangements for the *Canada Health Act*, and has also since been repealed). The Court rejected the challenge. The Court conceded that "the consequence [of legislation authorizing conditional grants to the provinces] is to impose considerable pressure on the provinces to pass complementary legislation or otherwise comply with the conditions of the allocation" (at para 19), and stated that conditions could be attached to grants "so long as the conditions do not amount in fact to a regulation or control of a matter outside of federal authority" (at para 23), thereby suggesting that the effects of some conditions on provincial areas of responsibility could be so significant as to render the federal law *ultra vires*. But the Court also stated that "questions of constitutional validity under ss 91 and 92 are not resolved by looking at the ultimate probable effect" (at para 19).

The issue was also commented on by the Supreme Court in *Reference Re Canada Assistance Plan (BC)*, [\[1991\] 2 SCR 525](#), [1991 CanLII 74](#), discussed further below. In that case, the Supreme Court addressed an argument raised by Manitoba that the cap on CAP was unconstitutional because it intruded on provincial jurisdiction. The Court rightly noted that this

argument was a challenge to the constitutionality of the CAP itself. It rejected Manitoba's submission, stating that the simple fact that a federal spending statute "impacts upon [a] constitutional interest" (at 566) outside of federal jurisdiction was "not enough to find that a statute encroaches upon the jurisdiction of the other level of government" (at 567). This statement suggests that the effects of federal spending statutes are constitutionally irrelevant. Moreover, both judgments appeared to assume that the spending power may be deliberately directed at matters lying within provincial jurisdiction. If this is true, then the *Canada Assistance Plan Reference* may have overruled the *Unemployment Insurance Reference*. However, the Court referred to the *Unemployment Insurance Reference* decision in the *Canada Assistance Plan Reference*, leaving the matter uncertain.

NORMATIVE CRITIQUES AND DEFENCES OF THE SPENDING POWER

Consider the following criticism of the federal spending power by Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 Can Bar Rev 448 at 463-67:

There are many values which find voice in the Canadian Constitution but, in terms of the structure of government, the two most fundamental are federalism and responsible government. Although federalism has many forms, at root it implies a division of legislative and executive responsibilities between two orders of government, neither of which is subordinate to the other. Responsible government is a system of representative democracy in which the head of state acts upon the advice of an executive that, in turn, is directly answerable to a democratically elected legislature. Viewed in light of these constitutional values, the debate over the federal spending power takes on new importance. It becomes a debate not just about constitutional doctrine, but about the integrity of the federal system and the preservation of political accountability in Canadian government.

The underlying rationale for federalism is a belief that while some matters are better decided by the national political community, others should be left to regional political communities. Implicit in this belief is a view that, with respect to certain matters, regional governments can better reflect the political attitudes and aspirations of citizens. It is not hard to see why this might be the case. In a country as large and diverse as Canada, the opinions and priorities of the inhabitants of one region may well differ from those of other regions. A system of regional governments is more likely to be responsive to these regional variations than is a single central government. ...

The *raison d'être* of the federal spending power (and of conditional grants in particular) is to permit the federal government to use fiscal means to influence decision-making at the provincial level. In other words, it allows national majorities to set priorities and to determine policy within spheres of influence allocated under the Constitution to regional majorities. Thus, both by design and effect, the spending power runs counter to the political purposes of a federal system. ...

An even more powerful objection to the federal spending power concerns its impact upon responsible government. The organizing principle of responsible government is political accountability: accountability of the executive to the legislature and of the legislature to the electorate. It is this thread of accountability that transforms what would otherwise be a despotic system of government into a democratic one. Yet if a legislature is to be held accountable to the electorate, citizens must have a definite understanding of the scope of that legislature's powers. An electorate that cannot attribute political responsibility to one order of government or the other lacks both the ability to express its political will and the assurance that its will can be translated into action.

By allowing the federal government to use fiscal means to influence provincial policies, the spending power compromises political accountability and thereby weakens the ability of electors to exercise democratic control over government.

Petter then discusses a hypothetical example where a province wishes to impose user fees for health care services on high-income individuals, but does not because of the fiscal penalties that it would face under the *Canada Health Act*, and continues:

Some may argue that the solution is for citizens to favour such a policy to organize at the national rather than the provincial level. ... Even if citizens, by organizing nationally, were able to convince the federal government to endorse their proposal, that government would be forced to rely solely upon fiscal measures to implement the reform. While such measures probably could be structured so as to compel provincial acquiescence with federal requirements, they could not give the federal government direct regulatory control over the policy. Thus the policy, although well conceived at the federal level, could suffer from incompetence or lack of political support on the part of the provincial authorities charged with its administration.

What the above example shows is that the spending power does not simply shift political responsibility from one order of government to the other; it intersperses responsibility between both orders. The result is to require those advocating a particular reform to fight a battle on two fronts. At the same time, it becomes virtually impossible for citizens to determine which order of government to hold accountable for policies that fail or, for that matter, for ones that succeed.

Consider the following defence by Sujit Choudhry of a strong federal role in redistribution, which is one of the policy goals achieved by exercises of the spending power:

To fully grasp the difficulties that the pursuit of redistributive goals poses for a federal state, we must define what those redistributive goals actually are. The goal I focus on here is *vertical equity*. Vertical equity refers to the appropriate stance of governments toward interpersonal economic inequality (however measured) prior to and independent of redistributive policies. ...

How does vertical equity operate in a federal state? In federations like Canada ... the concern raised by economists is that this goal is quite difficult to achieve.

The seminal work here is Wallace Oates' *Fiscal Federalism* Oates starts by considering how redistribution would work in a highly decentralized federation, in which the federal government did not exercise any of the traditional functions of the public sector, including redistribution. For the purposes of his analysis, he makes a key assumption—"an absence of restrictions on the movements of goods and services" within the federation, i.e. extensive inter-provincial economic mobility. Oates' central claim is that in a decentralized federation, vertical equity, understood as interpersonal redistribution in order to reduce economic inequality, is very difficult to achieve. To understand why, Oates outlines the normative justification for federalism that emerges from the public choice literature, particularly the work of Charles Tiebout.

Tiebout relies on an economic conception of citizenship, which gives principal importance to the satisfaction of citizens' preferences. Tiebout's focus is on citizens' preferences for goods and services provided by governments, and he argues that systems of government can be compared with one another and assessed by their ability to maximize preference satisfaction. His central point is that federalism can be expected to produce a higher degree of preference satisfaction than would a unitary state, in the following way. Suppose each province provides a package of goods and services that varies along a number of different dimensions. As a simplifying device, assume that the two dimensions that matter most are the level or quantity of those goods and services, and the cost of those services. Each province can be uniquely characterized by where it lies on these two dimensions. One province may offer larger quantities per capita of goods and services (e.g. comprehensive health insurance, publicly funded education through to the post-secondary level) and will charge accordingly. Another province may offer a slightly lower quantity of goods and services (e.g. health insurance covering minimal health needs, and no publicly operated higher

education system), but will charge less. Tiebout assumes that citizens are mobile, and that they will migrate to the province which offers them the basket of policies which suits them best. Federalism, then, creates a market for mobile citizens, where federal sub-units compete with one another through packages of goods and services they offer their citizens in exchange for fees to finance those services. ...

A complication arises, though, when one considers how provincial governments charge their residents for publicly provided goods and services. Oates sketches two different pricing options: benefit pricing and pricing on the basis of ability to pay. Under benefit pricing, each provincial resident, regardless of income level, would be charged an identical fee to cover the additional costs of offering goods and services to an additional resident of a province. From the vantage point of vertical equity, the principal problem with a flat benefit tax is that it disproportionately burdens the poor. The obvious solution, then, is to price publicly provided goods and services on the basis of ability to pay, so that those with relatively higher incomes pay more for the same goods and services than those with relatively lower incomes. A provincial income tax system would be the simplest mechanism for this sort of pricing.

Oates argues, though, that provincial governments are limited in their ability to redistribute interpersonally. The difficulty is the prospect of inter-provincial migration, both of higher and lower income persons. Higher income individuals would have an economic incentive to relocate to provinces where they would pay less for publicly provided goods and services, either because those provinces priced on a benefit basis, or adopted forms of income taxation which were less redistributive. Conversely, lower income individuals would have an incentive to move into provinces that finance services in a manner that least disadvantages low income individuals. The result is a cycle of out-migration and in-migration, whereby the departure of the rich and the arrival of the poor increases the proportion of lower income persons in the province, reduces the per capita provincial tax base, and accordingly requires an increase in the provincial income tax rate in order to provide public goods and services at the original level. Each increase in income taxes would in turn cause more higher income persons to leave and more poor persons to immigrate. After a point, the decline in the per capita tax base would force provinces to offer a lower level of goods and services. As a consequence, provinces that redistribute will be constrained in their ability to offer goods and services to their residents. Indeed, Oates goes further, and identifies the same dynamic at work in any provincial effort to achieve vertical equity. Thus, if a province wished to achieve a more egalitarian distribution of income than currently existed, it too would create incentives for higher income individuals, who would bear the burden of this policy, to migrate to jurisdictions with less egalitarian income tax policies. The end result would be a more egalitarian distribution of income, but a decline in per capita income.

One solution would be for provinces interested in redistribution to co-ordinate their public policies so as to make unavailable an attractive exit option within the federation for high-income individuals. Provinces might co-ordinate the structure of provincial income tax regimes, and/or might ensure that they provide comparable levels of goods and services to their residents, acting as a cartel to set a price for their goods and services other than the one which would prevail in the absence of co-ordinated action. High-income individuals would lack the incentive to migrate inter-provincially, because they would be unable to escape redistribution. Inter-provincial co-ordination, though, may be ineffectual, because in some circumstances provinces have strong incentives to defect from a co-ordinated regime of redistribution. Provinces will have an incentive to defect when the benefits foregone exceed the benefits of participating in such a regime. The foregone benefit is the additional tax revenue brought in by each additional high-income individual who migrates to a province from another province in response to an inter-provincial redistribution differential. Provinces benefit from the in-migration of each additional high-income individual as long as the tax yield exceeds the marginal cost of providing goods and services to that person. But provinces will only be able to derive that benefit if other provinces do *not* defect,

and adhere to the co-ordinated redistribution regime, thereby creating the incentive for high-income persons to migrate.

The difficulty though, is that each province has the same incentive to defect, and to adopt policies that are less redistributive in nature. Moreover, in response to a defection that has already occurred, a province will have an incentive to defect and adopt less redistribution in order to stem the out-migration of high-income individuals, because failing to do so would leave them in a worse off situation than if they did not respond. Thus, given sufficient incentives, rather than co-operate, provinces will compete on the terrain of redistribution. The net result will be lower rates of redistribution than would have occurred were inter-provincial co-ordination to have been successful. In other words, if left to the provinces alone, Canada risks a redistribution race to the bottom.

See Sujit Choudhry, "Recasting Social Canada," above at 219-24.

Choudhry goes on to argue that the prospect of races to the bottom can serve as the basis of federal regulatory jurisdiction over social policy under the national dimensions/national concern branch of POGG. Would the existence of federal regulatory jurisdiction over social policy be an effective response to Petter's concerns?

NOTE: PROPOSED CONSTITUTIONAL AMENDMENTS

The spending power has been the subject of constitutional discussions on a number of occasions. Quebec governments, in particular, have demanded controls on the federal spending power to prevent encroachments on provincial areas of jurisdiction. But others see the federal spending power as an important mechanism for maintaining a social union with common national standards. The following is a proposal on the reform of the spending power found in the 1987 Meech Lake Accord and duplicated in the Charlottetown Accord in 1992. It would have added a new s 106A to the *Constitution Act, 1867*, which would have read as follows:

106A(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

This provision raised a series of difficult interpretive questions. One was whether it amounted to an explicit recognition of the ability of the federal government to expend money in areas of provincial jurisdiction. The reference to "national shared cost program ... in an area of exclusive provincial jurisdiction" seems to presuppose this. But how can this position be reconciled with s 106A(2)? A host of questions surrounded the opt-out with compensation. What was a "national" program—one that operated in every province, or simply one operated by the federal government in some provinces? Section 106A would have applied, prospectively, only to new shared-cost programs. But would it apply to amendments to, or extensions of, existing programs? What amount of compensation would be "reasonable": on this point, see similar language in s 41 of the *Constitution Act, 1982*? What is a "program," and is it different from an "initiative"? What are "national objectives," and in particular, how are they related to the national standards laid down in the CJA? What would it mean for a provincial program to be "compatible" with national objectives? Need that program employ identical means to pursue the same ends, or would it be sufficient if the program pursued the same objectives, by whatever means?

Although s 106A was never entrenched, the federal government made a promise in the February 1996 Speech from the Throne not to use its spending power to create new shared-cost

programs in areas of exclusive provincial jurisdiction without the consent of a majority of the provinces. Provinces choosing not to participate were promised compensation if they established "equivalent or comparable initiatives."

NOTE: THE ENFORCEMENT OF NATIONAL STANDARDS

The enforcement of the national standards set out in the CHA has been a flash point of federal-provincial controversy. However, Sujit Choudhry suggests that national standards are largely unenforced:

Let me begin with two facts. The first is that, despite the explicit bans on user charges and extra-billing—which are remarkably specific in a statute otherwise marked by its use of open-ended language—provinces continue to violate these conditions of federal funding. ... Since these conditions are subject to the mandatory enforcement mechanism, the federal government is legally obliged to make deductions in federal transfer payments, and it appears that the federal government complies with the *CHA*. [The data show, however, that the total dollar amounts involved are small.] ...

In stark contrast, the discretionary enforcement mechanism, which attaches itself to the important conditions of universality, comprehensiveness and accessibility, has never been used. Juxtaposed against the active use of the mandatory deductions scheme, a casual observer could reasonably conclude that the federal government is actively monitoring provincial compliance with the terms of the *CHA*, and has come to the conclusion that provincial plans meet those national standards. Alternatively, one could conclude that instances of non-compliance have been resolved without the need for financial penalties. ...

However, the reports of the auditor general tell a radically different story. The auditor general has examined the enforcement of the *CHA* on three occasions, in 1987, 1990, and 1999. I focus on the last report, because it is by far the most detailed, and because it repeats many of the concerns advanced in the first two. The auditor general indicated in 1999 that there had been numerous instances of non-compliance in the last five years. Six cases were resolved without the use of financial penalties; the report did not provide any details. However, the auditor general noted that there were other cases of non-compliance that had not been resolved. A number of provinces (which the auditor general did not name) contravened the portability condition, which requires that medical services received outside of a province (including outside of the country) by insured persons temporarily absent from that province be reimbursed at the same rate as inside the province. The portability condition was apparently violated by five provinces with respect to treatment received outside of Canada; in addition, one province violated the condition with respect to treatment received in other provinces. The auditor general also stated, without providing any detail, that "[o]ther examples of suspected non-compliance with the comprehensiveness and accessibility criteria have been the subject of considerable discussion between the federal government and the provinces and territories." These disputes remained unresolved.

The most charitable interpretation of the auditor general's findings to this point of the report is that the federal government has been aware of the extent of provincial non-compliance, has been able to resolve some but not all disputes through negotiation, and has been reluctant to use the powerful financial levers available to it to secure better compliance. However, the report then went on to state that the federal government was largely unaware of the true extent of provincial non-compliance, because it lacked the required information. ...

[T]he federal government's non-enforcement of the *CHA*, along with the failure of political actors and the academic community to highlight the federal government's abdication of its responsibilities, is a national embarrassment. ...

Why the lacklustre federal performance? There would appear to be two reasons why the federal government has failed to aggressively enforce the national conditions spelled out in the *CHA*. The first is a lack of institutional capacity. Information gathering of the kind that is required to gauge provincial compliance with the conditions of accessibility and comprehensiveness, in particular, requires a serious commitment of human and capital resources.

See Sujit Choudry, "Bill 11, the Canada Health Act, and the Social Union: The Need for Institutions," above at 51-58. In an earlier article, Choudry concludes:

However, it would be a mistake to reduce the federal government's neglect of the *CHA* to a lack of resources. The more fundamental problem is a lack of political will. The auditor general's report made an oblique yet revealing reference to this problem, when it stated that the enforcement of the *CHA* had been tempered by national unity concerns. What the report was referring to was a long history of tense federal–provincial relations surrounding the federal spending power. Particular exercises of the federal spending power have long been regarded as federal impositions by provincial governments (although only one province, Quebec, has ever challenged the constitutionality of federal government expenditures in areas of provincial jurisdiction). The dynamic of fiscal federalism has also been profoundly affected by the dramatic decline in federal transfer payments. ... [T]he legitimacy of the federal enforcement of national standards has been diminished along with its financial involvement. The failure to exercise its discretionary enforcement power accordingly reflects a loss of legitimacy and political capital on the part of the federal government.

See Sujit Choudry, "The Enforcement of the Canada Health Act," above at 504-5.

In 1999, the federal government, the nine provinces other than Quebec, and the three territories signed the Social Union Framework Agreement (SUFA). The goal of SUFA was to provide for a normative framework for federal–provincial relations in the social policy arena. The document contains seven articles of varying specificity, ranging from the extremely general (for example, art 1's statement that "Canada's social union should reflect and give expression to the fundamental values of Canadians—equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities to one another") to the fairly specific (for example, art 5's requirement that the federal government "consult with provincial and territorial governments at one year prior to renewal or significant funding changes in existing social transfers to provinces/territories"). Noteworthy is art 6, "Dispute Avoidance and Resolution," which provides for the establishment of dispute settlement machinery for disagreements regarding the interpretation of national standards.

NOTE: FEDERAL TAXATION POWERS

The federal power to tax in s 91(3) of the *Constitution Act, 1867* is virtually unrestricted, despite the Privy Council's judgment in the *Unemployment Insurance Reference*, excerpted in Chapter 6. Provinces' powers are more circumscribed because s 92(2) limits them to direct taxation within the province (except with respect to natural resources, where indirect taxation is permitted by s 92A(4)). The meaning of "direct" and "indirect" taxation is explored in *Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan*, [1978] 2 SCR 545, 1977 CanLII 210, excerpted in Chapter 10, Federalism and the Economy. Both federal and provincial governments are immune from the taxes of the other level of government in relation to their lands and property because of s 125.

III. INTERGOVERNMENTAL AGREEMENTS

Federal and provincial governments enter into a wide variety of agreements on matters within their authority. Some of these agreements look like detailed contracts, and may cover matters such as the delivery of services or conditions to be satisfied for the receipt of funds. Others are broad statements of political objectives and obligations, such as an agreement by ministers to develop a common approach to educational standards. Because of this range, there is some uncertainty about the role of the courts in enforcing intergovernmental agreements. The most ambitious intergovernmental agreement in recent times is the Agreement on Internal Trade, discussed in Chapter 10, Federalism and the Economy.

The following case deals with the enforceability of intergovernmental agreements in a context where the federal government had unilaterally altered its obligations to certain provinces under the CAP.

Reference Re Canada Assistance Plan (BC)

[\[1991\] 2 SCR 525, 1991 CanLII 74](#)

[Section 4 of the *Canada Assistance Plan*, RSC 1985, c C-1 [the Plan] authorized the government of Canada to enter into agreements with provincial governments to pay contributions toward their expenditures on social assistance and welfare. Section 5 of the Plan authorized payments to the provinces pursuant to such agreements, and generally authorized contributions amounting to half of the provinces' eligible expenditures. The Plan specified certain conditions for eligibility of provincial expenditures (s 6(2)), but left it to the provinces to decide which programs would be operated and how much money would be spent. Section 8(1) of the Plan provided that agreements would continue in force so long as the relevant provincial law remained in operation, but they could be terminated by consent or on one year's notice from either party (s 8(2)). Agreements could also be amended by consent (s 8(2)). The Plan provided for regulations to govern such things as the calculation of eligible costs (s 9(1)), but regulations affecting the substance of agreements were ineffective unless passed with the consent of any province affected (s 9(2)). The Plan was silent as to the authority of Parliament to amend the Plan.]

The Government of Canada entered into agreements with each of the provincial governments in 1967. In 1990, the federal government decided to limit its expenditures in order to reduce its budget deficit. Therefore, it decided that payments due to the "have" provinces of Alberta, British Columbia, and Ontario (those that do not receive equalization payments) would grow by no more than five percent for the 1991 and 1992 fiscal years.

The Government of British Columbia initiated a reference to the BC Court of Appeal to determine whether the federal government could reduce its contributions in this manner. A majority of that Court relied on the doctrine of legitimate expectations to find that the federal government was required to obtain British Columbia's consent to the changes to the agreement.]

SOPINKA J (Lamer CJ and La Forest, Gonthier, Cory, McLachlin, and Stevenson JJ concurring):

In general, the language of the [Canada Assistance] Plan is duplicated in the [federal-provincial] Agreement. But the contribution formula, which actually authorizes payments to the provinces, does not appear in the Agreement. It is only in s. 5 of the Plan. Clause 3(1)(a) of the Agreement provides that "Canada agrees ... to pay to

the province of British Columbia the contributions or advances ... that Canada is authorized to pay to that province under the Act and the Regulations." That means, of course, the contributions or advances authorized by s. 5 of the *Plan*, an instrument that is to be construed as subject to amendment. This is the effect of s. 42(1) of the *Interpretation Act* which states:

42(1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

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In my view this provision reflects the principle of parliamentary sovereignty. The same results would flow from that principle even in the absence or non-applicability of this enactment. But since the *Interpretation Act* governs the interpretation of the *Plan* and all federal statutes where no contrary intention appears, the matter will be resolved by reference to it.

It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the *Plan*. To assert the contrary would be to negate the sovereignty of Parliament. This basic fact of our constitutional life was, therefore, present to the minds of the parties when the *Plan* and Agreement were enacted and concluded. The parties were also aware that an amendment to the *Plan* would have to be initiated by the government by reason of the provisions of s. 54 of the *Constitution Act, 1867*. If it had been the intention of the parties to arrest this process, one would have expected clear language in the Agreement that the payment formula was frozen. Instead, the payment formula was left out of the Agreement and placed in the statute where it was, by virtue of s. 42, subject to amendment. In these circumstances the natural meaning to be given to the words "authorized to pay ... under the Act" in clause 3(1)(a) is that the obligation is to pay what is authorized from time to time. The government was, therefore, not precluded from exercising its powers to introduce legislation in Parliament amending the *Plan*.

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... The contention is that the Agreement could only be amended in accordance with s. 8. This submission fails to take into account that the Agreement which is subject to the amending formula in s. 8 obliges Canada to pay the amounts which Parliament has authorized Canada to pay pursuant to s. 5 of the *Plan*. Hence, the payment obligations under the Agreement are subject to change when s. 5 is changed. That provision contains within it its own process of amendment by virtue of the principle of parliamentary sovereignty reflected in s. 42 of the *Interpretation Act*.

If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that this is not an ordinary contract but an agreement between governments. Moreover, s. 8 itself contains an amending formula that enables either party to terminate at will. In lieu of relying on mutually binding reciprocal undertakings which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance.

The result of this is that the Government of Canada, in presenting Bill C-69 to Parliament, acted in accordance with the Agreement and otherwise with the law which empowers the Government of Canada to introduce a money bill in Parliament.

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Appeal allowed.

NOTES AND QUESTIONS

1. The exact holding in the *Canada Assistance Plan Reference* is the subject of some dispute. It has been argued, for example, that the judgment stands for one of three propositions:

First, a narrow reading would hold that the agreement did not specify the levels of payment, leaving this matter to federal legislation. Thus, the agreement was not breached, and the question of legal enforceability was not decided. A second, and slightly broader, reading of the decision would be that the agreement was binding but could be discharged by conflicting legislation. ... Until Parliament or a provincial legislature did enact conflicting legislation, governments would be bound to comply with the terms of the agreement and could be held accountable by a court. The third, and broadest view, however, seems to be that the agreement only created political, not legal, obligations.

See Sujit Choudhry, "The Enforcement of the Canada Health Act," above at 503-4. For a case applying the second reading of the judgment, see *Saskatchewan Egg Producers Marketing Board v Ontario (Minister of Agriculture and Food)*, [1993] OJ No 434 (QL), 38 ACWS (3d) 917 (Gen Div).

2. The issue of the binding nature of intergovernmental agreements has arisen most recently in relation to the 1994 Agreement on Internal Trade. Although the Agreement sets out detailed obligations on federal, provincial, and territorial governments, the *Canada Assistance Plan Reference* seems to suggest that a province could refuse to comply with the Agreement or a decision of the dispute settlement process: see further Katherine Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade" in Michael J Trebilcock & Daniel Schwanen, eds, *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: CD Howe, 1995) at 196. For discussion on intergovernmental agreements more generally, see Lara Friedlander, "Constitutionalizing Intergovernmental Agreements" (1994) 4 NJCL 153.

3. In response to the judgment in the *Canada Assistance Plan Reference*, the Charlottetown Accord of 1992 proposed a constitutional amendment to make intergovernmental agreements binding. It read:

126A(1) Where the Government of Canada and the government of one or more provinces or territories enter into an agreement that is approved under this section, no law made by or under the authority of the Parliament of Canada or of any legislature of a province or legislative authority of a territory that is a party to the agreement and has caused it to be approved under this section may amend, revoke or otherwise supersede the agreement while the approval of the agreement remains in force.

(2) An agreement is approved when the Parliament of Canada and the legislature of a province, or the legislative authority of a territory, that is a party thereto have each passed a law that approves the agreement and that includes an express declaration that this section applies in respect of the agreement.

(3) An agreement approved under this section may be amended, revoked or otherwise superseded only in accordance with its terms or by a further agreement approved under this section.

(4) An approval under this section expires no later than five years after it is given, but may be renewed under this section for additional periods not exceeding five years each.

Why does s 126A(4) set a time limit of five years on an approval of an agreement? Would this provision be a useful addition to the Constitution?

4. See *Quebec (AG) v Canada (AG)*, [2015 SCC 14](#), excerpted in Chapter 11, Criminal Law and Procedure, which dealt with the dismantling of a cooperative scheme (related to firearms control) between the federal government and the provinces in circumstances where one province (Quebec) wanted to continue with the scheme on its own and to prevent the

destruction of data gathered under the scheme. A majority of the Court found that the federal government had no obligation to preserve the data.

IV. DELEGATION

Another way in which governments get around the constraints of the distribution of powers is through delegation of functions to the other level of government. Although governments cannot delegate legislative powers directly to one another, various devices allow them to achieve this result by indirect means.

In the *Nova Scotia Interdelegation* case: *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31, 1950 CanLII 26, the Supreme Court of Canada rejected the argument that the federal Parliament and the provincial legislatures could delegate *legislative* power to one another. The plan of the federal and provincial governments in that case had been to alter their respective legislative authority to regulate employment and indirect taxation in order to establish a public pension scheme. The seven members of the Court each wrote reasons rejecting the possibility of legislative delegation. The following quote from Rinfret CJ captures some of the reasons for the conclusion (at 33-34):

The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined by *The British North America Act*, but none of them has the unlimited capacity of an individual. They can exercise only the legislative powers respectively given to them by ss. 91 and 92 of the Act, and these powers must be found in either of these sections.

The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject-matters referred to it by s. 91 and that each Province can legislate exclusively on the subject-matters referred to it by s. 92. The country is entitled to insist that legislation adopted under s. 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in s. 92 should come exclusively from their respective Legislatures.

The Court has since relaxed this position by permitting extensive delegation between governments through various devices:

1. *administrative delegation*, whereby functions are delegated to an official, minister, or administrative tribunal of the other level of government or to a tribunal created by both levels, as in the *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198, 1978 CanLII 10, discussed in a note in Chapter 10, Federalism and the Economy, Section III.C;
2. *incorporation by reference* of the laws of the other level of government as they now exist or as they may be amended from time to time (the latter being known as *anticipatory incorporation by reference*); and
3. *conditional legislation*, whereby a law or legislative provision of one government does not come into effect at the other level of government without a certain condition being fulfilled, such as approval by that level's government.

All these devices are used in the case that follows, which was the most dramatic example of the effectiveness of these devices to circumvent the holding in the *Nova Scotia Interdelegation* case.

Coughlin v The Ontario Highway Transport Board[1968] SCR 569, 1968 CanLII 2

[The federal Parliament enacted the *Motor Vehicle Transport Act*, SC 1953-54, c 59, which delegated power to provincial highway transport boards to regulate inter-provincial trucking, a matter within federal jurisdiction under s 92(10)(a) of the *Constitution Act, 1867*. The Act read:

2. In this Act,

(a) "extra-provincial transport" means the transport of passengers or goods by means of an extra-provincial undertaking;

(b) "extra-provincial undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, connecting a province with any other or others of the provinces, or extending beyond the limits of a province;

• • •

(g) "local undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, not being an extra-provincial undertaking; and

(h) "provincial transport board" means a board, commission or other body or person having under the law of a province authority to control or regulate the operation of a local undertaking.

3(1) Where in any province a licence is by the law of the province required for the operation of a local undertaking, no person shall operate an extra-provincial undertaking in that province unless he holds a licence issued under the authority of this Act.

(2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.

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5. The Governor in Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act.

Coughlin was engaged only in extraprovincial trucking and challenged the constitutionality of the delegation of power to the Ontario Highway Transport Board (the Board) to issue extraprovincial operating licences. That Board was established by the *Public Commercial Vehicles Act*, RSO 1950, c 304, which authorized the Board to regulate intraprovincial trucking.]

CARTWRIGHT CJ (Fauteux, Abbott, Judson, and Spence JJ concurring):

[A]s matters stand at present the question whether a person may operate the undertaking of an interprovincial carrier of goods by motor vehicle within the limits of the Province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that Legislature and the Regulations passed thereunder as they may exist from time to time.

Mr. Laidlaw argues that in bringing about this result by the enactment of s. 3 of the *Motor Vehicle Transport Act* Parliament has in substance and reality abdicated its power to make laws in relation to the subject of interprovincial motor vehicle carriage and unlawfully delegated that power to the provincial Legislature.

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It is well settled that Parliament may confer upon a provincially constituted board power to regulate a matter within the exclusive jurisdiction of Parliament. On this

point it is sufficient to refer to the reasons delivered in the case of *P.E.I. Potato Marketing Board v. H.B. Willis Inc.* [[1952] 2 SCR 392, 1952 CanLII 26].

In the case before us the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the interprovincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intraprovincial carriage. Parliament can at any time terminate the powers of the Board in regard to interprovincial carriage or alter the manner in which those powers are to be exercised. Should occasion for immediate action arise the Governor-General in Council may act under s. 5 of the *Motor Vehicle Transport Act*.

In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *Attorney-General for Ontario v. Scott* [[1956] SCR 137, 1955 CanLII 16] and by the Court of Appeal for Ontario in *R v. Glibbery* [1962 CanLII 229, [1963] 1 OR 232 (CA)].

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RITCHIE J (Martland J concurring) (dissenting):

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In the case of *A. G. (Ontario) v. Winner* ... [1954 CanLII 289, [1954] AC 541 (PC)], the Privy Council had decided that it was beyond the legislative powers of a Province (New Brunswick) to prohibit the operator of an interprovincial bus line from carrying passengers from points outside the Province to points within the Province and vice versa on the ground that no Province had jurisdiction to legislate in relation to extra-provincial transport. The matter was succinctly stated by Lord Porter at page 580 where he said:

... it is for the Dominion alone to exercise either by Act or by Regulation control over connecting undertakings.

It appears to me to be of more than passing interest to note that the *Motor Vehicle Transport Act* (Canada) was assented to by Parliament almost exactly four months after the decision in the *Winner* case had been rendered by the Privy Council and that three months later, at the request of the Province of Ontario, a proclamation was issued "declaring the said act to be in force in the said province."

It seems to me that if it is to be held that s. 3(2) of the *Motor Vehicle Transport Act* is valid federal legislation, then the effect of the decision in the *Winner* case has been effectively nullified in so far as the Province of Ontario is concerned.

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In the case of the *Motor Vehicle Transport Act*, direct authority has been given to the local board in each Province "in its discretion to issue a licence to a person to operate an extra-provincial undertaking into or through the province," and the manner in which that discretion is to be exercised is not limited to such provincial Regulations as the Governor in Council may designate but is to be exactly the same as if the extra-provincial undertaking were a "local undertaking." In my view the effect of this legislation is that the control of the regulation of licensing of a "connecting undertaking," is turned over to the provincial authority, and in the Province of Ontario this means that the controlling legislation is the *Ontario Highway Transport Board Act*, R.S.O. 1960, c. 273, and the *Public Commercial Vehicles Act*, R.S.O. 1960, c. 319.

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There can, in my view, be no objection to Parliament enacting a statute in which existing provincial legislation is incorporated by reference so as to obviate the necessity of reenacting it verbatim, but in providing for the granting of licences to extra-provincial undertakings in the like manner as if they were local undertakings, Parliament must, I think, be taken to have adopted the provisions of the provincial statutes in question as they may be amended from time to time. The result is that the granting of such licences is governed by the *Public Commercial Vehicles Act, supra*, pursuant to s. 16 of which the Lieutenant-Governor-in-Council may make Regulations

... (q) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, ...

I can only read this as meaning that the licensing Regulations for extra-provincial transport may be governed by decisions made from time to time by the Lieutenant-Governor-in-Council without any control by, or reference to, the federal authority. This is very different from adopting by reference the language used in a provincial statute and, in my opinion, it means that the control over the regulation of licensing in this field has been left in provincial hands.

It is, of course, true that Parliament can at any time terminate the powers of the provincial Boards to license extra-provincial undertakings, but it seems to me that this would entail repealing s. 3(2) of the *Motor Vehicle Transport Act* and it is the constitutionality of that subsection which is here impugned.

It is also suggested that the Governor-in-Council might exercise control by acting under s. 5 of the *Motor Vehicle Transport Act* ... [quoted above].

... I do not read this latter section as reserving any power to the Governor-in-Council to nullify the effect of s. 3(2) of the Act by exempting all extra-provincial transport from its provisions, and I am therefore of opinion that no control was retained by the federal authority over the unlimited legislative powers which it purported to transfer to the Province by the language employed in s. 3(2) of the Act. Presumably, any person or undertaking exempted by the Governor in Council from the provisions of the Act would be without authority to operate in the Province of Ontario, unless and until provision was made for the granting of a federal licence, but this would in no way affect the powers which s. 3(2) purported to confer on the Board to issue licences to persons or undertakings which had not been so exempted.

In my view, therefore, in enacting the *Motor Vehicle Transport Act*, and particularly s. 3(2) and s. 5 thereof, the Parliament of Canada purported to relinquish all control over a field in which Parliament has exclusive jurisdiction under the *British North America Act*, and left the power to exercise control of the licensing of extra-provincial undertakings to be regulated in such manner as the province might from time to time determine.

• • •

Appeal dismissed.

PART THREE

THE JUDICIARY

CHAPTER THIRTEEN

THE ROLE OF THE JUDICIARY

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I. INTRODUCTION AND OVERVIEW OF THIS CHAPTER

As noted throughout this book, the judiciary is an essential player in the Canadian constitution. Canada's legal system is characterized, above all, by a commitment to the rule of law. One of the constitutive elements of that is a positive system of laws applied and upheld by an impartial, independent judiciary.

Aside from the rule of law, other key principles relevant to the judiciary are judicial independence and the separation of powers. These principles stand in a symbiotic relationship with other constitutional principles, such as parliamentary supremacy, federalism, and democratic governance. (A review of these foundational principles can be found both in the Introduction and in *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793, excerpted in Chapter 2, Judicial Review and Constitutional Interpretation.)

Confederation affirmed some of the principles above through a number of written provisions. The preamble of the *Constitution Act, 1867* expressed a desire for a constitution "similar

in Principle to that of the United Kingdom.” Section 129 maintained the pre-Confederation court system based on the primacy of the superior courts of inherent jurisdiction. And, finally, specific provisions (ss 96-101, s 92(14)) set out how the courts would function in a federal system.

Section 52 of the *Constitution Act, 1982* confirms that the Constitution is the supreme law of Canada, and any law inconsistent with it is of no force or effect. The preamble to the Charter reaffirms the principle of the rule of law, and s 11(d) guarantees the right to be presumed innocent of an offence until determined otherwise in a fair and public hearing by an independent and impartial tribunal. In addition, s 24 permits anyone whose Charter rights or freedoms have been infringed or denied to apply to a “court of competent jurisdiction” to seek an “appropriate and just” remedy.

The Canadian judiciary encompasses distinct court systems, each with intermediate appeal courts. Sections 92(4) and (16) of the *Constitution Act, 1867* empower provinces to create “inferior,” statutory courts vested with civil and criminal jurisdiction. At the federal level, s 101 of the Act empowers Parliament to create its own statutory courts “for the better Administration of the Laws of Canada.”

Notwithstanding the country’s federal structure, Canadian trial and appellate courts have mixed jurisdiction. This is why, for example, provincial inferior courts can hear matters arising under the federal *Criminal Code*.

Additionally, as noted above, s 129 of the *Constitution Act, 1867* maintained the superior common law courts that had been operating prior to Confederation. Note that, by virtue of s 96, the federal government appoints judges to those superior courts.

In 1975, the Supreme Court of Canada gained the ability to decide most of the appeals it would hear, based on the national importance of an issue of law or of mixed law and fact (a small number of appeals are still heard “as of right”). As a result, the Court’s docket came to include more public law cases. In addition, the Court issues reference or advisory opinions, mostly on constitutional questions, that reach the Court either directly from the federal Cabinet or on appeal from references issued by provincial appellate courts. (References are discussed in Section VII of this chapter.)

Section II of this chapter reviews the basic structure of the Canadian judicial system and the role of the judiciary, which has changed considerably since Confederation. It sets out the elements of the judicial system. Section III turns to the Supreme Court’s interpretation and application of the constitutional provisions—especially s 96 of the *Constitution Act, 1867*—designed to preserve the historical role of the superior courts within the British legal tradition. The Supreme Court has extended the s 96 safeguards in three ways: against the federal government, as a guarantee of certain superior court supervisory review over administrative tribunals, and as an assurance of access to justice.

Section IV examines the unwritten constitutional principle of judicial independence. Section V considers judicial appointments, looking first at provincial, superior, and federal courts, and, second, the Supreme Court of Canada. Section VI looks at judges’ security of tenure and the related issue of judicial discipline. Finally, Section VII considers a number of issues pertinent to how constitutional issues get before courts.

II. THE COURT STRUCTURE

The Canadian court structure is founded on the special independence accorded to the superior courts (trial and appellate) of each province and territory. As the descendants of British common law courts, superior court judges enjoy security of tenure and remuneration to ensure their impartiality and freedom from political pressure or manipulation.

Only superior courts possess what is called “inherent jurisdiction.” Originally, this meant that, unless expressly removed by statute, their jurisdiction was “plenary”—extending to any type of

legal case. However, as discussed in more detail in Section III, the courts have strengthened their jurisdiction against legislative attempts to narrow it.

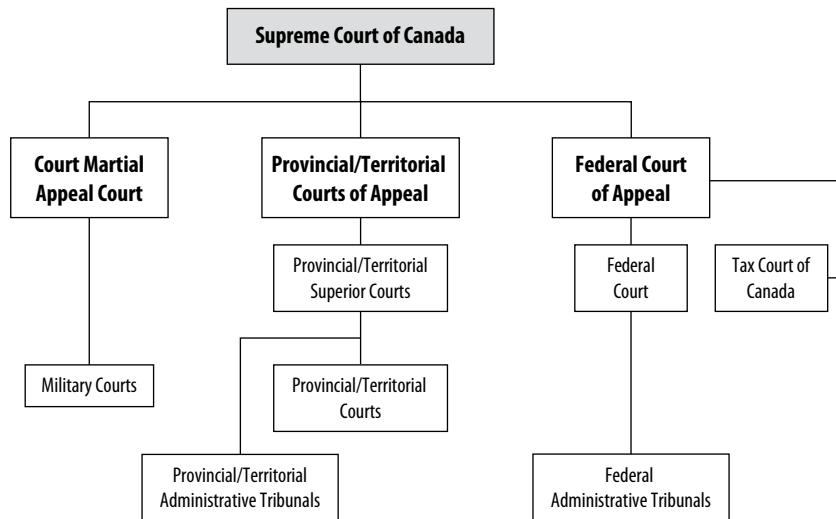
Under the Constitution, statutory and superior courts are structured differently. For statutory courts, the level of government that establishes the court is also responsible for appointing and paying its judges. In contrast, while provinces are responsible for the administration of superior courts (under s 92(14)), the federal order of government appoints, remunerates, and safeguards the security of tenure of its judges (under s 96).

The Supreme Court of Canada, which Parliament was permitted to create under s 101, is now composed of nine judges. Its enabling statute, the *Supreme Court Act*, RSC 1985, c S-26, states that the federal executive (through the governor general) appoints judges to the Court. By convention, appointments of associate or "puisne" justices are based on the recommendation of the minister of justice. For the position of chief justice, the prime minister makes the recommendation personally. There is no legislated process for these appointments. In recent years, different governments have tried out different methods to permit more parliamentary input. More detail on the appointment process to the court is set out below in Section V.

The Federal Court, which is also anticipated by s 101 of the *Constitution Act, 1867*, operates under the *Federal Courts Act*, RSC 1985, c F-7, with jurisdiction over matters arising under federal law, such as copyright, patents, and trademarks; tax; and citizenship. The Federal Court also has the power of judicial review over federal officials and agencies exercising administrative authority under federal laws.

The Federal Court, which has both a trial and appellate division, enjoys concurrent jurisdiction with the provincial superior courts to adjudicate constitutional cases so long as they arise within the Court's area of statutory authority.

Figure 13.1 Canada's Court System



Under s 92(14) of the *Constitution Act, 1867*, the provinces have jurisdiction over the "Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction" as well as "Procedure in Civil Matters in those Courts." Pursuant to s 129 of the *Constitution Act, 1867*, the provinces and territories have continued to maintain the superior trial courts (under a number of names—for example, Court of Queen's Bench, Supreme Court, Superior Court, or Superior Court of Justice) as well as an appellate level court (named the Court of Appeal or Appeal Division). These courts oversee trials and appellate review in

criminal law and divorce cases, which are under federal jurisdiction, civil cases under provincial law, and constitutional cases.

The *Constitution Act, 1867*, in ss 96 to 100, secures the special status of the provincial superior courts. Section 96 provides that the governor general has the authority to appoint these judges. (While the original text refers to the "Superior, District and County Courts," only the superior courts remain in operation today.) Section 98 stipulates that eligibility for appointment requires membership in the relevant bar. Section 99 ensures the security of tenure of these judges—they hold office during good behaviour, must retire at age 75, and can only be removed from office by the governor general upon address of the Senate and House of Commons. Section 100 provides financial security, stipulating that the salaries, allowances, and pensions of these judges must be "fixed and provided by the Parliament of Canada."

There is one remaining component of the judicial structure to consider—the provincial and territorial court systems, which operate solely under those jurisdictions which appoint and pay their judges. These courts are strictly statutory, with jurisdiction over both civil and criminal matters. In criminal law, their jurisdiction includes all but the most serious criminal offences. They lack inherent jurisdiction, and their judgments are subject to statutory appeal or judicial review in the superior courts.

As is evident from the description above, the Canadian judicial system is complex. That complexity has presented a number of challenges and intriguing questions, a number of which are developed in the rest of this chapter.

III. THE SEPARATION OF POWERS AND THE SECTION 96 COURTS

The separation of powers (also discussed in Chapter 1, Introduction) is a foundational constitutional doctrine. It provides that different functions will be performed by different branches of government: legislative, executive, and judicial. That said, the doctrine is attenuated in a country with a parliamentary system of government because the executive derives its authority from the confidence of the legislature and, indeed, draws most if not all of its members from that body.

A lot of Canadian case law on the separation of powers relates to the judiciary. At least in part, that is because the judicial role has greatly expanded since the *Constitution Act, 1982*. While separation of powers concerns are not limited to cases dealing with the Charter, Canadian courts acknowledged quite early on that that element had added a new dimension to their role: *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 1985 CanLII 74; *Wells v Newfoundland*, [1999] 3 SCR 199, 1999 CanLII 657; *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66; *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 1996 CanLII 152.

Citing the doctrine of separation of powers, the Canadian Supreme Court has declined to deal with a number of issues touching on core powers of other branches, including prosecutorial discretion, parliamentary privileges, and Crown prerogatives. A converse development has been the Court's use of separation of powers principles so as to enhance its power. Some of these are canvassed below.

A. SECTION 96 AND THE ADJUDICATIVE FUNCTION

NOTE: JOHN EAST IRON WORKS

In *Labour Relations Board of Saskatchewan v John East Iron Works Ltd*, 1948 CanLII 266, [1949] AC 134 (UKJCPC), the Privy Council addressed a challenge to certain powers vested in a provincially appointed tribunal. Under the *Trade Union Act, 1944*, the province of Saskatchewan

established a Labour Relations Board with the power to require reinstatement of and compensation to employees who had been unlawfully dismissed. When John East Iron Works Ltd terminated the employment of six employees, the United Steelworkers of America complained that the company had engaged in an unfair labour practice. The Labour Relations Board ordered reinstatement and compensation, but the Court of Appeal for Saskatchewan quashed those orders on the grounds that only superior courts could have awarded them. The Board successfully appealed this decision to the Privy Council.

At the Privy Council, Lord Simonds identified factors that would become the basic elements of analysis in s 96 litigation: the continuity of the historical role of the superior courts, the contrast between the modes of adjudication afforded for claims based on the common law and claims to entitlements embedded in legislated policy regimes, the different kind of expertise required of the adjudicator in these different contexts, and the importance of supervision by the superior courts.

Over time, other considerations were added. Federal tribunals were subject to similar restrictions as provincial ones. Judges considered the "core" powers of the superior courts, asking, for example, whether the exclusive assignment to inferior courts and tribunals of functions traditionally exercised by the superior courts undermined the independence of the judiciary and the separation of powers. ("Core powers" are discussed later in this section under *MacMillan Bloedel*.)

The Supreme Court of Canada's advisory opinion in *Re Residential Tenancies Act*, excerpted below, adapted Lord Simonds's tests to a proposed Residential Tenancy Commission. Established by a 1979 Ontario law, the Commission was designed to protect tenants at a time of apartment scarcity. Prior to the law coming into effect, the Ontario Cabinet initiated a reference on its validity to the Ontario Court of Appeal, which advised that the Act was non-compliant with s 96. Ontario appealed that conclusion to the Supreme Court of Canada.

Justice Dickson (as he then was), considered and refined the various s 96 tests into a more systematic formulation known as "the *Residential Tenancies* test."

Re Residential Tenancies Act

[1981] 1 SCR 714, 1981 CanLII 24

DICKSON J (Laskin CJ and Martland, Ritchie, Estey, McIntyre, and Lamer JJ concurring):

The *Residential Tenancies Act*, 1979 ... set up a new tribunal, the Residential Tenancy Commission, to oversee and enforce the obligations of landlords and tenants in Ontario. The tribunal is given wide-ranging powers and functions. Some of these are purely administrative in nature, for example, the Commission is charged with the obligation of informing members of the public as to their rights under the legislation. But by far the most significant role to be played is in the resolution of disputes between landlords and tenants. ...

• • •

... [T]he Courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. ... [I]t is now open to the provinces to invest administrative bodies with "judicial functions" as part of a broader policy scheme. ...

The teaching of *John East Labour Relations Board of Saskatchewan v John East Iron Works Ltd*, 1978 CanLII 266, [1949] AC 134 (UKJCPC), *Tomko v Labour Relations Board (Nova Scotia)*, [1977] 1 SCR 112, 1975 CanLII 183], and *Mississauga [City of Mississauga v Regional Municipality of Peel*, [1979] 2 SCR 244, 1979 CanLII

37] is that one must look to the "institutional setting" in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body. ...

• • •

The jurisprudence since *John East* leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether [it] conforms to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation. ...

If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter. ... If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the inquiry.

Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. ... The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and [must apply] a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a "judicial capacity." To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of "principle," that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of "policy" involving competing views of the collective good of the community as a whole. (See Dworkin, *Taking Rights Seriously* (Duckworth, 1977) pp. 82-90.)

If, after examining the institutional context, it becomes apparent that the power is not being exercised as a "judicial power" then the inquiry need go no further ... and the provincial scheme is valid. [If it is ...], then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. ... It may be that the impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East*; *Tomko*) or ... necessarily incidental to the achievement of a broader policy goal ... (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating "like a s. 96 court."

• • •

[Applying the historical test, Dickson J noted (at 738) that "the settlement of disputes between landlords and tenants ... [had] always been within the exclusive jurisdiction of the Superior, District and County Court judges."

In considering the second stage of the test, Dickson J concluded that the commission—which was required to analyze the law, apply the law to the facts, make a decision, and issue an order—was "exercising judicial powers roughly in the same way" as the courts (at 745).

With respect to the third stage, Dickson J stated that "the central function of the Commission is that of resolving disputes, in the final resort by a judicial form of hearing between landlords and tenants" (at 746). The power to mediate was of secondary importance, available only on application by one of the parties, and other powers were either "ancillary" or "bear no relation" to the core power of adjudication.

Accordingly, the impugned provisions were invalid.]

Appeal dismissed.

NOTE

While it became an important tool for s 96, the *Residential Tenancies* test also spurred criticism and concern. The test requires historical analysis that is highly dependent upon the quality of evidence adduced before the Court, which in turn depends on the competence (and resources) of parties. The test has been criticized, as well, for lacking precision.

Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, Ont: Carswell, 2007) (loose-leaf) at 7-49, took the view that while the test

is no doubt a sound synthesis of the prior case law ... it is not satisfactory as constitutional-law doctrine. Each of the three steps is vague and disputable in many situations, and small differences between the provinces in their history or institutional arrangements can spell the difference between the validity and invalidity of apparently similar administrative tribunals.

For another critical assessment, see Robin Elliot, "Rethinking Section 96: From a Question of Power to a Question of Rights" in Denis N Magnusson & DA Soberman, eds, *Canadian Constitutional Dilemmas Revisited* (Kingston, Ont: Institute of Intergovernmental Relations, 1997).

In *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal*, Wilson J addressed a number of issues relating to the first, historical factor. In particular, she discussed whether it was acceptable to have divergent results in different provinces given that s 96 was intended to standardize the superior court system across the country.

Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)

[\[1989\] 1 SCR 238, 1989 CanLII 116](#)

WILSON J (Dickson CJ and McIntyre and Lamer JJ concurring):

The respondent Sobeys Stores Limited ("Sobeys") operates a chain of grocery supermarkets in the Atlantic provinces. The appellant Clifford Yeomans was continuously employed by Sobeys ... [for ten years] when he was dismissed for alleged unsatisfactory performance ...

Yeomans complained to the Director of Labour Standards for Nova Scotia that he had been dismissed "without just cause" within the meaning of s. 67A of the Code [*Labour Standards Code*, SNS 1972, c 10]. The Director ordered that Yeomans be reinstated and that Sobeys pay him \$21,242 in lost wages stemming from the unjust dismissal. This decision was upheld by the Labour Standards Tribunal. ... [Sobeys successfully appealed.] The [Nova Scotia Supreme Court] held that ss. (2) and (3) of s. 67A of the Code were unconstitutional because they conferred a s. 96 power on a provincially appointed tribunal.

[Justice Wilson first asked whether the tribunal's jurisdiction over unjust dismissal conformed to the powers of s 96 courts at the time of Confederation. In the course of this analysis, she considered three problems. The first was how specific the characterization of the function should be.]

• • •

In argument before this Court both the Attorney General of Nova Scotia (appellant) and the respondent Sobeys initially characterized the jurisdiction under s. 67A as jurisdiction in relation to the equitable remedy of specific performance of employment contracts. Each argued that such a characterization would [fall] in his favour When the argument progressed to the second and third stages of the *Residential*

Tenancies test [*Re Residential Tenancies Act*, [1981] 1 SCR 714, 1981 CanLII 24], [however,] the same parties suggested broader characterizations such as "unjust dismissal," "employer–employee relations" and "labour standards." Counsel for the other appellant, Yeomans, argued consistently throughout that the jurisdiction was over "master–servant relations." [Justice Hart, in the Appeal Division, characterized s 67A as a provision relating to "unjust dismissal."]

• • •

... The purposes of s. 96 require a strict, that is to say a narrow, approach to characterization at the first stage. ... [A]ny other approach would potentially open the door to large accretions of jurisdiction and thereby defeat the purposes of the constitutional provision. I would therefore reject as too broad characterizations of the s. 67A jurisdiction as being in relation to employer/employee relations or labour standards.

Having rejected broad characterizations, the court is given a choice between two possible narrow ones, jurisdiction over reinstatement or jurisdiction over unjust dismissal. ...

I would ... resolve the issue by reference to the language and purpose of the *Residential Tenancies* test. At the first stage the search is for "broad conformity" with the powers of s. 96 courts at Confederation. It is a search for analogous, not precisely the same, jurisdiction. Even if I were to accept the appellant's contention that the remedy of reinstatement was outside the purview of s. 96 courts . . . I do not think that should be determinative in s. 96 cases. To do so would be to freeze the jurisdiction of those courts at 1867 by a technical analysis of remedies . . . The question of new remedies for traditional causes of action is better suited to the second and third steps of the *Residential Tenancies* test which are specifically designed to allow the courts to consider ... approaches which are more responsive to changing social conditions. Thus, the jurisdiction in this case should, in my view, be characterized as jurisdiction in relation to unjust dismissal.

[Justice Wilson next considered whether the superior court jurisdiction at the time of Confederation must be exclusive.]

• • •

... [A] certain gloss must be added to the *Residential Tenancies* test. At the first step, the threshold question is whether at Confederation superior courts exercised an exclusive jurisdiction. This test accords with the general principle that inferior court jurisdiction need not be frozen at its pre-Confederation level: see *Re Cour de Magistrat de Quebec* [[1965] SCR 772, 1965 CanLII 46]. If the jurisdiction was exclusive to superior courts, then the inquiry must pass on to the second and third stages of the test. If the jurisdiction was shared, the legislation under challenge may, in some circumstances, be held valid by the historical test.

• • •

... In all cases, ... the inquiry should be directed to the question whether or not the work of the inferior courts at the time of Confederation was broadly co-extensive with that of the superior courts. Only if this standard is met will the history of shared jurisdiction validate the contemporary scheme under the historical test.

[Justice Wilson then considered the geographic scope of the historical inquiry.]

• • •

It seems to me that this issue should be resolved by answering a somewhat broader question—does pre-confederation jurisdiction refer to pre-1867 jurisdiction or to jurisdiction ... immediately prior to [a] province joining confederation? ... [P]ast decisions of this Court have been somewhat inconsistent. ...

• • •

In resolving this issue I take as my starting point this Court's decision in *Residential Tenancies*. In describing the historical test Dickson J. had this to say at pp. 729 and 734: ...

... the test must now be formulated in three steps. The first involves consideration, *in the light of the historical conditions existing in 1867*, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. [Emphasis added.]

Although it might be argued that the references to 1867 [in the *Residential Tenancies* case] were the result of the fact that [that case] emanated from Ontario, I think the better view is that they were intended to refer generally to the original bargain made in 1867. ...

• • •

... When new provinces joined confederation they accepted the existing constitutional arrangements in ss. 91 and 92 and must, in my view, be taken to have done the same with s. 96.

... [T]he *Residential Tenancies* test of 1867 jurisdiction should be expanded somewhat to include examination of the general historical conditions in all four original confederating provinces. ...

... [Section] 96 should apply in the same way across the country. The "strong constitutional basis for national unity, through a unitary judicial system" (*Residential Tenancies*, p. 728) would indeed be undermined by inconsistent results derived from a jurisprudence developed province by province. ...

I do not wish to suggest that there must be uniformity of result for all s. 96 challenges

... It is entirely possible that different results may emerge from analyzing contemporary schemes in light of the second and third stages of the *Residential Tenancies* test. I am suggesting only that consistency at the level of the historical analysis would seem to be desirable The test at this stage should be national, not provincial.

[In case of a tie, as there was in this case, Wilson J stated that the Court should "examine jurisdiction in the United Kingdom at the time of Confederation" (at 266-67).

At the second stage of the test, Wilson J concluded that "the Tribunal [was] acting sufficiently like a court that it [could] not pass this stage of the test" (at 277). However, at the third stage—examining the institutional setting within which the judicial function was being exercised—she concluded that the Board's exercise of an essentially judicial function was "a necessarily incidental aspect of the broader social policy goal of providing minimum standards of protection for non-unionized employees" (at 282).]

Appeal allowed.

Another important development regarding s 96 occurred in *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 1995 CanLII 57.

Chief Justice Lamer, writing for the majority, argued that certain "core" powers of the superior courts, including the power to try individuals for contempt of court, could not be transferred to other courts without a formal constitutional amendment. He expanded on the concept of "core powers" as follows:

[15] ... The superior courts have a core or inherent jurisdiction which ... cannot be removed ... by either level of government, without amending the Constitution. Without this core jurisdiction,

s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.

• • •

[37] ... In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.

• • •

[41] In light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing all those sections of our Constitution which refer to our existing judicial system as inherited from the British, including ss. 96-101, s. 129, and the principle of the rule of law recognized both in the preamble and in all our conventions of governance.

As a result, the s. 96 test now reflects the following approach, summarized in the majority opinion in the *Reference re Code of Civil Procedure (Que)*, art 35, [2021 SCC 27](#) (discussed in further detail in the next note):

[64] Until *MacMillan Bloedel*, this Court's decisions protected the superior courts' role by limiting grants of their historical jurisdiction. In *MacMillan Bloedel*, the Court applied the three-step *Residential Tenancies* test to an exclusive grant to youth courts of the power to punish young persons for *ex facie* contempt of court—a power that was traditionally exercised by superior courts. The application of that test was seen as deficient because it did not prevent the removal of this significant power from the superior courts. This Court thought it was necessary to interpret the nucleus of the superior courts as also protecting their core jurisdiction (*Sobeys*, at p. 264). Otherwise, there was a risk that gaps in the *Residential Tenancies* test would undermine the role of superior courts either by allowing the creation of parallel courts with certain powers essential to the superior courts' role or by allowing the defining features of superior courts to be removed.

[65] To preserve the essence of the superior courts, this Court therefore added a second test to the analysis of constitutionality under s. 96. It held that when the core jurisdiction of superior courts is affected, courts must ask whether the legislation has the effect of removing any of the attributes of the superior courts' core jurisdiction (*MacMillan Bloedel*, at paras. 18 and 27). Core jurisdiction includes "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" (*Reference re Residential Tenancies Act (N.S.)*, at para. 56, per Lamer C.J., concurring). These defining features enable a superior court "to fulfil itself as a court of law" (*MacMillan Bloedel*, at paras. 30, 35 and 38 (emphasis deleted), quoting I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23, at p. 27). Their "inherent" nature is attributable to the fact that they are derived not from legislation, but "from the very nature of the court as a superior court of law" (para. 30, quoting Jacob, at p. 27). If such an attribute is removed, the measure is unconstitutional.

It can be challenging to determine precisely what is meant by "core jurisdiction." The *Reference Re Civil Code* contains a number of descriptions that are not entirely identical. A particularly concise statement from the majority opinion (at para 68) is:

[C]ore jurisdiction includes the inherent jurisdiction and inherent powers of a superior court recognized in *MacMillan Bloedel*: namely, review of the legality and constitutional validity of laws, enforcement of its orders, control over its own process, and its residual jurisdiction as a court of original general jurisdiction.

The majority describes the purpose of core jurisdiction as enabling "superior courts to ensure the maintenance of the rule of law in our legal system" (para 51). Core jurisdiction is clearly linked to the doctrine of separation of powers.

We can now consider this advisory opinion in more detail.

NOTE: REFERENCE RE CODE OF CIVIL PROCEDURE (QUE), ART 35

Reference re Code of Civil Procedure (Que), art 35

2021 SCC 27

[In 2021, the Supreme Court of Canada advised that a provision granting the Court of Québec exclusive jurisdiction to hear civil cases was unconstitutional. The matter began as an application for declaratory judgment filed by the Chief Justices of the Superior Court of Quebec against art 35 of the *Code of Civil Procedure* [CCP]. Art 35 granted the Court of Quebec exclusive jurisdiction to hear civil cases involving monies lower than \$85,000. As well, several statutes granted the Court of Quebec the power to review the decisions of certain administrative bodies which, by virtue of case law, entitled the Court's decisions to be treated with judicial deference in any subsequent appeals.]

The Government of Québec took over the litigation by initiating a reference to the Court of Appeal. That Court concluded that the exclusive jurisdiction over certain civil claims, but not the obligation of deference, was inconsistent with s 96.

In a 4–3 opinion, the Supreme Court of Canada dismissed the appeals on both questions.

Writing for the majority, Coté and Martin JJ stated that s 96 has always prohibited the creation of "parallel courts":]

[31] This Court's jurisprudence on s. 96 of the Constitution Act, 1867 upholds the two fundamental principles underlying this provision, namely national unity and the rule of law. The case law has sought to safeguard the compromise reached at Confederation by preserving the unitary nature of our judicial system. To achieve this objective, the Court has, over the years, developed various tests designed to protect the status of the superior courts. The creation of courts that mirror the superior courts has always been considered an important limit that cannot be overstepped. All the tests have had the purpose, among others, of precluding such an outcome. If the role of the superior courts were undermined by the creation of parallel courts, Canada's judicial system would be stripped of its unitary nature and could be transformed into a dualistic system like that of the United States.

[The majority outlined six (non-exhaustive) factors they thought especially relevant to determining the existence of a prohibited parallel court (para 88):

the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the monetary limits to which it is subject, whether there are mechanisms for

appealing decisions rendered in the exercise of the jurisdiction, the impact on the caseload of the superior court of general jurisdiction, and whether there is an important societal objective.

They went on to consider those six factors in turn:]

• • •

[98] [scope of the jurisdiction] Whether a grant of jurisdiction is vast or limited is a question of degree. For example, jurisdiction over civil disputes is more vast than jurisdiction over contract law, which is in turn more vast than jurisdiction over employment contracts, which is more vast than jurisdiction over individual contracts of employment, which, finally, is more vast than jurisdiction over unjust dismissals. The more vast the granted jurisdiction is, the more likely it is that the provincial court will resemble a superior court of general jurisdiction. In contrast, a limited or specific grant will be less likely to make the provincial court resemble a superior court of general jurisdiction.

[99] In the case at bar, art. 35 para. 1 *C.C.P.* grants to the Court of Québec almost the entirety of the law of obligations for claims of less than \$85,000. This is not just any area of jurisdiction. The law of obligations, the real heart of private law, is the foundation of a multitude of specialized subfields. In fact, it is difficult to imagine a more central field

• • •

[102] [exclusive or concurrent jurisdiction] In the instant case, civil suits concerning contractual and extracontractual matters for less than \$85,000 have been removed from the Superior Court's jurisdiction. ... [T]his accounts for more than 20,000 cases a year. ... This removal of jurisdiction undermines the Superior Court's role as the cornerstone of a unitary system of justice. ...

[In considering the third factor, the monetary limit, the majority noted that the Court of Appeal had taken as a starting point the original limit, in 1867, of \$100 for inferior courts. The majority thought that comparing the historical and current monetary limits "produces a quantitative benchmark that can be used to contrast the historical role of inferior courts with the role played by a court with provincially appointed judges today" (at para 107). While cautioning against a purely mathematical calculation, the majority stated a preference for a "reasonable connection" (at para 110) between the two. The majority then adopted a comparative approach based on nominal GDP which led them to state:]

• • •

[118] ... [A] ceiling of \$100 in 1867 is equivalent today, Canada-wide, to an amount somewhere between \$63,698 and \$66,008. The current ceiling of \$85,000 is 29 percent more than the higher of these two amounts. This certainly suggests that the Court of Québec's role is greater than the historical role of the inferior courts, but this expanded role is not in itself entirely disproportionate given the gap between the current and historical ceilings and the methodological challenge of accurately converting historical monetary data. The monetary ceiling must be considered in its context in order to determine whether it undermines the role of the Quebec Superior Court by impermissibly infringing on its general private law jurisdiction. The figures must not obscure what is at issue here: the limits on the exclusive grant of a large block of jurisdiction that has an impact on the whole of Quebec civil law. When the transfer of a large block of jurisdiction affects one of the most fundamental branches of private law, the scope of the limits to which it is subject must be considerable.

[The fourth factor, appeal mechanisms, created an imbalance between Quebec (which permits direct appeals to the Court of Appeal) and most of the other provinces (which require appeals to proceed first to a superior court). In the majority's view, that contributed to the sense that art 35 "transforms the Court of Québec into a prohibited parallel court that undermines the role of the superior court of general jurisdiction" (at para 123). The majority drew no conclusions about the fifth factor—the impact on the superior court's caseload. With respect to the sixth factor—pursuit of an important societal objective—the majority acknowledged Quebec's desire to increase access to justice. The majority was skeptical that ceding jurisdiction to inferior courts would improve access to justice more than other methods, such as giving superior courts "sufficient resources" (at para 126). They found that the evidence did not clearly demonstrate that the impugned law facilitates access to justice, and concluded:]

• • •

[141] In our opinion, art. 35 para. 1 C.C.P. in its current form infringes s. 96. Its constitutional infirmity does not arise from the high monetary limit alone, but from the combination with all the other factors. It would be possible to imagine a grant of jurisdiction that does not exclude the superior court from a field of law that is so vast and so fundamental. That is not, however, this legislation. Here, there is an exclusive grant of a vast area of jurisdiction at the core of Quebec's private law to a court with provincially appointed judges that operates like a superior court in every respect. The grant, if it is subject to no limits other than a monetary one, transforms the Court of Québec into a s. 96 court. In other words, art. 35 para. 1 C.C.P. encroaches impermissibly on the role the Constitution reserves to the superior court of general jurisdiction.

[The majority's analysis of the second question relating to judicial deference is omitted. In short, the majority decided that the question had become moot due to other developments in administrative law (at para 149).]

Chief Justice Wagner (Rowe J concurring) disagreed with the majority's conclusion regarding art 35. They characterized art 35 as conferring civil jurisdiction over contractual and extracontractual obligations that had never been vested exclusively in s 96 courts. They emphasized that ss 96 and 92(14) of the *Constitution Act, 1867* reflect an important Confederation compromise over the administration of justice—one that would be undermined by giving to s 96 courts an overly broad scope that would limit the provinces' ability to address complex and emerging legislative challenges in that area.

Writing separately, Abella J also concluded that art 35 was constitutional.]

NOTES AND QUESTIONS

1. You will have encountered the notion of "progressive" or "living tree" constitutionalism—an approach to interpreting the constitution so as not to render it frozen in time—in *Edwards v Canada (AG)*, [1929 CanLII 438](#), [\[1929\] UKPC 86](#) [*The Persons Case*]. In the modern era, the approach appears in Charter cases, though it has also extended to other areas. Does the general approach to s 96 discussed thus far seem consistent or inconsistent with the idea that the constitution should not remain frozen? If you find it inconsistent, might there nevertheless be good reasons for that?

2. The majority's analysis is extremely technical. For example, it delves into units of economic measurement and comparison and tries to determine how many thousands of dollars "margin" there is to superior court jurisdiction. Is this kind of analysis useful? Inevitable? Is the Court properly equipped to engage in it in a systematic and predictable fashion?

B. SECTION 96 CONSTRAINTS ON PARLIAMENT

While the Supreme Court's initial s 96 jurisprudence dealt with provincial laws, those principles have since expanded to include Parliament itself. Essentially, the Court has affirmed the idea that the superior courts' core jurisdiction is beyond the reach of all legislative action and, indeed, is a product of the separation of powers.

Typical cases involve parliamentary attempts to assign criminal law jurisdiction under s 91(27) of the *Constitution Act, 1867*. In the *McEvoy, Reference re Young Offenders Act (PEI)*, and *MacMillan Bloedel* cases, Parliament had transferred traditional superior court jurisdiction over criminal trials to a provincial inferior court. The idea was to create a "unified criminal court" that would combine the criminal jurisdiction of the inferior and superior courts. Such a court, its supporters argued, would jettison the hierarchical system of inferior and criminal courts, provide a more general approach to the independence of the judiciary, streamline the complexity of the judiciary set at Confederation, and rationalize criminal procedure.

McEvoy v Attorney General of New Brunswick and Attorney General of Canada

[1983] 1 SCR 704, 1983 CanLII 149

THE COURT (Laskin CJ and Ritchie, Dickson, Beetz, Estey, Chouinard, and Wilson JJ):

The questions ... [relate to the proposal to establish] a unified criminal court in New Brunswick.

[The questions were:

1. Is it constitutionally permissible for Parliament to confer exclusive jurisdiction on a provincial inferior court to try all indictable offences under the *Criminal Code*?
2. Is it constitutionally permissible for Parliament to confer jurisdiction on a provincial inferior court to try all indictable offences under the *Criminal Code* if that jurisdiction is concurrently held by the provincial superior courts?
3. Is it constitutionally permissible for a provincial legislature to create an inferior court to exercise jurisdiction from Parliament to try all indictable offences under the *Criminal Code* if that jurisdiction is exclusive? If that jurisdiction is concurrent with that exercised by the provincial superior courts?]

... The New Brunswick Court of Appeal answered all three questions in the affirmative.

In general terms the issue is whether s. 96 of the *Constitution Act, 1867* is a bar to a plan whereby the federal government and a provincial government would [...] transfer the criminal jurisdiction of Provincial Superior Courts to a new court to be called the "unified criminal court" the judges of which would be provincially appointed.

• • •

There is no doubt that jurisdiction to try indictable offences was part of the Superior Court's jurisdiction in 1867; ... Nor does anyone argue that inferior courts had concurrent jurisdiction to try indictable offences in 1867. ... [N]one of the other considerations which might save the scheme from the force of s. 96 apply here. The proposed court is obviously a judicial body; its judicial aspect does not change colour

when considered in the factual setting in which the court will operate; nor will the court exercise administrative powers to which its adjudicative functions are incidental. The proposed body is clearly and only a criminal court.

• • •

... It has long been the rule that s. 96, although in terms an appointing power, must be addressed in functional terms lest its application be eroded. ... [A]s we view the matter, the result is to defeat the new statutory Court because it will effectively be a s. 96 Court.

Sections 96, 97, 98, 99 and 100 are couched in mandatory terms. They do not rest merely on federal statutory powers as does s. 91(27). ...

What is being contemplated here is not one or a few transfers of criminal law power, ... but a complete obliteration of Superior Court criminal law jurisdiction. Sections 96 to 100 do not distinguish between courts of civil jurisdiction and courts of criminal jurisdiction. They should not be read as permitting the Parliament of Canada through use of its criminal law power to destroy Superior Courts

Parliament can no more give away federal constitutional powers than a province can usurp them. ... Section 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* just as it does the provinces from doing so.

The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867*

• • •

Nor is much gained for the proposed new provincial statutory court by providing for concurrent Superior Court jurisdiction. The theory behind the concurrency proposal is presumably that a Provincial court with concurrent rather than exclusive powers would not oust the Superior Courts' jurisdiction, at least not to the same extent; since the Superior Courts' jurisdiction was not frozen as of 1867, it would be permissible to alter that jurisdiction so long as the essential core of the Superior Courts' jurisdiction remained; s. 96 would be no obstacle because the Superior Court would retain jurisdiction to try indictable offences. With respect, we think this overlooks the fact that what is being attempted here is the transformation by conjunct action of an inferior court into a superior court. Section 96 is, in our view, an insuperable obstacle to any such endeavour.

• • •

We would, therefore, allow the appeal and answer all three questions in the negative

Appeal allowed.

NOTES AND QUESTIONS

1. McEvoy left several questions unanswered. First, does s 96 prevent Parliament from transferring judicial functions from provincial superior courts to s 101 federal courts (also considered in many respects to be superior courts)? Second, is it only "wholesale" transfers of superior court powers to inferior courts and tribunals that are beyond Parliament's competence? Are "piecemeal," or modest, transfers permissible? (For discussion, see Robin Elliot, "Case Comment, New Brunswick Unified Criminal Court Reference" (1984) 18 UBC L Rev 127.)

2. The issue of transferring criminal jurisdiction has arisen, notably, with respect to young offenders. Criminal defendants under the age of 18 are subject to a special legislative regime: the *Youth Criminal Justice Act*, SC 2002, c 1 (known for many years as the *Young Offenders Act*). The law sets out distinct legal proceedings and greatly reduced punishment (note,

however, that everyone is subject to the same criminal law—the definitions of offences set out in the *Criminal Code* remain constant regardless of an offender's age).

The practice of transferring such jurisdiction was challenged in *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252, 1991 CanLII 11713. Under s 2 of the Act, Prince Edward Island designated its provincial inferior court as the Youth Court for the purpose of all cases involving a young person as defined by the Act. This transfer was held to be valid. *McEvoy* was distinguished on the basis of the novelty of a jurisdiction over offences allegedly committed by young persons—a jurisdiction that, in those terms, did not exist at Confederation.

A second case dealing with young offenders is *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 1995 CanLII 57. We discussed the case, above, for its important modification to the overall test for s 96. Here, we look briefly at the precise law in issue. A young offender who disobeyed an injunction was tried and convicted in superior court of criminal contempt. On appeal, he argued that because the contempt did not occur in the face of a superior court, he should have been tried in a youth court. The dispute was whether Parliament could make a grant of exclusive jurisdiction to such a court in the case of an offence (contempt of court) traditionally within the jurisdiction of a superior court.

Emphasizing that there are certain core powers of the superior courts that cannot be constitutionally transferred to other courts, Lamer CJ decided that proceedings for contempt of court is one of them. In dissent, McLachlin J rejected the idea of a fixed set of immutable, non-transferrable superior court functions. She based her reasoning on the idea that "a strict separation of judicial and legislative powers is not a feature of the Canadian Constitution" (at para 52). Note that the idea of the separation of powers to which McLachlin J referred is no longer persuasive.

In *Cooper v Canada (Human Rights Commission); Bell v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 1996 CanLII 152, Lamer CJ, concurring in the result but writing his own reasons, stated:

[10] One of the defining features of the Canadian Constitution, in my opinion, is the separation of powers [among the three branches of government—the legislature, the executive, and the judiciary]. ...

[11] ... [T]he absence of a strict separation of powers does not mean that the Canadian Constitution does not recognize and sustain some notion of the separation of powers. This is most evident in the Court's jurisprudence on s. 96 of the *Constitution Act, 1867*. Although the wording of this provision suggests that it is solely concerned with the appointment of judges, through judicial interpretation—an important element of which has been the recognition that s. 96 must be read along with ss. 97-100 as part of an integrated whole—s. 96 has come to guarantee the core jurisdiction of the superior courts against legislative encroachment. As I recently noted in *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725, at 753:

Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. [Emphasis added.]

As this passage makes clear, the existence of the courts is definitional to the notion of constitutionalism in Canada.

C. SECTION 96 AND THE ENTITLEMENT TO REVIEW AND APPEAL

In addition to limits on certain bodies' ability to adjudicate trial-level or "first instance" disputes, s 96 imposes constraints on those bodies' appellate and review functions, as well as their capacity to render "final" decisions. The constraints reflect the traditional role of the superior courts to review the decisions of administrative tribunals and inferior courts.

The Supreme Court set down the basic structure of those constraints in *Crevier v AG (Québec)*, excerpted below. Within an administrative regime, legislatures may create a two-stage structure of proceedings—that is, a first instance process and an appeal process—so long as two considerations are satisfied. First, the arrangement must be integrated into the general policy initiative. Second, there must be no bar to judicial review exercised by the provincial superior courts. That second stipulation rests on the idea that the superior courts' ability to review the decisions of statutory tribunals and inferior courts is part of their core jurisdiction. For federal tribunals, such review takes place within the Federal Court system.

Crevier v AG (Québec)

[1981] 2 SCR 220, 1981 CanLII 30

[The *Professional Code*, RSQ 1977, c C-26, [the Code] of Quebec governed 38 professional corporations, each of which was required to create a discipline committee with jurisdiction over every complaint brought under the Code. The Professions Tribunal, made up of six provincial court judges designated by the chief judge, received appeals from any decision of a discipline committee. It was empowered to confirm, alter, or quash any decision it reviewed.

The Code barred the Superior Court from reviewing those decisions.]

LASKIN CJ (Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, and Lamer JJ concurring):

The Court of Appeal majority viewed the preclusive words of s. 194 [which shielded the decision of the Professions Tribunal from judicial review] as not touching the power and right of the Superior Court to issue a writ of evocation where there has been [an] excess of jurisdiction. Section 194 itself, however, does not recognize this supervisory authority of the Superior Court. ... Even if it were otherwise and the supervisory authority of the Superior Court on questions of jurisdiction was expressly preserved, it would still not be a complete answer to [a s 96 claim].

• • •

Three issues arise from the reasons in the Court of Appeal. The first, which I think may be quickly disposed of ... [is that] the Professions Tribunal is given no function other than that of a general tribunal of appeal The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of [it]

• • •

The second issue ... concerns the effect upon s. 96 of a privative clause of a statute which purports to insulate a provincial adjudicative tribunal from any review of its decisions. Is it enough to deflect s. 96 if the privative clause is construed to preserve superior court supervision over questions of jurisdiction[?] In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions ... such provincial legislation must be struck down as unconstitutional

• • •

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. ... I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.

• • •

... Where ... questions of law have been specifically covered in a privative enactment, this Court ... has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

[The third issue considered by Lamer CJ related to an earlier case, *Attorney General (Que) v Farrah*, [1978] 2 SCR 638, 1978 CanLII 195, where the Court unanimously declared a similar, albeit more narrow, administrative structure unconstitutional. Chief Justice Lamer found that in both cases "there was a purported exclusion of the reviewing authority of any other court, whether by appeal or by evocation" (at 239).]

In the result, I would allow the appeal. ...

Appeal dismissed.

D. SECTION 96 AND ACCESS TO JUSTICE

The Supreme Court has applied s 96 to constrain provincial legislation that impedes access to the superior courts for litigating disputes. In the case that follows, the court struck down fees meant to recoup some of the costs of the court system. The invocation of the rule of law, in this case, is mirrored in Section IV, below, which focuses on judicial independence.

Trial Lawyers Association of British Columbia v British Columbia (AG)

2014 SCC 59

McLACHLIN CJ (LeBel, Abella, Moldaver, and Karakatsanis JJ concurring):

[1] The issue in this case is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional. ...

• • •

[4] Ms. Vilardell [initiated a proceeding for custody of a child and an interest in the marital home against her common-law spouse.] ... [T]o get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial, so he could address the question of ability to pay after hearing evidence respecting the parties' means, circumstances, and entitlement to property.

[5] The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600—almost the net monthly income of the family Ms. Vilardell is not an "impoverished" person She was unemployed in the year leading up to the trial; the "family" income appears to have come mainly from her partner. ... [A]fter legal fees had depleted her savings, she could not afford the hearing fee.

[The Court noted that the *Supreme Court Civil Rules*, BC Reg 168/2009 permits a judge to exempt someone from paying the fee.]

• • •

[21] Hearing fees fall squarely within the "administration of justice" [under s 92(14) of the *Constitution Act, 1867*] and may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts.

• • •

[24] ... [The province's] ... power to impose hearing fees must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96

• • •

[26] ... [T]he interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that "flow by necessary implication from those terms": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, per Major J. ...

• • •

[29] [Sections 92(14) and 96] ... [t]aken together ... have been held to provide a constitutional basis for a unified judicial presence throughout the country: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 11 and 52. ...

• • •

[31] ... The question is ... whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts.

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. ... [Such measures strike] at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. ...

• • •

[37] ... The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts [*British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 66].

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). ...

[39] ... As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

[40] ... If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-9, per Newbury J.A.

• • •

[46] ... A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate

exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.

• • •

[48] ... A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them

• • •

[51] The trial judge held that the primary purpose of the hearing fee scheme is to provide an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials (para. 309). The secondary purpose of the scheme is to provide sufficient revenue to offset the costs of providing civil justice To put it in other words, the Province's aim is to establish a revenue-neutral trial service.

[52] The trial judge, affirmed by the Court of Appeal, found that B.C.'s hearing fees go beyond these purposes and limit access to courts [F]or many litigants, bringing a claim would require sacrificing reasonable expenses.

[The majority noted that the fees imposed here amounted to the plaintiff's net monthly income and were imposed on her regardless of whether she contributed to or controlled the length of the proceeding.]

• • •

[58] I agree with the view of the trial judge that the plain meaning of the words "impoverished" and "indigent" does not cover people of modest means who are nonetheless prevented from having a trial because of the hearing fees

• • •

[60] Other objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment—a burden she may be unable or unwilling to assume. ...

• • •

[62] Moreover, the plaintiff who is required to pay the hearing fee may not control the length or efficiency of the trial—the defendant may be responsible for prolonging the matter. ...

[63] Most fundamentally, unlike cost awards, the imposition of the hearing fees at issue are not dependent on efficiency or the merit of one's claim. The hearing fees imposed by this scheme escalate to \$800 per day after 10 days of trial—the highest price tag in the country—without any relationship to the efficiency of the proceeding. These hearing fees do not promote efficient use of court time; at best they promote less use of court time.

[64] I conclude that the hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

• • •

[68] The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so.

• • •

ROTHSTEIN J (dissenting):

[80] Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers. ...

• • •

[82] ... In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. ...

[83] ... In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism.

• • •

[87] This is not to deny that universal, free (or at least affordable) access to courts is a laudable goal; it is merely to say that s. 96 and the unwritten principle of the rule of law cannot be used to force provincial governments to expend funds or forego cost recovery to bring this goal to fruition. ...

• • •

[90] ... The cases cited by the majority speak of the inability of governments to remove "core or inherent jurisdiction," as doing so "emasculates the court, making it something other than a superior court" The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise. ...

[91] ... It is true that this Court has, on occasion, turned to unwritten principles to fill in "gaps in the express terms of the constitutional text" But there are no such gaps in the text of s. 92(14). ...

[92] There is no express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specifies the particular instances in which access to courts is guaranteed. ...

[93] ... So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. ...

[94] This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are absolute. They are not subject to s. 1 justification or the s. 33 notwithstanding clause. These provisions reflect a recognition that, in certain circumstances, governments will be permitted to enact legislation or take action that places limits on *Charter* rights. ...

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[98] ... The majority acknowledges that imposing hearing fees is a permissible exercise of the province's jurisdiction according to the *written* constitutional text—that is, s. 92(14) (para. 23). But they ultimately conclude that the hearing fees fall outside the province's jurisdiction in part because the fees are inconsistent with the *unwritten* principle of the rule of law (paras. 38-40). ... [T]he rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme.

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Appeal allowed and cross-appeal dismissed.

NOTE AND QUESTION

According to Rothstein J, the Charter provides the principal way to safeguard individual rights. In that respect, he noted, its internal limiting mechanisms (like s 1) matter. By contrast, s 96 has no such limiting features. Therefore, the Court should hesitate to use it in cases invoking individual rights. Does he have a point?

IV. THE INDEPENDENCE OF THE JUDICIARY

The Court's rulings on the independence of the judiciary were originally based on interpretation and extrapolation from constitutional text. Later rulings have an expanded scope, applying constitutional principles to interpret text as well as to fill in textual gaps.

This trend in Supreme Court cases reflects developments in the United Kingdom and other constitutional democracies. Below is a list of "generally accepted conditions" for judicial independence:

1. guaranteed tenure with removal from office only for reasons of incapacity or misconduct that renders them unfit for judicial office
2. a merit-based appointment and promotion process
3. fair and secure remuneration protected from external influence
4. adequate systemic funding to enable judges to fulfil their functions
5. protection for jurisdiction including the authority to decide matters of a judicial nature, and to determine whether any particular issue submitted for judicial decision falls within their competence as defined by law.
6. personal immunity against suit for the exercise of judicial functions
7. rules providing for recusal and disqualification in particular cases, as well as rules banning activities incompatible with judicial office
8. protection against improper use of complaints
9. an independent legal profession
10. a general attitude of respect for the law and the legal system within politics.

See Graham Gee, Robert Hazell, Kate Malleson & Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015) at 9-10; see also *Tokyo Principles of the Independence of the Judiciary in the LAWASIA Region* (1982); UN General Assembly, *UN Basic Principles on the Independence of the Judiciary* (1985); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003); Bangalore Principles of Judicial Independence (The Hague, 2002).

A number of judicial independence cases relate to judges' salaries.

Section 100 of the *Constitution Act, 1867* stipulates that salaries and benefits be fixed and provided by Parliament. In *The Queen v Beauregard*, [1986] 2 SCR 56 at 75, 1986 CanLII 24, the Court found the provision to have the following rationale:

[T]he essence of judicial independence for superior court judges is complete freedom from arbitrary interference by both the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges.

While the Court ruled that under s 100, Parliament can modify judicial benefits such as pensions, it stated (at para 39) that:

If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges vis-à-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be ultra vires s. 100 of the *Constitution Act, 1867*.

In a series of appeals heard together and known as the *Ref re Remuneration of Provincial Judges* (or the *Provincial Judges Reference*), the Court considered judicial remuneration in regard to provincially appointed judges. The textual focus was s 11(d) of the Charter, which guarantees the right to a fair trial. A question arose as to whether this guarantee constrained the power of the province to reduce the salary of the judges of provincial courts.

**Ref re Remuneration of Judges of the Prov Court of PEI;
Ref re Independence and Impartiality of Judges of
the Prov Court of PEI**

[\[1997\] 3 SCR 3, 1997 CanLII 317](#)

LAMER CJ (L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ concurring):

[7] ... Litigation, and especially litigation before this Court ... is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system—the executive and the judiciary

[8] The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine "the web of institutional relationships ... which continue to form the backbone of our constitutional system" (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3).

[9] ... [T]he purpose of the constitutional guarantee of financial security—found in s. 11(d) of the *Charter*, and also in the preamble to and s. 100 of the *Constitution Act, 1867*, is not to benefit the members of the courts Financial security must be understood as ... an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals—it is a means to secure those goals.

[10] One of these goals is the maintenance of public confidence in the impartiality of the judiciary Another ... is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.

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[82] These appeals were all argued on the basis of s. 11(d), the *Charter's* guarantee of judicial independence and impartiality.

[83] ... Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the [British] *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867* to 1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate": *Switzman v. Elbling*, [1957] S.C.R. 285 at p. 306, per Rand J.

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[85] ... [T]here are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence. ... [First,] the range of courts ... protected by the written provisions of the Constitution contains large gaps. ... [Section] 99, on its terms, only protects the security of tenure of superior court judges. Moreover, ss. 96-100 do not apply to provincially appointed inferior courts, otherwise known as provincial courts.

[86] ... [B]y its express terms, s. 11(d) is limited in scope as well—it only extends the envelope of constitutional protection to bodies which exercise *jurisdiction over offences*.

[87] ... [Second,] some of those provisions, by their terms, do not appear to speak to this objective.

[88] ... Section 96 seems to do no more than confer the power to appoint judges of the superior, district, and county courts. ... However, through a process of judicial interpretation, s. 96 has come to guarantee the core jurisdiction of the courts which come within the scope of that provision. ... The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role.

[89] ... This jurisprudential evolution undermines ... the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of *unwritten* understandings

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[93] ... There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the source of those unwritten norms is.

[94] In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the *Constitution Act, 1867* [text of the preamble omitted]. ... Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force" [S]trictly speaking, it is not a source of positive law

[95] But the preamble does have important legal effects In the words of Rand J., the preamble articulates "the political theory which the Act embodies": *Switzman, supra*, at p. 306. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. ... As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

[96] ... The preamble speaks of the desire of the founding provinces "to be federally united into One Dominion," and thus, addresses the structure of the division of powers. Moreover, by its reference to "a Constitution similar in Principle to that of the United Kingdom," the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged. ...

[Chief Justice Lamer set out a number of examples in which the judiciary had extrapolated legal doctrines from unwritten constitutional principles from the preamble—namely, the doctrines of full faith and credit, paramountcy, suspended declarations of invalidity, the constitutional status of the privileges of provincial legislatures, the federal power to regulate political speech, and the implied limits on legislative sovereignty with respect to political speech.]

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[104] These examples ... illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

[105] The same approach applies to the protection of judicial independence. ...

[106] The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of*

Settlement of 1701. ... [T]hat Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. ... In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

[107] ... [T]he express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. ...

[108] ... As this Court has said before, there are three branches of government—the legislature, the executive, and the judiciary [Courts,] in other words, are equally "definitional to the Canadian understanding of constitutionalism" ... as are political institutions. It follows that the same constitutional imperative—the preservation of the basic structure ... extends protection to the judicial institutions of our constitutional system.

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[111] [In *Valente v The Queen*, [1985] 2 SCR 673, 1985 CanLII 25 (Valente No 2)] ... this Court laid down the interpretive framework for s. 11(d)'s guarantee of judicial independence and impartiality. Le Dain J., speaking for the Court, began by drawing a distinction between impartiality and independence. ... Impartiality was defined as "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (*Valente* [(No. 2)], *supra*, at p. 685 (emphasis added)). ... Independence, by contrast, focussed on the status of the court or tribunal. ...

[112] Le Dain J. went on in *Valente* [(No 2)] to state that independence was premised on the existence of a set of "objective conditions or guarantees" (p. 685), whose absence would lead to a finding that a tribunal or court was not independent. ... However, he [supplemented] the requirement for objective conditions with what could be interpreted as a further requirement: that the court or tribunal be *reasonably perceived* as independent. The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system. ... [T]he objective guarantees must be viewed as those guarantees that are necessary to ensure a reasonable perception of independence

[113] ... [As stated] by Howland C.J.O. in ... *R. v. Valente* (No. 2) (1983), 2 C.C.C. (3d) 417 (Ont. C.A.), at pp. 439-40:

The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude [that the tribunal or court was independent].

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[115] The three core characteristics identified by Le Dain J. are *security of tenure*, *financial security*, and *administrative independence*. *Valente* laid down (at p. 697) two requirements for security of tenure for provincial court judges: those judges could only be removed for cause "related to the capacity to perform judicial functions," and after a "judicial inquiry at which the judge affected is given a full opportunity to be heard." Unlike the judicature provisions of the *Constitution Act, 1867*, which govern the removal of superior court judges, s. 11(d) of the *Charter* does not require an address by the legislature in order to dismiss a provincial court judge.

[116] Financial security was defined in these terms (at p. 706):

The essential point ... is that the right to salary of a provincial court judge is established by law, and there is no way in which the executive could interfere with that right in a manner to affect the independence of the *individual judge*. [Emphasis added.]

[117] Finally, the Court defined the administrative independence of the provincial court, as control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (p. 712).

[118] The three core characteristics of judicial independence—security of tenure, financial security, and administrative independence—should be contrasted with what I have termed the two dimensions of judicial independence ... the *individual independence* of a judge and the *institutional or collective independence* of the court or tribunal of which that judge is a member. ... The two different dimensions of judicial independence are related in the following way (*Valente [(No 2)], supra*, at p. 687):

The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

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[123] ... Individual independence was referred to as the "historical core" of judicial independence, and was defined as "the complete liberty of individual judges to hear and decide the cases that come before them" (p. 69). It is necessary for the fair and just adjudication of individual disputes. By contrast, the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors "of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process

[124] ... The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes Institutional independence also inheres in [Charter rights] adjudication ... against the state. ... Taken together, it is clear that the institutional independence of the judiciary is "definitional to the Canadian understanding of constitutionalism" (*Cooper, supra*, at para. 11).

[125] ... [T]he institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government: see *Cooper, supra*, at para. 13.

[126] ... I am well aware that provincial courts are creatures of statute However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. ... [I]t is clear therefore that provincial courts must be granted some institutional independence.

[Chief Justice Lamer cited a number of features of provincial courts that warrant their protection, including their remedial powers with respect to enforcement of the Constitution; their enforcement of a number of Charter rights, particularly but not exclusively in criminal cases; their role in policing the division of powers; and their frequent interaction with the rights accorded to Indigenous peoples in Canada under s 35 of the *Constitution Act, 1982*.]

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[131] ... [W]hat is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that ... the relationship between the judiciary and the other branches of government be *depoliticized*. ... [I]n the context of institutional or collective financial security, this imperative demands that the

courts both be free and appear to be free from political interference through economic manipulation ... , and that they not become entangled in the politics of remuneration

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[133] *First*, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen However, any changes to or freezes in judicial remuneration require ... an independent body ... to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, ... if the executive or the legislature chooses to depart from them, it has to justify its decision—if need be, in a court of law. ... [W]hen governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

[134] *Second*, under no circumstances is it permissible for the judiciary [either collectively or individually] to engage in negotiations over remuneration Any such negotiations would be fundamentally at odds with judicial independence. ... [S]alary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, is a form of "horse-trading." The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

[135] *Third*, and finally, any reductions to judicial remuneration, including *de facto* reductions ... by inflation, cannot take those salaries below a basic minimum level ... required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

[136] ... [T]hese appeals raise the issue of judges' salaries. However, the same principles are equally applicable to judges' pensions and other benefits.

[137] I also note that ... financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances, for example, such as the outbreak of war or pending bankruptcy. In those situations, governments need not have prior recourse to a salary commission before reducing or freezing judges' salaries.

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[139] The separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies However, there is also another aspect of the separation of powers—the notion that the principle requires that the different branches of government only interact, as much as possible, in particular ways. ...

[140] What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be *depoliticized*. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public

policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

[141] To be sure, [depoliticization] is largely governed by convention ... [which does] not have the force of law in Canada However, to my mind, the depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11(d) of the *Charter*, must be interpreted in such a manner as to protect this principle.

[142] The depoliticized relationships ... create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy

[143] On the other hand, ... judges ... are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence—security of tenure, financial security, and administrative independence—are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

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[189] I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. ... [T]he mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns Moreover, a commission serves as an institutional sieve which protects the courts from political interference through economic manipulation, a danger which inheres in salary negotiations.

[190] ... The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism ... which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

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[192] Finally, I turn to the question of whether the Constitution—through the vehicle of either s. 100 or s. 11(d)—imposes some substantive limits on the extent of salary reductions for the judiciary. ...

[193] I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. ... If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. ... I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. ...

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[196] ... [A] minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

NOTES

1. In the aftermath of this major advisory opinion, the Supreme Court has had occasion to consider other claims to independence, illustrated by the following cases.

2. In *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (AG); Minc v Quebec (AG)*, [2005 SCC 44](#), the Court addressed the judicial independence of provincial inferior courts once again, in considering challenges to the rejection by four provincial governments of the recommendations of judicial compensation commissions. The Court elaborated on the standard of rationality required for such rejections, indicating the need for "legitimate," "complete," and "meaningful" reasons, based on the facts, and rendered "in good faith." Three of the provinces met that standard; one did not. If a reviewing court determined that a province had failed to meet the rationality standard, the appropriate remedy was to send the matter for reconsideration, rather than issue a mandatory order.

3. In *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001 SCC 52](#), the Court considered whether a provincial administrative tribunal must enjoy independence in order to carry out its adjudicative function, which included the imposition of penalties. Chief Justice McLachlin noted (at paras 23-24) that while administrative tribunals make quasi-judicial rulings, they do not enjoy express constitutional protection of their independence because they are part of the executive branch of government charged with the role of implementing government policy. Accordingly, it falls to Parliament and the legislatures to provide for their composition and structure, including the provision for elements of independence as deemed warranted.

4. In *Federation of Law Societies*, discussed below, the independence of the bar was at issue.

NOTE: CANADA (AG) V FEDERATION OF LAW SOCIETIES OF CANADA

In *Canada (AG) v Federation of Law Societies of Canada*, [2015 SCC 7](#), the Court considered the importance of the independence of the bar to the rule of law. In order to deter and identify money laundering and terrorist financing, federal legislation imposed duties on financial intermediaries, including lawyers, to keep records that included verification of the identity of the persons on whose behalf they paid or received money.

The Federation of Law Societies challenged the regime's application to lawyers as a violation of s 7 of the Charter. The Supreme Court read down the statute so as to exclude its application to legal counsel and law firms. Justice Cromwell, for the majority of the Court, concluded that the lack of protection for solicitor-client privilege infringed ss 7 and 8 of the Charter and, in particular, that the interference with a lawyer's duty of commitment to the client's cause constituted a breach of the principles of fundamental justice. In doing so, he quoted with approval the following passage from *Attorney General of Canada v Law Society of British Columbia*, [\[1982\] 2 SCR 307, 1982 CanLII 29](#) at para 98:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. [Emphasis added at 335-36.]

Justice Cromwell then continued:

[101] Various international bodies have also broadly affirmed the fundamental importance of preventing state interference with legal representation. The *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders state that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled ... requires that all persons have effective access to legal services provided by an independent legal profession": U.N. Doc. A/CONF.144/28/Rev.1 (1991), at p. 119. Similarly, the Council of Bars and Law Societies of Europe's *Charter of Core Principles of the European Legal Profession* emphasizes lawyers' "freedom ... to pursue the client's case," including it as the first of 10 "core principles" (p. 5 (online)). The International Bar Association's *International Principles on Conduct for the Legal Profession*, adopted in 2011, also emphasize committed client representation as the first principle governing lawyers' conduct: "A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation" (p. 5 (online)).

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[113] The information gathering and record retention provisions of this scheme serve important public purposes. They help to ensure that lawyers take significant steps so that when they act as financial intermediaries, they are not assisting money laundering or terrorist financing. The scheme also serves the purpose of requiring lawyers to be able to demonstrate to the competent authorities that this is the case. In order to pursue these objectives, Parliament is entitled, within proper limits ... to impose obligations beyond those which the legal profession considers essential to effective and ethical representation. Lawyers have a duty to give and clients are entitled to receive committed legal representation as well as to have their privileged communications with their lawyer protected. Clients are not, however, entitled to make unwitting accomplices of their lawyers let alone enlist them in the service of their unlawful ends.

V. JUDICIAL APPOINTMENTS

A. INTRODUCTION

The following passage encapsulates the Canadian judicial appointments process for most of the country's history:

The power to shape our courts determines Canada's legal landscape for years to come. Yet that power is subject to relatively few constitutional constraints. Section 96 of the *Constitution Act, 1867* states that "The Governor General shall appoint the Judges of the Superior, District, and County Courts [in each Province]." The appointment power for these courts is followed by sparse criteria for selection, and some basic guarantees of security of tenure. Provincial courts are not mentioned. While there is a provision for Parliament to create a "General Court of Appeal for Canada," the power to appoint to such a court is not specified. Even for those courts where an appointment power is included, the process is marked by an exceptionally narrow corridor. Subject to a few exceptions a blank slate is provided to the Governor-in-Council (in essence, the Prime Minister and the Minister of Justice). Canada is operating a 21st-century judiciary bound by 19th-century rules concerning judge-making.

See Carissima Mathen, "Choices and Controversy: Judicial Appointments in Canada" (2008) 58 UNBLJ 52 at 52-53.

In the past 50 or so years, most constitutional democracies have created stable, merit-driven, formalized processes for appointments to replace the secretive, executive prerogative. That includes a formal application or nomination process. It also involves expert, professional, and lay scrutiny of candidates by committees or commissions which consult with

relevant professional and social bodies. These committees make their evaluations according to a formalized list of criteria and generally seek to diversify the judiciary so as to reflect society as a whole. While most of the process is conducted in private with strong confidentiality standards, the work of the committee is shared with the public through websites that set out general information and frequent reports. The process for Supreme Court appointments, which is more elaborate, is detailed separately below.

The modern mode of appointment is understood to reflect respect for the rule of law and the independence of the judiciary. It also acknowledges the judiciary's important role within a constitutional democracy by providing a degree of accountability and transparency. As you read through the material in this section, consider the extent to which the modifications to the original appointments process appropriately respond to the country's current identity, challenges, and needs.

B. APPOINTMENTS TO PROVINCIAL COURTS

The provinces have led the way in modernization. While there is no single template, the basic arrangement is to prepare a short list based on formal applications initiated by the candidate at their own initiative or by the suggestion of others. Sometimes the process generates a pool of vetted candidates for consideration for appointment as vacancies arise. Another approach is a search process dedicated to filling a particular vacancy when it materializes.

The vetting process includes inquiries into professional qualifications, including years of practice and indicia of good standing in one's professional and personal life. A judicial selection committee, made up of members of the judiciary, lawyers, and lay people, consults widely with reference to the chosen criteria to select candidates to interview and later rank. At that stage, the attorney general considers the recommendations and makes the nominee known to Cabinet, which then notifies the lieutenant governor to proceed with the appointment.

C. APPOINTMENTS TO SUPERIOR AND FEDERAL COURTS

Compared with provincial processes, federal appointments have not been formalized and modernized to the same extent. Under the leadership of Prime Minister Stephen Harper, from 2006 to 2015, the system set aside some of the progressive changes adopted by previous governments to emphasize merit and increase transparency and accountability. In effect, it reverted to the old pattern of executive prerogative based on political considerations.

With respect to superior and Federal court judges, until 1988, the customary pattern was for the minister of justice to receive private recommendations and consult with regional ministers before making the selection. While the process was not necessarily ideological, various studies over the years indicated that appointments frequently reflected partisan leanings: John Willis, "Methods of Appointing Judges—An Introduction" (1967) 4 Can Legal Stud 216; William H Angus, "Judicial Selection in Canada—The Historical Perspective" (1967) 4 Can Legal Stud 220; Canadian Bar Association, *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada* (Ottawa: Canadian Bar Foundation, 2005).

In recent years, the process has been completely revamped. The new arrangement requires formal applications to the Office of the Commissioner for Judicial Affairs, which performs the initial screening of qualifications. Candidates must personally apply; it is no longer possible to be nominated by a third party.

Judicial appointments advisory committees, which are constituted for each province and territory, then provide an intensive examination of the candidates. Most committees are composed of seven voting members representing the bench, bar, and general public. The Committee for the Tax Court of Canada has five members.

D. APPOINTMENTS TO THE SUPREME COURT OF CANADA

1. Introduction

On its face, the *Supreme Court Act* contains very few criteria for appointment. Judges must be lawyers with a minimum of ten years, membership in the bar. In addition, the Act designates three seats for Quebec. Notwithstanding these limited parameters, a practice has emerged whereby the Court's composition reflects the regions of the country: Ontario has three seats, the Western provinces two, and the Atlantic provinces one. In 2014, the Supreme Court issued an advisory opinion in connection with the appointment of Marc Nadon J. That opinion has had a significant impact on how to think about the Court's composition and essential features. The Nadon reference is addressed below.

Historically, the prime minister selected Supreme Court justices on the advice of the minister of justice. From 1875 to 1949, when the Supreme Court was subordinate to the Privy Council, most of its appointees had held electoral office, and a good number had sat in Cabinet. Some were active politicians at the time of appointment; others were unsuccessful politicians.

The process also operated behind closed doors. Appearing before a committee of Parliament in 2003, Justice Minister Irwin Cotler characterized the process as "unknown" (Mathen, "Choices and Controversy" at 57) rather than secretive or partisan. He then described a process that commenced with the identification of candidates from the relevant province or region, followed by extensive consultation on the merits of the candidates with senior judges, attorneys general, and officials of the Canadian Bar Association and law societies of the relevant provinces. The focus was on professional qualifications, capacity, personal characteristics, and diversity. For candidates already on the bench seeking promotion, the screening included an examination of the quality of their judgments. The minister of justice would then discuss the leading candidates with the prime minister, who would select a preferred candidate to present to Cabinet and, eventually, the governor general.

In recent years, changes to this process have involved members of Parliament. This began in 2004 when the Liberal government appointed an Interim Ad Hoc Committee on the Appointment of Supreme Court Judges. At the end of the evaluation process described above, the Committee privately reviewed the qualifications of the two candidates considered the most suitable, and then advised the prime minister of their conclusions. After the prime minister had made his selection, the minister of justice, at a public, televised hearing, explained the process, delineated the prime minister's nominees' qualifications, and then answered questions from a committee. The governor general's appointment of the two nominees—Justices Abella and Charron—followed this hearing.

In 2005, Cotler announced a new, merit-driven, confidential process for Supreme Court appointments. An intervening election produced a new government headed by Prime Minister Harper. Harper largely jettisoned the process but did appoint an Ad Hoc Committee, composed of parliamentarians, to interview the nominee, Rothstein J, in a televised hearing. This novel step increased parliamentary engagement and attracted strong public interest.

Some commentators favour greater parliamentary involvement as a way to maintain a proper balance between the power of the judiciary and the power of Parliament and to provide a modicum of accountability and transparency. Critics, though, are wary of the introduction of the ideological questioning and political machinations that epitomize the Senate hearings into appointments to the US Supreme Court. They also question whether political involvement can undermine merit-based criteria for appointment. For example, the best candidates may not agree to be exposed to public review before the appointment is made or to undergo evaluation in a situation where confidentiality may not be fully preserved.

The hearing held just before Rothstein J's appointment did not end this debate for a number of reasons. The committee, composed of MPs, was ad hoc. The parliamentarians did not

have the benefit of parliamentary privilege, and, perhaps for that reason, their questioning was superficial and restrained. Justice Rothstein's judicial record did not raise any particular "red flags" for those concerned about so-called activist judicial decision-making. The MPs were not experts, had little time to prepare for the hearing, and played no role in the actual appointment.

In 2008, a different minister of justice decided to enlarge the parliamentary involvement in the appointment. He prepared a list of candidates to be reviewed by a new body, the Supreme Court Selection Panel, composed of five members of Parliament—two government members and one each from the other parties. This panel was to produce a short list of three for consideration by the prime minister and minister of justice. The nominee would be questioned by an ad hoc parliamentary committee.

During an intense political period, Prime Minister Harper chose to revert to the older mode of executive appointment. He appointed Cromwell J in the absence of either a panel's recommendation or a hearing. He also took the unusual step of making the appointment while Parliament was prorogued. (For commentary on the exercise of the appointment power when the government is in restricted "caretaker" mode, see Michael Plaxton, "The Caretaker Convention and Supreme Court Appointments" (2016) 72 SCLR (2d) 449.)

In 2011, Binnie and Charron JJ each announced their intention to retire, producing two Ontario vacancies. The appointments of Moldaver and Karakatsanis JJ included these steps: the compilation of a list of candidates in the Department of Justice, deliberation by the ad hoc parliamentary Supreme Court Selection Panel to narrow down the list to six names, the prime minister's selection of the preferred candidates on the advice of the minister of justice, and a public hearing in which the nominees answered questions from the members of an ad hoc committee of Parliament in a public televised hearing. This was also the process followed for the appointment of Wagner J in 2012.

Then, in 2013, a series of events transpired, leading to the most dramatic moment in Canadian judicial appointments history. It would profoundly change the Supreme Court of Canada.

2. The Supreme Court Act Reference

In September of 2013, Prime Minister Harper announced the appointment of Marc Nadon, a justice of the Federal Court of Appeal, to a Quebec seat on the Supreme Court soon to be vacated by Fish J. Justice Nadon's appointment raised the issue of whether the *Supreme Court Act* permitted a sitting Federal Court judge to take one of the three seats allocated to Quebec jurists. Section 6 of the Act stipulates that three of the Court's nine judges should be appointed "from among the judges of the Court of Appeal, or of the Superior Court of the Province of Quebec or from among the advocates of that Province" (emphasis added). At the time of his appointment, Nadon J was not a member of the *barreau du Québec*, although he had been for more than ten years prior to his appointment to the Federal Court. A question, therefore, arose whether s 6 required *current* membership in the Quebec bar. The government had sought a legal opinion on this issue prior to announcing the appointment. The opinion, provided by retired Supreme Court Justice Binnie and supported by retired Charron J and constitutional expert Peter Hogg, affirmed Nadon J's eligibility. In October, an ad hoc meeting of MPs, with 48 hours' notice, had the opportunity to question Nadon J in a televised session. The governor general then made the appointment.

Proceedings challenging the nomination were immediately commenced in the Federal Court by a Toronto lawyer. The government responded with a budget implementation bill to introduce two amendments to the *Supreme Court Act* in the form of declaratory provisions. Of most relevance, s 6.1 provided that, for the purpose of s 6 of the Act, an appointee to the Supreme Court would be considered to be from among the advocates of the province of Québec if, at any time, they were an advocate of at least ten years standing at the bar of that

province. Immediately after the amendments were introduced, the governor in council referred two questions to the Supreme Court. The first question asked whether a person who was, at any time, an advocate of at least ten years standing at the *barreau du Québec* could be considered under s 6 of the Act as being "from among the advocates of that Province." The second question asked whether Parliament could enact legislation to make such a person eligible for appointment in the event that they did not qualify under the statute in its unamended form, thus engaging the issue of the validity of s 6.1. (By the time the reference was heard, in early 2014, the amendments had passed into law.)

By a 6–1 majority, the Supreme Court answered both questions in the negative. The Court's reasons in the reference decision were multifaceted. The majority engaged in statutory interpretation of both the original provisions in the *Supreme Court Act* regarding the three Quebec seats on the Supreme Court and the new declaratory provisions. A review of the declaratory provisions precipitated analysis of the 1982 constitutional amending formula, as applied to Supreme Court appointments and, by extension, the status of the Supreme Court as both a statutory and constitutional institution. This was the first time a court in a common law system had ever invalidated a judicial appointment.

Reference re Supreme Court Act, ss 5 and 6

[2014 SCC 21](#)

McLACHLIN CJ (LeBel, Abella, Cromwell, Karakatsanis, and Wagner JJ concurring):

I. Introduction

[1] [Section 6 of the] *Supreme Court Act* provides that three of the nine judges of the Supreme Court of Canada must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province"

[2] The first [question in this Reference] is whether a person who was at any time an advocate of at least 10 years standing at the Barreau du Québec [in the past] qualifies for appointment under s. 6 as being "from among the advocates of that Province." If the answer to the first question is no, the second question arises. It is whether Parliament can enact legislation to make such a person eligible for appointment to one of the three Quebec seats on the Court. The answer to these questions—which on their face raise issues of statutory interpretation—engage more fundamental issues about the composition of the Court and its place in Canada's legal and constitutional order.

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III. Background

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[11] On October 22, 2013, the Governor General in Council referred the two questions ... to this Court for hearing and consideration pursuant to s. 53 of the *Supreme Court Act*. On the same day, Bill C-4, *Economic Action Plan 2013 Act, No. 2*, was introduced in the House of Commons. Clauses 471 and 472 of Bill C-4 proposed to amend the *Supreme Court Act* by adding ss. 5.1 and 6.1. These provisions were subsequently passed and received Royal Assent on December 12, 2013: S.C. 2013, c. 40. The new s. 6.1 seeks to make it clear that a former member of the Quebec bar is eligible for appointment under s. 6.

[12] Sections 5, 5.1, 6 and 6.1 of the Act now read as follows:

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.

IV. Question 1

A. The Issue

(1) Can a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec be appointed to the Supreme Court of Canada as a member of the Supreme Court from Quebec pursuant to sections 5 and 6 of the Supreme Court Act?

[13] Section 5 of the *Supreme Court Act* sets out the general eligibility requirements for appointment to the Supreme Court of Canada by creating four groups of people who are eligible for appointment: (1) current judges of a superior court of a province, including courts of appeal, (2) former judges of such a court, (3) current barristers or advocates of at least 10 years standing at the bar of a province, and (4) former barristers or advocates of at least 10 years standing.

[14] Section 6 of the Act sets out the specific eligibility requirements for appointment to the Supreme Court as a judge for the province of Quebec. The provision expressly identifies two categories of people who are eligible for appointment: (1) judges of the Court of Appeal and Superior Court of Quebec, and (2) members of the Quebec bar.

[15] The question in this reference is whether the second category in s. 6 of the Act encompasses both current and former members of the Quebec bar, or whether it limits eligibility to current members of the bar. Justice Nadon does not belong to the first category—he was not a judge of the Court of Appeal or of the Superior Court of Quebec—and was not a current member of the Quebec bar at the time of his appointment. He is, however, a former member of the Quebec bar of more than 10 years standing. His eligibility for appointment thus turns on the scope of the second category—i.e. on whether a person is eligible for appointment to the Supreme Court of Canada under s. 6 of the Act on the basis of former membership of the Quebec bar.

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[17] In our view, s. 6 narrows the pool from the four groups of people who are eligible under s. 5 to two groups who are eligible under s. 6. By specifying that three judges shall be selected from among the members of a specific list of institutions, s. 6 requires that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of these institutions.

[18] We come to this conclusion for four main reasons. First, the plain meaning of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation gives effect to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 advances its dual purpose of ensuring that the Court has

civil law expertise and that Quebec's legal traditions and social values are represented on the Court and that Quebec's confidence in the Court be maintained. Finally, this interpretation is consistent with the broader scheme of the *Supreme Court Act* for the appointment of *ad hoc* judges.

B. General Principles of Interpretation

[19] The *Supreme Court Act* was enacted in 1875 as an ordinary statute under the authority of s. 101 of the *Constitution Act, 1867* (S.C. 1875, c. 11). ... Parliament's authority to amend the Act is now limited by the Constitution. Sections 5 and 6 of the *Supreme Court Act* reflect an essential feature of the Supreme Court of Canada—its composition—which is constitutionally protected under Part V of the *Constitution Act, 1982*. As such, they must be interpreted in a broad and purposive manner and understood in their proper linguistic, philosophic and historical context: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

C. Legislative History of Sections 5 and 6

[20] The eligibility requirements for appointments from Quebec are the result of the historic bargain that gave birth to the Court in 1875. Sections 5 and 6 in the current Act descend from the original eligibility provision found in s. 4 of the 1875 Act. ... There have been no substantive changes to the criteria for appointments from Quebec since the Act was introduced in 1875.

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E. Section 6

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[36] The Attorney General of Canada argues that ss. 5 and 6 must be read together as complementary provisions, so that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. Since s. 6 makes no reference to how many years an appointee must have been at the bar, reading it without s. 5 would lead to the absurd result that a highly inexperienced lawyer would be eligible for appointment to the Court, the Attorney General says.

[37] We agree that ss. 5 and 6 must be read together. We also agree that the requirement of at least 10 years standing at the bar applies to appointments from Quebec. We disagree, however, with the Attorney General's ultimate conclusion that reading these provisions together in a complementary way permits the appointment of *former* advocates of at least 10 years standing to the Quebec seats on the Court. Section 6 does not displace the general requirements under s. 5 that apply to all appointments to the Supreme Court. Rather, it makes additional specifications in respect of the three judges from Quebec. One of these is that they must currently be a member of the Quebec bar.

[38] We reach this conclusion based on the plain meaning and purpose of s. 6, and the surrounding statutory context.

(1) The Plain Meaning of Section 6

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[45] ... [O]n a plain reading, s. 5 creates four groups of people eligible for appointment: current and former judges of a superior court and current and former barristers

or advocates of at least 10 years standing at the bar. But s. 6 imposes a requirement that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of the listed Quebec institutions. Thus, s. 6 narrows eligibility to only two groups for Quebec appointments: current judges of the Court of Appeal or Superior Court of Quebec and current advocates of at least 10 years standing at the bar of Quebec.

(2) The Purpose of Section 6

[46] This textual analysis is consistent with the underlying purpose of s. 6. The Attorney General of Canada submits that the purpose of s. 6 is simply to ensure that three members of this Court are trained and experienced in Quebec civil law and that this purpose is satisfied by appointing either current or former Quebec advocates, both of whom would have civil law training and experience.

[47] ... [A] review of the legislative history reveals an additional and broader purpose.

[48] Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation ... , the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise.

[49] The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada. This broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record:

... [T]he antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of *right*, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture. [Emphasis in original.]

(Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (1969), at p. 8.)

[50] At the time of Confederation, Quebec was reluctant to accede to the creation of a Supreme Court because of its concern that the Court would be incapable of adequately dealing with questions of the Quebec civil law

[51] The bill creating the Supreme Court was passed only after amendments were made responding specifically to Quebec's concerns. Most significantly, the amended bill that became the *Supreme Court Act* provided that two of the six judges "shall be taken from among the Judges of the Superior Court or Court of Queen's Bench, or the Barristers or Advocates of the Province of Quebec": s. 4 of the 1875 Act.

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[55] Government and opposition members alike saw the two seats (one third) for Quebec judges as a means of ensuring not only the functioning, but also the legitimacy of the Supreme Court as a federal and bijural institution.

[56] Viewed in this light, the purpose of s. 6 is clearly different from the purpose of s. 5. Section 5 establishes a broad pool of eligible candidates; s. 6 is more restrictive.

Its exclusion of candidates otherwise eligible under s. 5 was intended by Parliament as a means of attaining the twofold purpose of (i) ensuring civil law expertise and the representation of Quebec's legal traditions and social values on the Court, and (ii) enhancing the confidence of Quebec in the Court. Requiring the appointment of current members of civil law institutions was intended to ensure not only that those judges were qualified to represent Quebec on the Court, but that they were perceived by Quebecers as being so qualified.

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[58] ... Parliament could have adopted different criteria to achieve the twofold objectives of s. 6—for instance by requiring a qualitative assessment of a candidate's expertise in Quebec's civil law and legal traditions—but instead it chose to advance the provision's objectives by specifying objective criteria for appointment to one of the Quebec seats on the Court. In the final analysis, lawmakers must draw lines. The criteria chosen by Parliament might not achieve perfection, but they do serve to advance the provision's purpose: see Michael Plaxton and Carissima Mathen, "Purposive Interpretation, Quebec, and the *Supreme Court Act*" (2013), 22 *Const. Forum* 15, at pp. 20–22.

[59] We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. The underlying purpose of the general eligibility provision, s. 5, is to articulate minimum general requirements for the appointment of all Supreme Court judges. In contrast, the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.

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[61] Some of the submissions before us relied heavily on the context provided by constitutional negotiations following the patriation of the Constitution in 1982, particularly on Quebec's agreement to proposed constitutional reforms that would have explicitly rendered Federal Court and Federal Court of Appeal judges eligible for appointment to one of the Quebec seats on the Court. The Charlottetown Accord went furthest by stipulating that it was entrenching the current *Supreme Court Act* requirement of "nine members, of whom three must have been admitted to the bar of Quebec (civil law bar)" (*Consensus Report on the Constitution: Charlottetown* (1992), at p. 8). This showed, it was argued, that these eligibility requirements were acceptable to Quebec.

[62] We do not find this argument compelling. The Meech Lake and Charlottetown negotiations over the eligibility requirements for the Court took place in the context of wider negotiations over federal–provincial issues, including greater provincial involvement in Supreme Court appointments. In the case of Quebec, the proposed changes would have diminished the significance of s. 6 as the sole safeguard of Quebec's interests on the Supreme Court by requiring the Governor General in Council to make an appointment from a list of names submitted by Quebec. In this context, we should be wary of drawing any inference that there was a consensus interpretation of s. 6 different from the one that we adopt.

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[69] We therefore conclude that s. 5 establishes general eligibility requirements for a broad pool of persons eligible for appointment to the Supreme Court of Canada. In respect of the three Quebec seats, s. 6 leads to a more restrictive interpretation of

the eligibility requirements in order to give effect to the historical compromise aimed at protecting Quebec's legal traditions and social values.

[70] We conclude that a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec, may be appointed to the Supreme Court pursuant to s. 5 of the *Supreme Court Act*, but not s. 6. The three appointments under s. 6 require, in addition to the criteria set out in s. 5, current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec. Therefore, a judge of the Federal Court or Federal Court of Appeal is ineligible for appointment under s. 6 of the Act.

[71] We note in passing that the reference questions do not ask whether a judge of the Federal Court or Federal Court of Appeal who was a former advocate of at least 10 years standing at the Quebec bar could rejoin the Quebec bar for a day in order to be eligible for appointment to this Court under s. 6. We therefore do not decide this issue.

NOTES AND QUESTIONS

1. The majority opinion in *Supreme Court Act* reference was extremely controversial. What do you think? For critical commentary, see Grant Huscroft, "The Supreme Court's Faulty Logic on Nadon," *National Post* (25 March 2014), online: <<https://nationalpost.com/opinion/grant-huscroft-the-supreme-courts-faulty-logic-on-nadon>>; Andrew Coyne, "Flaky Supreme Court Ruling Meets Dubious Appointment," *National Post* (24 March 2014), online: <<https://nationalpost.com/opinion/andrew-coyne-on-marc-nadon-flaky-supreme-court-ruling-meets-dubious-appointment>>; Leonid Sirota, "What You Wish For" (22 March 2014), online (blog): *Double Aspect* <<https://doubleaspect.blog/2014/03/22/what-you-wish-for>>. More positive commentary included Paul Daly, quoted in Sean Fine, "Supreme Court's Rejection of Nadon Is a Legal Marker and a Political Blow," *The Globe and Mail* (21 March 2014), online: <<https://www.theglobeandmail.com/news/politics/supreme-courts-rejection-of-nadon-is-a-legal-marker-and-a-political-blow/article17625541>>; Adam Dodek, quoted in John Geddes, "Q & A: Supreme Court of Canada Rejects Harper Appointment," *Macleans* (21 March 2014), online: <<https://www.macleans.ca/politics/ottawa/q-a-supreme-court-of-canadas-rejects-a-harper-appointment>>; Carissima Mathen, "Nadon Ruling Hits Like an Earthquake," *Ottawa Citizen* (21 March 2014), online: <<https://ottawacitizen.com/news/the-nadon-ruling-hits-like-an-earthquake>>.

2. The second half of the majority opinion, dealing with question 2 and the validity of the government's attempt to revise the eligibility criteria through the addition of s. 6.1 to the *Supreme Court Act*, can be found in Chapter 26, Amending the Constitution. It is that portion of the judgment that discusses the evolution of the Court, its constitutional status, and how the amending formula in part V of the *Constitution Act, 1982* applies to changes to the Court.

3. Justice Moldaver dissented. He read the eligibility criteria in s. 5 to be applicable to all appointments, including those filling a Quebec seat on the Court. Accordingly, current and former members of the Quebec bar having at least ten years standing, as well as current and former judges of the Quebec superior courts, would meet the eligibility requirements for a Quebec seat. He also read ss. 5 and 6 together. While s. 5 provided for general eligibility rules, s. 6 merely provided an additional proviso relating to the three Quebec seats.

Justice Moldaver then rejected the claim that the sections rendered ineligible former advocates of at least ten years' standing at the Quebec bar. He considered an additional requirement of current membership at the Quebec bar as unconnected to this objective. In his view, the words "from among," in s. 6, had no temporal significance given the context. Rather, these words referred to those eligible under s. 5. This reading also had the advantage of avoiding the

absurd possibility that an individual having only one day's standing at the Quebec bar could nonetheless be eligible. It could not possibly forward the objective of the sections to read s 6 as requiring a former advocate of at least ten years standing at the Quebec bar, or a former judge of the Quebec Court of Appeal or Superior Court, to rejoin the Quebec bar for one day in order to be considered for appointment.

4. Near the beginning of its opinion, the majority included this somewhat puzzling paragraph:

[6] The practical effect is that the appointment of Justice Nadon and his swearing-in as a judge of the Court were void *ab initio*. He remains a supernumerary judge of the Federal Court of Appeal.

This paragraph is puzzling because it seems to grant an actual remedy—declaring the appointment *ab initio* and, in effect, reinstating Nadon J to his former position. But the Court was delivering a reference, which is merely advisory (discussed in Section VII). Consider the following passage from Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon and the Supreme Court Act Reference* (Vancouver: UBC Press, 2020) 183–84:

[Nadon] remains surprised that the majority declared his appointment void *ab initio*. Advisory opinions are, by definition, nonbinding and involve no parties formally seeking redress. For that reason, there were never any written or oral arguments concerning the legal status of Marc Nadon's appointment to the Supreme Court. "No arguments were made, and I was not represented," he said. He likes to joke with students that "I may still be a Supreme Court judge in law"—a tenth justice. The order-in-council appointing him was never revoked. "If I had a hundred thousand dollars to burn," Nadon mischievously re-marked, "it would be fun to challenge" that aspect of the opinion. Ultimately, he suggested, it would have been better if the continued validity of his appointment had been properly litigated in the Federal Court—if [the Toronto lawyer] had been allowed to proceed with his initial claim.

What do you think motivated the Court to make the declaration that it did in paragraph 6? Was it right to do so?

NOTE: THE “MAINVILLE REFERENCE”

With respect to the specific issue of eligibility for appointment to a Quebec seat, the precedential importance of the Supreme Court's decision in the *Supreme Court Act Reference* is unclear. The rules applicable to membership in the Quebec bar may no longer preclude membership for all judges. The *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 now provides that the judicial office on certain courts is incompatible with legal practice but does not refer to the federal courts or the Supreme Court of Canada in that respect.

As well, in *Quebec (AG) v Canada (AG)*, 2015 SCC 22, the Supreme Court of Canada rejected a challenge to the appointment of Justice Robert Mainville, a Federal Court judge, to the Quebec Court of Appeal. Section 98 of the *Constitution Act, 1867* states that appointment to the “courts of Quebec” must be made “from the Bar of that Province.” The question was whether a candidate’s connection to the “Bar of Quebec” had to be current. Initiating a reference to the Quebec Court of Appeal, the Quebec government argued that, following the Nadon reference, s 98 should be interpreted in the same way as s 6 of the *Constitution Act, 1867*, thus rendering judges of the federal courts ineligible for appointment to the superior courts of Quebec. Concluding that s 98 arose in an entirely different statutory and historical context, the Court of Appeal advised that Mainville J’s appointment was valid. Understanding the purpose of s 98 as ensuring that judges of the superior courts would be legally trained and trained in local law, the Court of Appeal interpreted the section to require only that a

person appointed to one of the courts of Quebec had been admitted to the *barreau du Québec* or was such a member when appointed. A contrary interpretation would have cast doubt on a common practice of promoting Quebec trial court judges (who are not "current" members of the bar) to the Quebec Court of Appeal. In very brief reasons, the Supreme Court of Canada upheld that conclusion. The implication is that it would have been possible to appoint Nadon J to the Supreme Court in a two-step process that provided him with a short-term appointment to the Quebec Court of Appeal, to satisfy the strictures of ss 5 and 6 of the *Supreme Court Act*. Does this development support Moldaver J's concern that the majority's interpretation in the *Supreme Court Act Reference* was, essentially, absurd? For a different view of the absurdity argument, see Carissima Mathen, "The Shadow of Absurdity and the Challenge of Easy Cases: Reflections on the Supreme Court Act Reference" (2015) 71 SCLR 161 at 178-80.

3. Current Issues

In 2014, additional detail relating to the Nadon appointment came to light. It was reported that the initial short list consisted of six persons, four of whom were judges on the Federal Court or Federal Court of Appeal. The final list of three later produced by the parliamentary committee included Nadon; Trudel J, also from the Federal Court of Appeal; and Bich J of the Quebec Court of Appeal.

The publication of the inner workings of the parliamentary screening committee constituted a serious breach of confidentiality. As a result, Prime Minister Harper reverted to a process of full executive control. The next three Supreme Court appointments—Gaston, Côté, and Brown JJ—were announced after the appointment had been made, with very little information provided for the selection.

In August 2016, a newly elected Liberal government announced a different process for appointments to the Supreme Court of Canada. One precipitating factor was the need to fill the vacancy resulting from the unexpected early retirement of Cromwell J. Another was the commitment to address long-standing calls for a stable, responsive, and merit-driven process.

The new process, which thus far has been used to appoint Rowe, Martin, Kasirer, and Jamal JJ, formalizes the creation of the applicant pool. Qualified applicants must complete a detailed questionnaire and consent to the release of information from relevant law societies and a general background check. The questionnaire requires a comprehensive review of the applicant's qualifications, including personal information, references, statutory qualifications, education, extensive professional history, an annotated dossier of five judgments or other legal writing, an account of the applicant's disposition of five significant cases or matters while in legal practice or on the bench, information pertaining to personal suitability and integrity on any matter that "could reflect negatively on oneself or the judiciary," and a description of any serious physical or mental health problem. The questionnaire also calls for a number of long-form answers on the role of the judiciary in Canada's legal system and the role of a judge in a constitutional democracy. The application package is submitted to the Office of the Commissioner for Federal Judicial Affairs.

After initial screening by the Federal Judicial Affairs Office, the applications are sent to the Independent Advisory Board for the Supreme Court of Canada Judicial Appointments. The members of this body hold at pleasure renewable five-year appointments. Most of its members have professional qualifications, and some may be drawn from the public. The governor general designates one advisory board member to act as chairperson.

The advisory board is empowered to enlarge the applicant pool by encouraging qualified applicants to apply. It also consults with the chief justice of the Supreme Court of Canada and other key stakeholders. The advisory board's work culminates in a non-binding shortlist of three to five nominees sent to the prime minister, accompanied by statements setting out

each candidate's compliance with the long-standing statutory criteria as well as other criteria specified in the new arrangements for appointment.

The minister of justice has the opportunity to consult on the shortlist of candidates with the chief justice of Canada, relevant provincial and territorial attorneys general, and the relevant Cabinet ministers and opposition justice critics, as well as the members of certain standing committees of Parliament. On the basis of these consultations, the minister of justice will advise the prime minister. The prime minister may ask the advisory board for more names.

After the prime minister selects his nominee, members of Parliament have the opportunity to participate in a formal public process that presents the nominee to them and to the Canadian public.

In the final public element in the process, the advisory board prepares a report describing its fulfillment of its responsibilities, including its expenditures, statistics on the applications received, and any recommendations for improving the appointment process. For further documentation pertaining to the new process, see Justin Trudeau, News Release, "Prime Minister Announces New Supreme Court of Canada Judicial Appointments Process" (2 August 2016), online: *Government of Canada* <<https://pm.gc.ca/en/news/news-releases/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial>>.

Reaction to the new process has been positive in regard to its transparency, accountability, and merit orientation. Some, though, have criticized the process as unduly onerous and, therefore, discouraging to certain candidates. Another concern is that the addition of diversity considerations, including bilingualism, may undermine the conventional practice of allocating seats on the Court geographically.

One of the longest-lived traditions in Supreme Court appointments is its regional composition. Increasingly, however, that seems to run up against other imperatives to render the Court more representative of the country that it serves. The following excerpt discusses some of these issues.

Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon and the Supreme Court Act Reference*

(Vancouver: UBC Press, 2020) (footnotes omitted)

[T]here are a number of unwritten conventions pertaining to regional representation. The *Supreme Court Act* says only that Quebec must have three representatives on the court. In practice, though, it is generally accepted that Ontario, too, must have three judges. In addition, there must be at least one judge from the Maritime provinces. Until recently, it was sometimes said that Manitoba, Alberta, and Saskatchewan should be represented by one judge between them—with each province alternating in turn—and that British Columbia should have the post that remained. Since the Nadon Reference, these conventions have been the subject of much public attention and have given rise to considerable controversy, particularly as they have come into tension with contemporary views about the value of gender and racial diversity. ... In 2015, when the Harper government was seeking a replacement for Justice Rothstein, many suggested that the province of Saskatchewan was due—by convention, they claimed, it was Saskatchewan's turn. After all, the province had not been represented on the Supreme Court of Canada since the retirement of Justice Emmett Hall in 1973. There were also skeptics who argued that, for precisely that reason, no such convention existed. As one commentator observed: "If there is a convention that the next appointment should come from Saskatchewan, it is hardly rock-solid—and arguably shouldn't be. The very fact that the last four Western Canadian appointments

have come from Manitoba and Alberta could be taken as evidence that no such convention exists. (Such is the nature of conventions: they guide until they don't)." At the very least, it was noted further, "[A] government that is prepared to push against the boundaries of convention, or game them somewhat, [could] credibly say that it is not bound to make its next selection from a Saskatchewan pool." Ultimately, Harper appointed Justice Russell Brown of the Alberta Court of Appeal.

The issue of regional representation took on far greater public significance in 2016, when Justice Cromwell announced his retirement. This time, the concern was that Atlantic Canada might lose its representative on the court, in that Prime Minister Trudeau might appoint an Indigenous person from outside the region. [The Prime Minister had suggested] that the new application process would be open to "any Canadian lawyer or judge who fits the criteria." ...

There were expressions of discontent from both the Premier of Nova Scotia and the justice minister for Newfoundland and Labrador. Conservative member of Parliament Lisa Raitt suggested that the prime minister's announcement reflected a view in government that Atlantic Canada was a backwater. Professor Wayne MacKay stated:

I think it's a really big mistake to go against the long-standing convention of regional representation on the court, it's one of our most important policy-making institutions now, and to have no Atlantic voice in that institution would be contrary to the basic principles of Confederation. ...

On 19 September 2016, the Atlantic Provinces Trial Lawyers Association announced that it had filed an application with the Nova Scotia Supreme Court. In obvious reliance on the Nadon Reference, the association sought a declaration that "the Prime Minister's proposed departure from the constitutional convention of regional representation on the Supreme Court of Canada amounts to an amendment to the Constitution that requires unanimous consent of the provinces." That was almost certainly a bridge too far: though the court might well agree that there was a convention of regional representation, it is difficult to imagine it holding that the convention was part of the "law" governing Supreme Court appointments and as such could not be changed without constitutional amendment. After all, the court has been careful to distinguish between conventions and law precisely on the basis that the latter is enforceable whereas the former is not. In any event, the case was rendered moot by the appointment of Justice Rowe, who hailed from Newfoundland. But it is interesting to wonder what might have been. ...

The issue of regional representation was reopened with the retirement of Chief Justice Beverley McLachlin [in 2017]. At the outset, Trudeau announced that the government would comply with the convention of regional representation—or, at least, one reading of it. The press release stated:

Candidates may demonstrate that they satisfy the geographical requirement by reference to their bar membership, judicial appointment, or other relationship with Western Canada (British Columbia, Alberta, Saskatchewan and Manitoba) and Northern Canada (Yukon, Northwest Territories and Nunavut).

Immediately, the president of the Canadian Bar Association expressed gratification at this development. Moreover, there were expressions of approval at the decision to include the territories in "western Canada." But some were unhappy at the idea that British Columbia, which for more than twenty-five years had held a seat on the court, might find itself with no distinctive representative of its own. Some commentators insisted that the court should have a member who was familiar with British Columbia's unique culture and traditions. (Ironically, such suggestions

vaguely echo those of Arthur Bunster who, in 1875, argued that British Columbia, like Quebec, should have a statutory guarantee of representation on the Supreme Court.) The need for regional representation tied into calls for more (i.e., some) Indigenous representation on the court. Tasneem Karbani remarked:

With McLachlin's departure, British Columbia no longer has representation or a voice on the Supreme Court. This lack of representation also ties in with the concerns about Indigenous representation. The issues that involve Indigenous groups in British Columbia are often unique from those in the rest of Canada. The Supreme Court stands to lose out on both a British Columbia perspective and Indigenous perspective by having a judicial appointment that neither represents the region or Indigenous peoples.

QUESTIONS

1. Does the combination of statutory, linguistic, and diversity criteria make filling Supreme Court seats too complicated?
2. Assuming that the relevant procedures under part V of the *Constitution Act, 1982* could be satisfied, should the Supreme Court be required to have at least one Indigenous jurist?

VI. JUDICIAL SECURITY OF TENURE

Security of tenure is critically important to judicial independence. Prior to Confederation, judges held office at the "pleasure" of the executive. Then, s 99 of the *Constitution Act, 1867* provided that federally appointed judges served for life, conditional only on "good behaviour." The provision brought Canadian superior courts into line with the independence afforded the superior courts in the United Kingdom. A constitutional amendment later provided for a retirement age of 75.

Section 99 also permitted the governor general the power to terminate a judicial appointment, based on an "Address of the Senate and House of Commons." To date, this has never occurred.

The need for an administrative structure for processing allegations against sitting judges became apparent in the 1960s, after an inquiry into the question of whether to remove Ontario Supreme Court Justice Leo Landreville from the bench. The first stage of inquiry was conducted under the *Inquiries Act*. A second stage was conducted by a subcommittee of members of Parliament. The recommendation was for removal. Though he eventually resigned, Landreville J challenged the legitimacy of the inquiry process in court. Ten years later, the Federal Court ruled that the inquiry had exceeded its mandate.

The federal *Judges Act*, RSC 1985, c J-1 now provides a formal administrative structure for investigating complaints against superior court judges. The Canadian Judicial Council (CJC), set up in 1971, oversees the process. The chief justice of Canada acts as chair of the council, which is made up of the chief justices and associate chief justices of the superior courts and federal courts. The council's responsibilities are twofold. First, it examines allegations of misconduct to determine if they warrant investigation. Second, it runs a public inquiry for serious and well-founded allegations to provide a basis for a recommendation to the minister of justice on the question of removal. The decision to seek removal of a judge by Parliament lies with the minister, not the CJC. The public inquiry process was designed to insure judicial accountability, without undermining the constitutional principle of judicial independence, through a process that is fair, efficient, and transparent.

Complaints may be submitted by anyone—lawyers, parties to a particular case, or members of the public. Most complaints are dismissed informally on the basis that they are not

relevant or are trivial, vexatious, or not in the public interest. An inquiry committee is set up if the matter is sufficiently serious to warrant a judge's removal.

Under s 63(1), the minister of justice or a provincial attorney general may require the council to commence an inquiry. In *Cosgrove v Canadian Judicial Council*, [2007 FCA 103](#), leave to appeal to SCC refused, [2007 CanLII 66738](#), s 63(1) was challenged as infringing judicial independence. The Federal Court of Appeal held that s 63(1) was constitutional, and the Supreme Court denied leave to appeal.

The criteria for recommendations for removal from office include a determination that a judge has become permanently incapacitated or disabled; is unable to carry out the duties of the office due to age, illness, or misconduct; has failed to carry out these duties; or was situated in a position incompatible with these duties. The general concern is whether conduct falling within these categories has undermined public confidence in the judge's ability to execute the judicial role. Since 1971, the CJC has recommended the removal of a judge in three instances, invariably prompting resignations by the judges under review.

In the last few years, there have been a number of controversies concerning alleged judicial misconduct at both the judicial and federal levels. Consider the following cases. In your opinion, did the judge's conduct merit discipline?

1. While he sat on the Alberta Provincial Court, Robin Camp acquitted a defendant of sexual assault. The acquittal was overturned by the Alberta Court of Appeal (*R v Wagar*, [2015 ABCA 327](#)), which found that Camp J's conduct and reasons for judgment disclosed numerous serious errors of law. Court transcripts showed that Camp questioned the complainant's morals, called her attempts to fight off an attack "ineffectual," repeatedly referred to her as the "accused," and remarked that "sex and pain sometimes go together" (at 52). Perhaps most notoriously, when the complainant was giving evidence about the assault, alleged to have occurred in a bathroom, Camp asked her: "[W]hy couldn't you just keep your knees together?" (at 40).

Sometime after the trial, Camp was appointed to the Federal Court of Canada. He was thus subject to the federal complaint system described above.

See Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council, *In the Matter of an Inquiry Pursuant to s 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp* (29 November 2016), online (pdf): *Canadian Judicial Council* <https://cjc-ccm.ca/cmslib/general/Camp_Docs/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf>.

2. On November 9, 2016, the day after Donald Trump was elected President of the United States, Ontario Provincial Court Judge Bernd Zabel walked into court wearing a red "MAKE AMERICA GREAT AGAIN" baseball hat. The incident attracted widespread public criticism. A few days later, Zabel J apologized and acknowledged that he should not have worn the hat in court. Eighty-one complaints were filed.

At a hearing before the Ontario Judicial Council, Zabel J testified that he purchased the hat as historical memorabilia at a time when it seemed highly unlikely that Trump would win. Zabel J stated that he thought "it would add a bit of humour by starting off the day with the hat, which was very ill-fitting—it looks very silly on me." He admitted that when he passed two colleagues in the hall, one of them asked: "Are you out of your mind?" After the clerk registrar announced that Court was in session, Zabel J stated: "Just in celebration of a historic night in the United States. Unprecedented." He took off the hat and placed it on the dais with the MAGA phrase visible to those in the courtroom.

Following media coverage of the incident, some members of the public and legal community expressed concern about Zabel J's capacity (real or perceived) to render fair judgments. They cited Trump's conduct throughout the 2016 campaign, including derogatory comments about women, a proposed temporary ban on Muslims entering the United States, the deportation of undocumented immigrants, and a plan to build a wall along the Mexican border. There were no complaints from individuals actually in the courtroom on the day in

question. In fact, one of those persons wrote a letter in support of Zabel, as did other members of the legal profession.

See Ontario Judicial Council, *In the Matter of 81 complaints respecting the Honourable Justice Bernd Zabel a Judge of the Ontario Court of Justice in the Central West Region* (11 September 2017), online (pdf): <<https://s3.amazonaws.com/tld-documents.llnassets.com/0004000/4632/358713557-ojc-hearing-re-justice-zabel-decision-september-11-2017.pdf>>.

3. Section 55 of the Judges Act prohibits judges from engaging in any occupation or business other than their judicial duties.

In 2018, Ontario Superior Court Justice Patrick Smith accepted an appointment as the Interim Dean of Law at Lakehead University. The Law School, which was established in 2013, has as its mandate "Aboriginal and Indigenous Law, Natural Resources and Environmental Law, and Sole/Small Town Practice." The faculty had recently lost its dean, a Native American named Angelique EagleWoman, who resigned after experiencing what she alleged to be institutional racism.

Justice Smith sought and received support from the Chief Justice of the Superior Court and, subsequently, express permission from the federal Minister of Justice for a six-month leave. The approval contained a number of limitations to ensure that he provide solely "academic leadership" (as opposed to, say, fundraising and faculty hiring).

Many years earlier, Smith J had faced criticism after sentencing a First Nations chief to six months in jail for contempt of court. The chief was charged after refusing a mining company permission to access traditional territory. That case, along with some others rendered by the judge, became the focus of negative media attention,

The CJC, of its own accord, initiated an investigation into Smith J's acceptance of the decanal position. The CJC cited, in part, Smith J's failure to consider "the possible public controversy associated with the reaction from First Nations chiefs and ... the political environment or the potential effect on the prestige of judicial office" (at para 36).

See *Smith v Canada (AG)*, 2020 FC 629.

4. In 2021, a controversy arose regarding the alleged involvement of a federal judge in the hiring of a new Director of the International Human Rights Program (IHRP) of the Faculty of Law at the University of Toronto. A search committee had decided upon an international law scholar named Valentina Azarova. After some initial negotiations, the hiring process was halted. The university cited timing and immigration concerns. It then emerged that a judge of the Tax Court of Canada, David Spiro, had corresponded with university officials to alert them to concerns from the Centre for Israel and Jewish Affairs that Azarova's hiring would be met with controversy and could harm the university's reputation. The concerns related to Azarova's past scholarship on the Israeli–Palestinian conflict.

A number of complaints lodged with the CJC alleged that by his conduct, Judge Spiro had "put the integrity and impartiality of the Tax Court of Canada in jeopardy, and cause[d] any party or lawyer before the Court who is Palestinian, Arab, or Muslim to reasonably fear bias" (at 26 [Scott]).

See Craig M Scott, "Letter of April 21, 2021, from Craig Scott to Canadian Judicial Council Review Panel in Justice David Spiro Proceeding (CJC File 20-0260) Concerning the Reliability of the University of Toronto Cromwell Report & For the Record," (21 April 2021), online: *Osgoode Hall Law School* <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1220&context=public_writing>; Canadian Judicial Council, Press Release, "Canadian Judicial Council Completes its Review of the Matter Involving the Honourable DE Spiro" (21 May 2021), online: <<https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-review-matter-involving-honourable-de-spiro>>.

VII. LITIGATING THE CONSTITUTION

We end this chapter with a very brief overview of the ways in which constitutional issues reach the courts for adjudication. Constitutional litigation addresses broad issues of public concern but is conducted within the basic framework developed for the litigation of private law claims. This section outlines a number of special rules and procedures developed to accommodate the particular requirements of public law. It begins with a look at the critical advisory function of Canadian courts, which accounts for a significant proportion of constitutional jurisprudence.

A. THE REFERENCE FUNCTION OF CANADIAN COURTS

Constitutional disputes reach the courts in a variety of ways. Sometimes constitutional issues are raised in the course of ongoing civil or criminal proceedings. In civil cases between private parties, one party may challenge the validity of a law that the other party relies on. In the context of a prosecution, the accused might raise a constitutional challenge to the provision that is the basis of the criminal or penal charges. In other cases, an independent action may be commenced by someone seeking a declaration that a particular law is invalid on constitutional grounds.

Constitutional issues may also reach the courts by means of a process initiated by the executive branch of the state, known as the reference procedure. The following excerpt provides a description of this distinctive function:

Carissima Mathen, Courts Without Cases: The Law and Politics of Advisory Opinions

(Oxford: Hart, 2019) ch 1 (footnotes omitted)

The reference function first appeared in Canadian law in 1875. It was inserted into the federal statute—the Supreme and Exchequer Court Act—that brought into existence the Supreme Court of Canada. The function has remained in place ever since, not just for the Supreme Court but for other courts as well. It sets Canada somewhat apart from similar Anglo-American legal systems. There are few comparators to Canadian references in the United Kingdom, Australia, New Zealand or the US federal judiciary. The function also sets Canada apart from those legal systems with specialist “constitutional courts.” Numerous countries, in Europe and elsewhere, have instituted courts that are singularly authorised to consider constitutional issues. Those constitutional courts receive issues in numerous ways, including as references. Thus, Canada is not unique in permitting advisory opinions. What is more unusual, however, is to have the same court perform both an adjudicative *and* an advisory function.

References resemble cases in a few ways. Like cases, references involve questions about the law, put to law’s primary arbiters: courts. References display the procedural trappings of litigation. They feature participants, materials, oral advocacy and written reasons provided by judges. And when the body of references is compared to the body of cases, it can be very difficult to tell them apart . . .

In at least two respects, though, references and cases are distinct. First, references do not involve a “plaintiff” in the ordinary meaning of that term. In Canada, a reference is virtually always initiated by the government, but in doing so it does not make a *legal claim* against anyone else. It simply puts questions to a court for an answer. . . . Of course, the government typically offers arguments to assist a court in arriving at

an answer and, indeed, often has a clear opinion on what the answer to the questions it has posed should be. And that opinion will tend to correspond with what the government perceives to be in its legal or political interest. Certainly, the actor who initiates a reference is expected to make submissions to the court. But even if it does not, the proceeding can continue. That fact marks a sharp difference from cases. If, in an ordinary case, a plaintiff refused to take a position on one or more of the issues, the opposing party (respondent) almost certainly would prevail. The same does not necessarily apply to references. I say “not necessarily” because if the initiating government declines to offer any argument on a question, the court may, in turn, decline to provide an answer. But, especially in proceedings where the court has agreed to receive submissions from additional participants, such as other Attorneys General or advocacy groups, the court might well decide to answer the question anyway.

Another distinction between references and cases has to do with the status, in law, of the answers that each proceeding provides. When a court decides a case, it issues a judgment, which binds the parties, and also, in certain instances, binds other courts in how they decide cases—and thus it may be said that it binds generally.

References do not engage the court’s power in the same way. The court provides an answer but that answer does not take the form of a *judgment*. The reference, supposedly, is not backed by the power of law and the court is not entitled to directly impose consequences on parties. That does not mean, of course, that references have no practical consequences. ... [T]hey do have consequences, sometimes highly significant ones. But the consequences are considered to be ancillary or collateral to what the court has done. This distinction is often expressed as the idea that references are not *legally binding*.

Think of the decisions you have encountered throughout this book. How many have been references? Were you even aware of that fact as you were reading them?

Legislation in each province empowers the provincial cabinet to initiate references to its court of appeal (and in the case of British Columbia, to the Superior Court). Appeals from the appellate court rulings in reference cases are allowed as of right—without seeking permission—to the Supreme Court of Canada.

The reference procedure departs from the common law requirement that courts consider legal issues in the context of concrete disputes between interested parties who are best situated to make the most pertinent arguments and present the relevant facts. For this reason, art III of the US Constitution requires a “case or controversy” for the Supreme Court to hear a case. However, advisory jurisdiction akin to the Canadian arrangements is a common feature of modern constitutions.

To its detractors, the reference procedure politicizes the judiciary by requiring consideration of hypothetical issues. However, references are often mounted to formalize, expedite, or consolidate proceedings raising the same or similar challenges. In these instances, the issue may be so important that the provincial or federal government in question wants to have carriage of the case or to shift the cost from private parties to the state. In addition, the reference procedure affords a variety of ways to bring the factual nexus to the courts.

The reference procedure provides a relatively quick mechanism for obtaining a definitive answer on a question of constitutional validity because it bypasses the trial level proceeding. The government that has carriage of the case can ensure expeditious preparation when the importance of the case warrants. In some cases, the reference procedure is invoked to obtain a determination of validity before a particular piece of legislation comes into force in order to avoid the complications and costs of reliance on an unconstitutional law.

References produce advisory opinions that do not carry the precedential weight of decisions made in the context of ordinary litigation. In practice, however, references are considered as authoritative as other court judgments. Perhaps the strongest indication of the important role of the reference procedure is the fact that references have not only been numerous, but many have delineated significant areas of constitutional theory and doctrine.

The Supreme Court has on occasion refused to answer a reference question—for example, where the question lacks sufficient legal content, where it is ambiguous or imprecise, or where the information submitted to the court is inadequate. An example is *Reference re Same-Sex Marriage, 2004 SCC 79*. The Reference arose when, instead of appealing a series of losses in provincial appellate courts to the Supreme Court, the federal Executive converted the matter into a reference. At paras 61 to 71, the Court refused to answer the final question: whether an opposite-sex requirement for marriage was consistent with the Charter. The Court set out a “unique combination of factors” (at para 71) supporting its refusal. The same-sex couples who had initiated the litigation in the provincial courts had secured declarations of their entitlement to marry. They had relied on the finality of the lower court judgments and acquired rights entitled to protection when they entered into marriages on the basis of these rulings. Any certainty in the matter would depend on the Court confirming those lower court rulings. An advisory opinion to the contrary would not dislodge those rights but would undermine them unfairly. In addition, answering this question would not ensure uniformity of provincial law on the question. Further, the Court clearly believed that it was inappropriate for the federal government to bring this reference question to the Court when it had not taken the opportunity to appeal the constitutional question to the Supreme Court for a legal determination after it lost at the appellate court level.

Professor Mathen writes:

In examining the Supreme Court’s assertion that it may refuse to answer a reference question, several points are noteworthy. The first point is that the stated reasons for refusal constitute, for all intents and purposes, a doctrine of “reference justiciability.” Mootness, prematurity, insufficient factual context, lack of specificity—all of these reasons constrain the courts’ intervention in issues that do not correspond to the limits, integral to the separation of powers, that are imposed on the court in view of their role as legal arbiters. Thus, reference justiciability plausibly demonstrates an intention by the Court to retain first and foremost a *legal* role. [Mathen’s second point, discussing references where the Court asserted the ability to refuse while nonetheless answering the question, is omitted.]

The third point is the most striking. The Court has never explained the source of its discretion. Nor has it reconciled such refusals with the plain, mandatory language of its enabling statute. Section 53(4) of the *Supreme Court Act* proclaims, *inter alia*, that “it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question[.]” ... Yet, the Court has never mentioned that aspect of its reference function.

At times, the omission seems deliberate. For example, in the *Same-Sex Marriage Reference*, the Court “reproduced and interpreted the first three subsections of section 53 of the *Supreme Court Act* which detail the authority of the Governor General in Council to refer questions to the Court” but did not mention “the fourth subsection detailing the Court’s duty on a reference.” One would have thought that final subsection particularly material to the Court’s decision to decline to answer Question 4.

What can explain such a pattern?

It may be that even though section 53(4) of the *Supreme Court Act* squarely articulates a “duty,” the Court does not feel that the language is material. It may be that no one has ever put the question squarely to the Court. Or, it may be that the Court believes that it is operating in a different register—one where its institutional and functional independence supersedes any countervailing directive from another branch.

The latter point seems the most likely. That is, the Court has never explicitly considered the obligation framed in section 53(4) because the Court does not consider it relevant to its current context, a context that, at least in part, presumes that its institutional independence must prevail.

The Supreme Court functions as the chief constitutional arbiter and the primary interpreter of its norms; and it enjoys independence from the other branches. Any doubts about that independence appear to have been laid to rest by the 2014 *Supreme Court Act Reference* [where] the Court stated that it is no longer a creature of statute that can be repealed at Parliament's command. ...

The *Supreme Court Act Reference* arose because of a question about the eligibility requirements for judges appointed to the Court. But to the extent that the Court's conclusion rests on the need to maintain its status as an independent arbiter, it might well resist an expectation to answer a reference question it views as inappropriate. ...

Thus, the unwritten constitutional principle of judicial independence, articulated as an aspect of the separation of powers, best explains the Court's repeated insistence that it can not be compelled to answer any reference question the executive chooses to put before it. The doctrine insulates the Court from being in a truly subordinate position to the executive, and provides a check of sorts on the latter. This is not, of course, to say that refusal doctrine is a cure-all for the political consequences of the advisory function. But it is an important part of the fuller picture of executive–judicial relations when an advisory function is in play.

See Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (London: Hart, 2019) ch 4 (footnotes omitted).

For discussion of some of the strategies involved in initiating a reference, see the discussion of the *Greenhouse Gas Pollution Pricing Act* in Chapter 9, Peace, Order, and Good Government.

B. ORDINARY LITIGATION RULES

1. Standing

The rules of standing determine who has a sufficient interest in a legal issue to raise it before a court. Historically, common law standing rules required that a law directly affect an individual's own interests in a way that is different from the law's impact on the public at large (the "special-prejudice" test). Such rules were intended to prevent "officious intermeddlers" from clogging the courts, as well as to ensure a concrete factual context for the adjudication of disputes. The traditional common law rules of standing are typically satisfied where a law is being challenged on federalism or Charter grounds in the course of ongoing legal proceedings. This, however, is not necessarily the case where an independent action is commenced seeking a declaration that a law is unconstitutional, and it is in that context that the issue of standing generally arises. For further discussion of some of the complexities of standing in Charter cases, see Chapter 25, Enforcement of Rights.

The traditional common law rules of standing precluded private citizens from bringing constitutional challenges in the public interest because that role was the exclusive domain of the attorney general, at the federal or provincial level, as the chief law officer of the Crown. But in a series of cases, the Supreme Court of Canada significantly broadened the rules of standing in constitutional cases, creating a new category of "public interest standing" to be granted at the discretion of the courts: see *Thorson v Attorney General of Canada*, [1975] 1 SCR 138, 1974 CanLII 6; *Nova Scotia Board of Censors v McNeil*, [1976] 2 SCR 265, 1975 CanLII 14; *Minister of Justice of Canada v Borowski*, [1981] 2 SCR 575, 1981 CanLII 34. These cases recognized the special significance of constitutional issues and the private citizen's interest in ensuring that governments act within constitutional bounds. A fourth case, *Finlay v Minister*

of *Finance of Canada*, [1986] 2 SCR 607, 1986 CanLII 6, extended the rules for public interest standing to non-constitutional, public law issues.

Until 2012, the test that was applied to determine public interest standing was that summarized by Martland J writing for the majority in *Borowski* (at 598):

[T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

In *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, 1992 CanLII 116, the Court applied the test for public interest standing to a public interest group challenging a number of provisions contained in the new *Immigration Act*, which had not yet come into force. Stringently applying the third part of the test, the Court determined that there was ample opportunity for refugee claimants to challenge the various provisions, and it refused standing to the group, which had demonstrated a strong commitment to fairness in the immigration and refugee process. The Court expressed concern that the interest group's challenge was too expansive and that it would lack factual underpinning as to the actual operation of the provisions in question.

However, in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, the Supreme Court of Canada, in a unanimous decision authored by Cromwell J, reformulated the test for public interest standing, softening the third part of the test and more generally allowing for greater discretion and flexibility:

[1] The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

[2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner"

• • •

[20] ... [T]he three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.

On the facts of the case, the Court granted public interest standing to an organization (the Society) devoted to improving the working conditions of sex workers living in Vancouver's

downtown eastside that wanted to bring a comprehensive challenge to the prostitution provisions in the *Criminal Code*. In applying the third part of the test, the fact that there were other possible ways of bringing these issues before the courts was not determinative. The Court took into account the practical reality that it was unlikely that persons charged under the prostitution provisions would bring a claim similar to the Society's and that the inherent unpredictability of criminal trials would make it difficult for a party to raise the kind of challenge raised by the Society. The existence of a civil case in another province raising some of the same issues was likewise not found to be determinative.

2. Notice Requirements

Governments have an interest in defending constitutional challenges to their legislation. The early case of *Russell v The Queen* (1882), 7 App Cas 829, 51 LJPC 77 (UKJCPC) (found in Chapter 4, The Late Nineteenth Century: The Courts Set an Initial Course) is often cited as an example of a significant constitutional decision made with no governmental participation. In response to this concern, constitutional notice requirements have been in place since the late 19th century. These stipulations, included in legislation dealing with the rules of litigation practice, require litigants to notify the affected attorneys general of any constitutional issues raised in the courts.

If the attorney general is already a party to the litigation, the notice provisions serve to provide the details of the particular constitutional claim and the time and place for the hearing. If the issue arises in private litigation, the notice provisions provide this information as well as the opportunity to participate in the litigation as intervenors, who may make written and oral submissions on the constitutional issues and have carriage of any appeal. If the intervention takes place at the trial level, the intervening attorney general may be permitted to submit evidence as well. (The general arrangement for non-governmental intervention is discussed further below.)

In each province, constitutional notice requirements apply to provincially administered courts and, in some cases, administrative boards and tribunals as well. Although the provincial legislation varies, the general approach is to require litigants raising a constitutional issue to notify the federal attorney general and the attorney general of the province in question.

For constitutional cases reaching the Supreme Court of Canada on appeal, the appellant must file a notice of constitutional question and serve it on any attorney general not already a party to the appeal: see ss 33(2)-(4) of the *Rules of the Supreme Court of Canada*, SOR/2002-156:

(2) In the case of an appeal that raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule, or the inoperability of a statute or regulation, a notice of constitutional question in Form 33B shall be filed by the appellant, as a schedule to the notice of appeal, or by the respondent, if the issue has been raised by the respondent, within 30 days after leave to appeal has been granted or after the filing of the notice of appeal in respect of an appeal for which leave is not required.

(3) On the same day as the notice of constitutional question is filed, a copy of it shall be served by email on all other parties to the appeal and on any attorney general who is not already a party to the appeal together with hyperlinks to

- (a) the judgment granting the application for leave to appeal and the reasons for judgment of the court appealed from;
- (b) the legislative provisions at issue; and
- (c) if applicable, the relevant provisions of the *Canadian Charter of Rights and Freedoms* and any other legislative provision relied on by the party.

(4) Within four weeks after the service of a notice of constitutional question, an attorney general who intends to participate in the appeal shall serve on all other parties and file with

the Registrar a notice of intervention in Form 33C without being required to obtain leave to intervene.

3. Parties and Intervenors

Constitutional issues often affect the interests of a wide range of persons and groups. Apart from constitutional references, which envision broad participation by interested and affected parties, participation in constitutional litigation is, as a starting point, confined to the parties to the litigation. In cases where a private party has commenced a court proceeding to directly challenge a piece of legislation (or a regulation promulgated under statute or an executive order), the attorney general, or another cabinet minister or government official or body, will be the respondent. As noted above, when an attorney general intervenes in litigation between private parties pursuant to a notice of constitutional question, they take on the status of intervenor and may make written or oral submissions on the constitutional issues.

Other interested and affected persons and groups may apply to the Court to be allowed to participate as intervenors under the applicable procedural rules. At the Supreme Court of Canada, for example, intervention is governed by ss 55-59 of the *Rules of the Supreme Court of Canada*. Section 55 provides: "Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge." The judge, in granting intervention, may "impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record" (s 59(b)). The intervenor is not allowed to present oral argument, unless authorized by the judge as per s 59(2), nor can the intervenor introduce new issues unless ordered by the judge as per s 59(3). Since the adoption of the Charter, intervention by public interest groups has become a common feature of constitutional litigation. In some instances, cases have attracted a large number of intervenors.

Where constitutional issues arise in the course of private litigation or in the context of a criminal or penal prosecution, a request for intervention requires the Court to balance a variety of considerations. These include, on one hand, concerns about unfairness to the parties or the accused, the cost to all participants of additional participants, and any delay in resolving the specific dispute. On the other hand, the Court will consider the potential usefulness of the intervenor's contribution to full consideration of the constitutional issue. In reference cases, where private interests are not exclusively at stake, intervention raises fewer concerns. The courts may nonetheless place some limits on the number of intervenors to avoid repetition and irrelevancy, or require intervenors to work together on their submissions.

Further reading on all of the issues touched on above can be found in Carissima Mathen, "Access to Charter Justice" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 639; Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) ch 7; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf); Barry L Strayer, *The Canadian Constitution and the Courts*, 3rd ed (Toronto: Butterworths, 1988).

PART FOUR

INDIGENOUS PEOPLES

CHAPTER FOURTEEN

INDIGENOUS PEOPLES AND THE CONSTITUTION

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I. INTRODUCTION

We are witnessing a reconfiguration of the Canadian federation through the Supreme Court of Canada's case law on Indigenous issues. In the process, the Court is recasting the country's constituent actors in profound yet uncertain ways. This includes questions about the place of Indigenous nations in the constitutional sphere. It opens space for considering Indigenous legal traditions within and beyond Canadian law. As the constitution expands, the Court has difficulty extending their opinions to their limit. In true common law fashion, it sleepwalks along diverse paths, "theorizing" as it goes, since cases appear as seemingly isolated incidents.

Constitutional law's reconfiguration should prompt us to make explicit the varied epistemological and ontological understandings of law (in general) and constitutional law (in particular). In studying constitutional law, we rarely refer to our implicit epistemological assumptions, which concern how we know what "law" is, and the basis for asserting that something is indeed law. Moreover, we do not consider questions about law's ontology, which involves the elements that make up such "law." This is generally true for both Indigenous and non-Indigenous peoples.

The failure to explicitly identify our assumptions about the very idea of "constitution" and "law" prevents us from considering the fragility of all knowledge, including legal knowledge. As a result, we do not see that concepts such as constitutions and law are always abstract reifications of what is "out there." When we do not see that conceptual constructs about law are mere hypotheses, unfortunately, we have difficulty evaluating the strengths and weaknesses of these

concepts. Freedom to question what flows from our assumptions is diminished when we fail to understand what underlies them. For instance, as one author underlined,

by equating law with inanimate abstract norms, by conceiving the concept of law as a noun rather than a as verb—that is, as a hierarchy of rules rather than, in the words of Lon L. Fuller, “a complex syste[m] of order that came into existence, not by a single act of creation, but through the cumulative effect of countless purposive directions of human effort”—we fail to grasp the relational character of law and constitutional law. By doing so, we lose sight of the human interactions hidden under the veil of notions such as “autonomy and rights,” “aboriginal title,” “sovereignty,” “peoples,” and “nation,” etc.”

See Jean Leclair, “Invisibility, Wilful Blindness and Impending Doom: The Future (If Any) of Canadian Federalism” in C Hughes Tuohy et al, eds, *Policy Transformation in Canada: Is the Past Prologue?* (Toronto: University of Toronto Press, 2019) 106 at 107.

This insight suggests that a study of constitutional law should draw attention to its various conceptual assumptions.

In this book thus far, you have been introduced to many views about law in general and constitutional law in particular. With the revitalization of Indigenous legal traditions, Canadian constitutional law is being shaken by the advent of different ways of conceiving and creating law. The law is also changing because Indigenous actors are asserting their right to be recognized as this nation’s founders and first polities. As old ideas are challenged, new perspectives are introduced. All the while, the Court attempts to metabolize these changes without jettisoning its settled legal categories. This is a difficult task, and this chapter will reveal where fractures, gaps, and inconsistencies have arisen in the jurisprudence. These challenges are apparent even as constructive opportunities arise from the Court’s jurisprudence.

Thus, this chapter asks you to consider whether Canada’s constitution will recognize the incontrovertible reality of Indigenous difference. This raises further questions about how we will conceptualize the relevant legal actors in Canada’s federation. It should cause us to ask: what is our federal ontology? One implication of the resurgence of Indigenous law and the rise of Indigenous constitutionalism is that the country can no longer be simply thought of as a set of “equal provinces” or of “two nations.” Canada is also filled with Indigenous nations. In the process of considering Indigenous differences, this opens questions about the place of other groups in our society. Moreover, we will ask you to consider whether Canada’s constitutional ontology only allows for groups. In turn, we also ask: are these nations made up of culturally homogenous and unanimous members? Too often, that is how we refer to the Quebec nation or the Rest of Canada (ROC). Will this be the case for Indigenous nations? Or can they be more than racialized ethnicities or groups? Can they exercise political and legal power as nations filled with complex lineages, identities, backgrounds, and ideas? In short, this chapter asks you to consider the relationship of Canada’s Indigenous constitution to Canada’s colonial constitution.

These ontological questions are normative—they are used to evaluate Canada’s constitution and make judgments about its legitimacy and legality. They raise questions about whether we will imagine constitutional law in terms of exclusivity and/or otherness, or in terms of “double aspect” and interrelatedness. This leads to issues about what institutional shapes the interpretation of Canada’s constitution creates. Is the Supreme Court helping us to imagine a polity where Indigenous communities are endowed with inherent powers, or one where they are defined according to an asphyxiated understanding of cultural distinctiveness?

The above questions highlight one of this chapter’s objectives, which is to provide an introductory picture of the multiple bases of legitimacy upon which Canada’s constitutional system rests. You will see that the ongoing contact and relationship between Indigenous and state legal systems call for nuanced approaches. We invite you to read this chapter with Nigerian author Chimamanda Ngozi’s caution: “Beware the danger of a single story” (Chimamanda Ngozi, “The Danger of a Single Story” (2009), online (video): [Ted.com](https://www.ted.com/talks/chimamanda_ngozi_beware_the_danger_of_a_single_story)

<https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/transcript?language=en>.

As an introductory point, one of the ways complexity is revealed in understanding Indigenous peoples' interaction with the constitution is through their diversity.

There are over one-and-a-half million people of Indigenous ancestry in Canada today. They represent almost 5 percent of Canada's population. They are members of Indigenous nations that existed before the arrival of the French, British, and other early settlers who initiated the Dominion of Canada. The term "Aboriginal" conceals the great diversity among peoples descended from those who lived in North America prior to the arrival of Europeans. Indigenous peoples are distinguished from one another by different social, cultural, economic, political, and spiritual traditions. Their languages may be as different from one another as English is to Mandarin, or as Hindi is to Hawaiian. Indigenous peoples in Canada are divided into 11 distinct language families and are further separated into 50 different linguistic groupings. In British Columbia, where six of the language families are located, these differences are often found merely by crossing from one mountain valley into the next.

Despite the diversity that exists among the first peoples of Canada, the text of s 35(2) of the *Constitution Act, 1982* makes only three distinctions among Aboriginal peoples (as Indigenous peoples are labelled in that text): the Indian, Inuit, and Métis. While courts have been somewhat sensitive to the greater multiplicity of Indigenous groups than this section may suggest, the terms Indian, Inuit, and Métis continue to form the predominant classification to describe differences among Indigenous peoples.

The federal government has maintained the term "Indian" as a category to recognize certain Indigenous people as holding status under its *Indian Act*, RSC 1985, c I-5. Thus, the term continues to have legal relevancy, as Indian status entitles its holder to a specific set of rights and obligations set out in treaties, legislation, and other government policies and programs. In 2019 there were 1,008,955 registered status Indians in Canada. This number had grown from 670,000 in 2000. First Nations people who are not registered by the government under federal procedures are referred to as non-status Indians. They constitute approximately 14 percent of the Indigenous population in Canada.

The Inuit are the Indigenous peoples of the circumpolar north. Historically known and misnamed as the Eskimo, they are divided between Alaska, Russia, Greenland, and Canada. Inuit people speak Inuktitut (although there are about 20 different dialects), and they number over 60,000 people in 53 Canadian communities. Most of the Inuit in Canada are found in the Northwest Territories, Quebec, Labrador, and Nunavut, the latter territory being formed in 1999 as a result of a land claim agreement with the Inuit of the eastern Arctic. There is no federal Inuit registry, and thus the status/non-status distinction does not exist in this group.

There are over 587,000 Métis people in Canada. The origins of the Métis peoples are entwined with the historical fabric of Canada. It was in the territory west of the Ottawa valley and the Great Lakes that they first evolved into a new and distinct grouping that eventually affected Indigenous rights in Canada. The Métis originally formed as the result of 19th-century unions between male fur traders and primarily Indigenous women on the Canadian plains; this population of mixed ancestry forged a common cultural, political, and ethnic identity. This shared identity led to the creation of the Métis nation that negotiated and fought for recognition when Manitoba and parts of the old North-Western Territory were being ushered into Confederation. Although the Métis under Louis Riel achieved some limited success in causing Canada to take account of their rights, for most of the country's history, numerous federal administrations treated the group as if they had no distinct rights. For example, the federal government acted as though it had no obligations to the Métis, and largely presumed that they would be assimilated into the general population. Other groups have arisen to claim Métis rights throughout the country as Indigenous people from different regions of the country married non-native traders and created distinct political and cultural identities that have legal significance for Aboriginal rights today.

II. INDIGENOUS CONSTITUTIONALISM

John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada"

in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) ch 2 at 13

The territory we now call Canada has a rich, varied, and ancient legal history. Prior to European arrival Indigenous peoples regulated their affairs and addressed their disputes by reference to a vast array of laws, practices, customs, and traditions. Although (like every human society) they did not always abide by their highest values they nevertheless had recognizable sources of authority which guided their governance and collective decision-making. Indigenous peoples "constituted" their societies in different ways—through, *inter alia*, Confederacies, House-structures, Leagues, Chieftainships, Tribes, Bands, and extended kin-based groupings. These structures facilitated world views which enhanced relationships of peace, friendship, and respect. At the same time, they were not always successful in cultivating goodwill. War, conflict, and social disorder were painful and periodic facts of life, as is the case with all peoples. Indigenous constitutional law prior to European arrival was complex. It produced tremendous innovations in human care and sustainable land use while struggling to deal with humanity's inevitable limitations.

Like all legal systems, Indigenous constitutional structures were entangled with their broader life ways. Furthermore, these structures were fluid and changed through time. They shifted, transformed, or retrenched in accordance with the ebb and flow of political, economic, and social considerations at play across the continent. Long and complicated legal genealogies preceded European arrival in North America. Indigenous constitutional arrangements continued to develop after Europeans contact too. In fact, Indigenous legal orders renew themselves even in the present day. All living traditions must adapt and change in order to stay relevant amidst changing circumstances. The presence of law is a necessary but not sufficient condition for securing any society's health, stability, and vitality. Law must always be seen in its broader light to understand it can never be an autonomous source of power. This is as true in a historical context as it is in the present day. Law draws upon wider social networks even as it simultaneously constitutes those relationships.

One example of Indigenous constitutionalism can be found amongst the Anishinaabe of central and western Canada. Anishinaabe people are the second largest Indigenous people in Canada, and the fourth largest Indigenous nation in the United States, after the Navajo, Cherokee and Lakota nations. They live within the Great Lakes watershed, surrounding large parts Lakes Superior, Huron and Michigan, and occupying the farmlands and woodlands north of Lake Ontario and Lake Erie. They are found in Quebec, Ontario, Manitoba and Saskatchewan, and even have small communities in Alberta and British Columbia. They also have reservations in the forests and prairies of northern Michigan, Wisconsin, Minnesota and North Dakota. Historically, the Anishinaabe were organized as clans in a loose confederacy more recently called the Council of the Three Fires. People from these groups collectively refer to themselves as the Anishinaabe, meaning "people" or "good people," though there are many possible interpretations of their name. Despite these labels they may be more easily recognized as the Odawa, Potawatomi, and Ojibwe people. Many still live in mixed "Three Fires" communities in their ancient homelands, while others

have spread throughout the continent living in cities, towns and villages throughout the United States and Canada.

[The following is excerpted from Aaron Mills, Karen Drake & Tanya Muthusamipillai, "An Anishinaabe Constitutional Order" in the Honourable Justice Patrick Smith, ed, *Reconciliation in Canadian Courts: A Guide for Judges to Aboriginal and Indigenous Law, Context and Practice* (Ottawa: National Judicial Institute, 2017) 260.]

Anishinaabe epistemology corresponds to an Anishinaabe conception of truth. Basil Johnston explains that the Anishinaabemowin phrase, "w'dae'b'awae" means "he or she is telling the truth, is correct, is right." But the truth referred to in this phrase is not absolute; it is a qualified truth, one that is circumscribed by the speaker's experience, perception, and command of language at that time. What one knows is a result of one's own lived experience and active personal engagement, and so is always bounded by the limits of that experience. This conception helps to explain why an elder will so often say that she or he does not know much at all. Such statements are incongruous from within a western epistemology, according to which Anishinaabe elders are authorities on Anishinaabe traditions. But as Leanne Simpson explains, "you'll always hear from our Elders what appears to be them 'qualifying' their teachings with statements that position them as learners, that position their ideas as their own understandings, and place their teachings within the context of their own lived experience." ...

Aadizookaanan and an Anishinaabe Constitutional Order

The following three Aadizookaanan, or stories, reflect an Anishinaabe constitutional order, which in turn give rise to Anishinaabe legal processes, which in turn give rise to Anishinaabe law. Our analyses of the first two stories highlight the tripartite framework of an Anishinaabe constitutional order. Our analysis of the third story identifies a key principle of Anishinaabe constitutionalism: the democratic principle. Insofar as Anishinaabe Aadizookaanan reflect constitutional and legal principles, it may be tempting to treat them as analogous to Canadian judicial decisions. However, Anishinaabe Aadizookaanan differ from judicial decisions in at least the following four ways. First, although Aadizookaanan reflect constitutional and legal principles, they are not authorities for law in the way that judicial decisions are authorities for common law principles. That is, Aadizookaanan are not the source of the law. Rather, the source may be some interaction within the natural world or the actions of community members which give rise to a consensus regarding the principle at issue.

Second, judicial decisions are meant to be fully comprehensible on a first reading, at least to those with the requisite training. Stories, in contrast, are often understood in a layered way. The different layers of meaning within a story can provide guidance that varies from person to person or even within the life of one and the same person, depending on his or her life experiences each time the story is heard. In other words, stories do not embody an objective, absolute truth; they require a listener or reader to be actively engaged in meaning-making. Our analysis of the following three stories reflects our understandings, based on our own experiences to date. ...

Third and most important, case law abstracts law from facts, intending that law should apply across all contexts. That is to say, case law—like all other sources of law in the common law tradition—presents law as rules: rights and reciprocal obligations standardized within a common citizenship. Aadizookaanan, on the contrary, present law as responsibilities: gifts and reciprocal needs that vary across distinct kinds of relationships. The law that lives in an Anishinaabe story is specific to its relational context; it cannot be disembedded, generalized, and transplanted elsewhere.

Finally (and directly connected to the third point), judicial decisions require a narrow kind of reason which reflects a liberal conception of rationality: we are—at law at least—primarily, thinking agents. Working effectively with case law requires finely honed critical and analytical thinking skills. Reasoning in the context of Anishinaabe law frequently makes demands upon one's whole self: body, mind, spirit, and heart. "Reasoning" has less to do with an anthropocentric form of rationality, and more to do with the provision of reasons.

a) The Vision of Kitche Manitou

The following account is drawn from Basil Johnston's version of "The Vision of Kitche Manitou." It begins with a poem in which people ask elders: Who gave each creature his or her gift? For example, who gave the rose the gift of beauty? Who gave the bear the gift of a sense of timing? Who gave me my vision? Finally, the narrator asks:

Who gave to us
The gifts we do not own
But borrow and pass on?

Johnston then provides a prose account of the earth's creation. Kitche Manitou, the Great Spirit, had a vision of all things. Kitche Manitou dreamt of a sky, sun, and moon, of mountains and forests, of flowers and vegetables, of crawling, flying, and swimming beings. Kitche Manitou also saw the birth and end of things, feeling wind and rain, and experiencing sadness and love. In these experiences Kitche Manitou realized that these experiences had to be brought into being. One by one, being by being, Kitche Manitou brought the world into existence. Out of nothing Kitche Manitou made rock, water, fire, and wind and gave each a unique power that became its soul-spirit. From these four substances, Kitche Manitou created the sun, stars, moon, and earth. From water, to wind, to air, from mountains, valleys, islands, and rivers, from plant beings to animal beings, Kitche Manitou gave each a unique power and nature. Last of all, Kitche Manitou created humankind. Humans were the least in the order of dependence, and weakest in bodily powers, but humanity had the greatest gift: the power to dream. Then, Kitche Manitou "made The Great Laws of Nature for the well being and harmony of all things and all creatures." The Great Laws of Nature governed all of the activity of the natural world, including "the place and movement of sun, moon, earth and stars; ... the powers of wind, water, fire, and rock; ... the rhythm and continuity of lift, birth, growth, and decay." Kitche Manitou's vision was brought into existence.

This story reflects the tripartite structure of Anishinaabe constitutionalism. The first constitutional feature revealed is the ontological condition of interdependence. ... [Remember that ontology considers concepts such as existence, being, becoming, and reality and includes how entities are grouped into basic categories.] Humans are not dominant over the natural world. Humans are "last in the order of creation, least in the order of dependence, and weakest in bodily powers." If all animals and plants ceased to exist, humans could not survive. Of all parts of the natural world, we are the most dependent. But our relationship with the rest of the natural world is more accurately described not merely as one of dependence, but of interdependence. We need each other, and this is why we were given gifts to pass on.

The second constitutional feature pertains to our gifts: it is the relational logic of mutual aid. ... Each being has its own gift. The gifts of the rose, the bear, humans, and others are described in the poem. Kitche Manitou conferred a special power and nature—or in other words, a gift—on each and every aspect of the natural world, including rocks, water, fire, and wind. There is a legal word for this sacred gifting in

Anishinaabemowin: we say "miinigowiziwin." It refers to the fact that Kitche Manitou has gifted all of creation with what we need to have a good life together. As such, these are gifts "we do not own/But borrow and pass on." In other words, our gifts are not ours to profit from; we are not to use them to benefit only ourselves. We pass them on; that is, we must give our gifts away. In another of Basil Johnston's stories, a boy named Southwind says to his grandmother, "No'okomiss, the flower gift that I received; it was really meant for you, wasn't it?" She replies: "In a way it is. But it was meant for everybody. But that's the way all human gifts are." It is the connection developed from the constant flow of gifts meeting one another's needs that coordinates interaction and sustains community cohesion, not the formal and detached bindingness of a social contract.

The third constitutional feature pertains to the ends towards which political community is oriented: harmony. ... The natural world, in its natural state, is not chaotic and lawless. There is no state of nature in the sense of an original, disordered position from which we escape by entering into a social contract to create a civil society where we impose human-made laws on each other. On the contrary, all aspects of the natural world are already imbued with law—The Great Laws of Nature—and are ordered. These laws govern all aspects of the natural world, including human life. When these laws are followed, the result is harmony. Importantly—and this is a critical distinction—"harmony" does not mean "non-conflict," but rather "non-disconnection." It is a state of shared openness to the gifts and needs of self and of other.

b) The Great Law

The following account of "The Great Law" is drawn from the version orated by Randy Councillor and recorded and revised by Art Przybilla. Rabbit usually ate a wide variety of plants and as a result did not overtax any one species of plant. But one summer the roses were especially delicious, and so Rabbit ate nothing but roses. Roses eventually became scarce and as a result Bee was unable to make as much honey as usual. Bee did not know the cause of the rose shortage, and frequently lamented the problem to all of the other animals. The other animals lost patience with Bee's complaints and ignored him.

Hummingbird, though, listened to Bee and to determine the extent of the issue, went on a search for roses. After searching widely but finding no roses, Hummingbird and Bee called a Great Council of all the animals. Even at the Great Council, the other animals did not listen to Bee, until Bear realized and explained that the lack of roses meant that he would not have enough honey for winter, and would have to eat some of the other animals instead. The other animals then became concerned that they might be eaten by Bear or, like Fox, have to compete with Bear for food.

The birds then flew to the four directions of the earth in search of roses. All were unsuccessful except Hummingbird who returned with a single half-dead Rose. The animals used all of their combined knowledge to nurse Rose back to health. When she was strong enough to talk, the animals asked what had happened and Rose explained that Rabbit had eaten all of the roses except for her. Bear was so angry that he yanked Rabbit by the ears, which then became stretched. Bear eventually tossed Rabbit into the angry crowd and told them to kill Rabbit. But Rose told them to stop. Rose explained that all of the animals were at fault—even Bear—as they failed to listen to Bee when Bee first told them about the issue. In fact, the animals had broken the greatest of all the Great Laws, namely, the one that "tells us that all living things must watch over all other living things and Mother Earth." And so Rabbit's ears remained stretched to remind all to listen, and roses received thorns to keep them safe from rabbits.

This story again illustrates the tripartite structure of Anishinaabe constitutionalism. However unlike the last story, this one identifies the three core constitutional features through the stacking errors of the animals in the story. It requires the reader to engage with it in a slightly different way, and to reason for oneself. It also introduces several Anishinaabe constitutional principles (which, recall, are not about rules, but rather how to orient oneself in relationship); we address only one of these here: the democratic principle. With respect to the first structural feature of Anishinaabe constitutionalism—interdependence—each of the animals lost sight of the fact that it is in a relationship of interdependence with the others. Rabbit failed to appreciate how his eating all of the roses would affect Bee’s ability to make honey, which would affect Bear’s diet, which in turn would affect other animals who might then be eaten by Bear or have to compete with Bear for food. The other animals also failed to appreciate this interdependence when they ignored Bee’s initial complaints.

With respect to the second structural feature of Anishinaabe constitutionalism—mutual aid—the majority of animals declined to render aid, opting out of the mutual aid framework which involves a cycle of (i) gifting, which generates (ii) gratitude, which in turn generates (iii) reciprocity, which then generates further (i) gifting, and so on. When the animals initially ignored Bee, they withheld their gifts—such as the birds’ ability to search for roses—which would have helped to meet the needs of all other animals.

With respect to the third structural feature of Anishinaabe constitutionalism—harmony—when the animals opt out of the mutual aid framework, closing themselves off from one another, the result is a sequence of calamity culminating in Rabbit’s ears getting stretched and Rabbit almost being killed. Harmony is finally restored when the animals are reminded of their responsibility to “watch over” each other, which they can fulfill by rendering mutual aid. Rabbit’s stretched ears serve as an ongoing reminder of this responsibility. In this way, the Anishinaabe constitutional order—including interdependence, mutual aid, and harmony—is encoded on the physiognomy of rabbits.

This story also illustrates the democratic principle. Although we use the term “democratic principle,” we mean something closer to participatory democracy, as opposed to representational democracy. Once Bee and Hummingbird realized the extent of the problem, rather than try to address it by themselves, they called a Great Council of all the animals. Each animal used its unique gifts to contribute toward the solution. The birds flew in all directions to find signs of roses and when Rose was found half-dead, they all used their gifts to nurse Rose back to health. No animal was left out of the decision-making process.

c) Beaver Gives a Feast

The following account of “Beaver Gives a Feast” draws from the version recorded in F.G. Speck’s collection. Beaver was the Chief of the animals. From time to time, Beaver decided to give a feast to which he invited all of the other animals. Each time Beaver passed the food to his guests, he also passed wind. This sent silly Otter into hysterics. Other guests cautioned Otter: “You mustn’t laugh when Beaver does that; he is our chief.” But every time Beaver passed wind at one of his feasts, Otter would laugh. Finally, the animals told Otter that he must not attend the next feast. “You must not come; you never keep your mouth shut; you always laugh,” they explained. While Otter obliged, he told the others to ask Beaver to send him his share of the food in the size of Otter’s forearm. Otter has a very small forearm. The others agreed and attended the feast. Beaver noticed that Otter was not among his guests and asked, “Where, indeed, is Otter? I like him because he is so funny.” The people

told Beaver that Otter did not come but asked Beaver to send him his share of food. Beaver cut a piece the size of Otter's forearm and sent it back to Otter.

This story further illustrates the democratic principle, mentioned above, which is one principle that flows from the tripartite structure of an Anishinaabe constitutional order. Here, we see how authority works within Anishinaabe political community, namely, through persuasive compliance. ... Beaver is the leader, but he does not exercise coercive authority or use force in a top-down way, as a western sovereign does in the form of the executive branch of government. Instead, authority rests with the community members; it was the community members who told Otter to stay home and the evidence that they truly possess power is that even though Otter enjoyed the feasts, he complied with the direction from the community. The community members have not delegated their authority upward to Beaver, but rather retain it themselves.

Power is diffuse, spread throughout the community, not concentrated in the position of the leader, whose role is rather that of facilitator and coordinator. Although Beaver enjoys Otter's company, Beaver respects the community's decision that Otter is not to attend the feasts. Beaver does not order Otter to attend or overrule the direction of the community. Instead, Beaver exercises persuasive leadership. He organizes and facilitates community gatherings, but does not impose his own will over them. It is Beaver's ability to effectively coordinate interaction within the community—in part via the provision of gifts in the form of holding feasts, and in part because of his demeanour, as evidenced by his attitude to Otter, who laughs at him—that persuades others to heed his judgment. Despite being prohibited from attending the feasts, Otter's need is not overlooked; the community brings him his share of food. Otter only asks for a small portion of food, presumably because that is all he needs. He does not take more than he needs.

An Anishinaabe Constitutional Order

To understand the significance of a constitutional order (whether Anishinaabe or otherwise), it is helpful to understand the relationship between a constitutional order and a society's related institutions. Aaron Mills explains this relationship—in the context of both Indigenous and non-Indigenous societies—using a tree model. The following account of Mills's tree model of legality is reproduced with minor adaptations from his article entitled "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today."

The roots of a society are its lifeworld: the story it tells of creation, which reveals what there is in the world (ontology) and how we can know (epistemology). Creation stories disclose what a person is, what a community is, and what freedom looks like. [Ask yourself, what are Canada's creation stories regarding the nation state?] The trunk is a constitutional order: the structure generated by the roots, which organizes and manifests these understandings as political community. [Ask yourself, what is your view of Canada's constitutional structure?] The branches are our legal traditions, the set of processes and institutions we engage to create, sustain, and unmake law. [Ask yourself, what process and institutions seem necessary to common law traditions, civil law traditions, and Indigenous legal traditions?] The trunk [the constitutional order] conditions the branches [the legal traditions]: it doesn't determine what they'll look like, but it powerfully shapes them. A constitutional order similarly settles which legal processes are legitimate within it, but without ever determining a necessary given set of processes as the legitimate ones. Subject to the conditions the trunk [the constitutional order] will support, legal processes and their institutions may vary considerably in object, scope, and means. Law [particular obligations, duties,

entitlements, responsibilities, regulations, resolution of disputes], like leaves, experiences a still higher level of conditioning. It's subject to the branches, which are subject to the trunk, which is subject to what the roots will bear. All are intimately connected but never so tightly as to eliminate difference.

No two trees are the same even if they're both white birch, the same age, and growing right next to one another. Similarly, while two Anishinaabe communities may have nearly identical constitutional structures, they will have laws that differ. Each level of legality within the lifeworld-law relationship is both empowered and constrained by the levels below. Every people is a tree. We tell different stories of creation (even those of us who don't acknowledge doing so or who explicitly disclaim a view of creation) and the story we tell powerfully conditions the constitutional order we bring into being. For all societies, that constitutional order will shape legal processes and institutions, and thus ultimately what we count as law.

This isn't quite the full image, however. Unlike Canada's constitutional image of a "living tree," no tree is actually freestanding. The roots are buried in and wrapped tightly against earth. The tree is grounded in something beyond itself. A "rooted" lifeworld doesn't reflect the spontaneous ideas of those standing within it. Indigenous societies are all different and have unique creation stories. But all are of something common: the earth beneath and all around us. What varies is how we understand it.

John Borrows, Anishinaabe Language and Law

[unpublished]

In contemporary debates, the Anishinaabe use the word *chi-inaakonige* to describe a configuration of a community's constitutional relationships. *Chi* means great or large and *inaakonige* means to act on an object through making a judgment, deciding things a certain way, or agreeing on something. Anishinaabe language is 70-80% comprised of verbs. Action is the focus of Anishinaabe constitutionalism. It cannot be compressed into a single concept, nor can it be summarized in a single sentence. For Anishinaabe people, constitutioning is a fluid verb; it is a practice, rather than a fixed noun or idea. This is why it cannot be captured or frozen as one thing. Constitutioning is always in motion; it joins or separates diverse persons, places and things to one another in the wider world. As explained in the above excerpt, Anishinaabe constitutionalism is relational. Since it functions like a verb, it sustains, negates, regulates, inflects, modifies, and/or transforms relationships and states of being through time. Recognizing, respecting and creating space for differences of opinion is of its key functions. Like all other legal traditions, Anishinaabe law flowing from its ongoing constitution is subject to continual revision and modification within its own contexts. It is a living legal tradition.

As with other constitutional traditions there are many manifestations of Anishinaabe law. They can be positivistic and expressed through written constitutions, statutes and regulations. This concept is embodied in the word *kinwezhewewm*, meaning rules and standards. Anishinaabe law can also flow from deliberation, persuasion, discussion and agreement. Tribal Court decisions in the United States are a prime example of these practices. Anishinaabe law is also formed through analogy, particularly in relation to the environment and physical world. These practices are included in ideas expressed by the word *akinomaagewin*. For example, Anishinaabe constitutionalism can draw guidance from the respect and deference owed to rocks, plants, and animals which are an important part of most Anishinaabe relationships. Many stories, songs and ceremonies are used to communicate these

broader issues. Furthermore, as explained above Anishinaabe constitutionalism also finds support in their broader "creational" teachings, related to who we are and how we should live their lives. The term *mino-bimaadiziwin*, living-well, is often used to describe and express these aspirations. Anishinaabe people also live by customary laws, called *Anishinaabe-izhitwaawinan*. These customs are formed through implicit behaviors developed through time, which provide resources for reasoning related to constitutional law.

As noted, some Anishinaabe communities have drafted written constitutions to bolster, highlight and support their unwritten constitutional laws. One example comes from the Anishinabek Nation which is a group of over 43 reserve communities in Ontario. While Anishinaabe clans and other unwritten provisions are at the heart of their constitution, the Anishinaabe Chi-Naaknigewin of the Anishinabek Nation Constitution contains the following clauses: Article 1—Interpretation; In this Law; Article 2—Official Languages of the Anishinabek Nation; Article 3—E'Dbendaagzijig of the Anishinabek Nation; Article 4—Principles of Government Structure of the Anishinabek Nation; Article 5—The Anishinabek Nation Law-Making Powers; Article 6—Anishinabek Nation E'Dbendaagzijig Participation and Consultation; Article 7—Institutions of the Anishinabek Nation Government; Article 8—Relationship of Laws; Article 9—Constitutional Amendment; Article 10—Admission of First Nations to the Anishinabek Nation; Article 11—Withdrawing of First Nations from the Anishinabek Nation

The Preamble to the Chi-Naaknigewin, called *Ngo Dwe Waangizid Anishinaabe* (One Anishinaabe Family) reads as follows:

Debenjiged gii'saan anishinaaben akiing giibi dgwon gaadeni mnidoo waadiziwin.

Creator placed the Anishinaabe on the earth along with the gift of spirituality.

Shkode, nibi, aki, noodin, giibi dgosdoonan wii naagdowendmang maanpii shkagmigaang.

Here on mother earth, there were gifts given to the Anishinaabe to look after; fire, water, earth and wind.

Debenjiged gii miinaan gechtwa wendaagog Anishinaaben waa naagdoonjin ninda niizhwaaswi kino maadwinan.

The Creator also gave the Anishinaabe seven sacred gifts to guide them. They are:

Zaagidwin, Debewin, Mnaadendmowin, Nbwaakaawin, Dbaadendiziwin, Gwe-kwaadziwin miinwa Aakedhewin.

Love, Truth, Respect, Wisdom, Humility, Honesty and Bravery.

Debenjiged kiimiingona dedbinwe wi naagdowendiwin.

Creator gave us sovereignty to govern ourselves.

Ka mnaadendanaa gaabi zhiwebag miinwaa nango megwaa ezhwebag, miinwa geyaabi waa ni zhiwebag.

Indigenous First Nations from many of the 43 communities of the Anishinabek Nation have also drafted their own constitutions which relate to the Anishinabek Constitution. These constitutional documents contain provisions which relate to the broader Anishinabek Nation, the waters, rocks, plants, insects, fish animals and other living beings, their own people and the federal and provincial governments. For example, the Wikwemikong Chi-Naaknigewin contains a preamble and then clauses relating to: 1.0 Anishinabeaadziwin; 2.0 Supreme Law; 3.0 The Wiikwemkoong Chief and Council; 4.0 Jurisdiction and Authority; 5.0 Law-Making Process; 6.0 Enforcement of Wiikwemkoong Laws; 7.0 Governance; 8.0 Review and Appeal

of Administrative Decisions; 9.0 Review and Challenging Laws; 10.0 Accountability; 11.0 Conflict of Interest; 12.0 Equal Protection and Benefit of Law; 13.0 Rights of Wiikwemkoong Anishinaabek; 14.0 The Elders Council; 15.0 The Justice Council; 16.0 Reasonable Limits; 17.0 Ratification; 18.0 Amendment of the Wiikwemkoong Gchi-Naaknigewin; 19.0 Definitions.

The Anishinabek Nation has negotiated a Governance Agreement and Fiscal Agreement with the Federal government to recognize and further implement their constitutional regimes. For the Anishinabek Nation this process is designed to recognize their inherent rights. As they have proclaimed: "The Anishinabek member First Nations have never relinquished any authority to other governments such as Canada. Although member First Nations have maintained that they are their own government, they are not recognized as such in Nation-to-Nation affairs. Through the proposed Governance Agreement, other governments will recognize member First Nations and the Anishinabek Nation as individual governments with legal status parallel to the federal and provincial governments." "First Nation Governance" (last visited 19 October 2021), online: *Anishinaabe Governance* <<https://www.governancevote.ca/agreement/first-nation-governance>>.

III. COMMON LAW FOUNDATIONS OF CONSTITUTIONAL RECOGNITION

There has been a search for appropriate ways to constitute peaceful relationships between Indigenous and non-Indigenous peoples ever since their first encounters in North America, discussed in Chapter 3, From Contact to Confederation. Chiefs and elders, legislators and judges, fur traders, farmers, and others have all accessed their own particular legal traditions in an attempt to create a workable order between the groups. As a result of these efforts, constitutional law in relation to Indigenous peoples has become an amalgam of different legal sources. Its doctrines are informed by, *inter alia*, the traditional laws and customs of Indigenous peoples, French and British colonial practice, executive proclamations, British legislative action, treaties, Privy Council rulings and decisions of the senior appellate courts of the United States and Australia, international law, and various sections of the *British North America Acts* and *Constitution Act, 1982*. As contemporary Canadian legal institutions sort through these various legal orders in answering the questions that come before them, the quest for reconciliation between Indigenous peoples and the Crown is gaining momentum. The responses generated by this search are changing our understanding of constitutional law in Canada.

Most, if not all, constitutional issues involving Indigenous peoples occur against the backdrop of Aboriginal rights with respect to land. Before 1982, apart from treaties that establish "reserves" for the exclusive use and enjoyment of Indigenous peoples, which, generally speaking, are regulated by the federal *Indian Act*, Anglo-Canadian law conceptualized Indigenous rights with respect to land as "Aboriginal title"—a common law entitlement that vested in Indigenous peoples, initially at least, by virtue of the *Royal Proclamation* of 1763. As noted in Chapter 3, the *Royal Proclamation* was issued in the aftermath of the *Treaty of Paris*, in which France ceded what is now Quebec to Great Britain. The *Royal Proclamation* also declared that lands possessed by Indians throughout British territories in America were reserved for their exclusive use, unless previously ceded to the Crown. Specifically, it stated that

Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

It also stipulated that "lands and territories not included within the limits of [the governments created under the *Royal Proclamation*, including that of Quebec], or within the limits of the territory granted to the Hudson's Bay Company" be reserved under the King's protection and dominion for the use of the Indians. Not only were these lands reserved, but they could not be purchased, settled, or taken by British subjects without the Crown's consent and prior issuance of a licence. Practically, that meant that the Crown alone possessed the initial right to acquire the Indigenous territory to which the *Proclamation* referred.

Until the Supreme Court of Canada's decision in *Calder v Attorney General of British Columbia*, [1973] SCR 313, 1973 CanLII 4, the *Royal Proclamation* was generally viewed by the judiciary as the sole Anglo-Canadian legal source of Indigenous rights. In 1888, for example, the Privy Council in *St Catherine's Milling & Lumber Co v The Queen* (1888), 14 App Cas 46, 10 CRAC 13 (UKJCPC) held that Aboriginal title existed in common law because the *Royal Proclamation* declared that Indigenous peoples had certain rights to their territory. The Privy Council held further that Aboriginal title was but a burden on the underlying title of the Crown and gave rise to rights that were merely personal and usufructuary in nature that could be extinguished by the exercise of the Crown's sovereign power.

An exception to this idea of the source of Indigenous rights lay with the famous decision by Monk J in *Connolly v Woolrich* (1867), 17 RJRQ 75, 1 CNLC 70 (SC), discussed below in an excerpt from a report by the Royal Commission on Aboriginal Peoples. As the Royal Commission indicates, *Connolly v Woolrich* suggests that Indigenous peoples hold rights to their territory not because of what the *Royal Proclamation* may have said about the matter but because Indigenous rights emanate from Indigenous legal systems that predate the establishment of colonies on the continent.

Canada, Royal Commission on Aboriginal Peoples, Report, vol 2, Restructuring the Relationship

(Ottawa: Queen's Printer, 1996) at 186-90 (footnotes omitted)

In about 1802, a young Quebec lad by the name of William Connolly left his home near Montreal and went west to seek his fortune in the fur trade with the North-West Company. A year or so later, William married a young woman of the Cree Nation, Suzanne by name. Suzanne had an interesting background. She was born of a Cree mother and a French-Canadian father and was the stepdaughter of a Cree chief at Cumberland House, located west of Lake Winnipeg. The union between William and Suzanne was formed under Cree law by mutual consent, with a gift probably given to Suzanne's stepfather. It was never solemnized by a priest or minister. Marriages of this kind were common in the fur trade during that era.

William and Suzanne lived happily together for nearly 30 years and had six children, one of whom later became Lady Amelia Douglas, the wife of the first governor of British Columbia. William Connolly prospered in the fur trade. He was described by a contemporary as "a veritable *bon garçon*, and an Emeralder of the first order." When the North-West Company merged with the Hudson's Bay Company, he continued on as a chief trader and was later promoted to the position of chief factor.

In 1831, William left the western fur trade and returned to the Montreal area with Suzanne and several of their children. Not long after, however, William decided to treat his first marriage as invalid and he married his well-to-do second cousin, Julia Woolrich, in a Catholic ceremony. Suzanne eventually returned west with her younger children and spent her final years living in the Grey Nuns convent at St. Boniface, Manitoba, where she was supported by William and later by Julia. When

William died in the late 1840s, he willed all his property to Julia and their two children, cutting Suzanne and her children out of the estate.

Several years after Suzanne's death in 1862, her eldest son, John Connolly, sued Julia Woolrich for a share of his father's estate. This famous case, *Connolly v. Woolrich*, was fought through the courts of Quebec and was eventually appealed to the Privy Council in Britain before being settled out of court. The judgement delivered in the case sheds a remarkable light on the constitutional status of Aboriginal nations and their relations with incoming French and English settlers.

In support of his claim, John Connolly argued that the marriage between his mother and William Connolly was valid under Cree law and that the couple had been in "community of property," so that each partner to the marriage was entitled to one-half of their jointly owned property. When William died, only his half-share of the property could be left to Julia, with the other half passing automatically to Suzanne as his lawful wife. On Suzanne's death, her children would be entitled to inherit her share of the estate, now in the hands of Julia.

The initial question for the Quebec courts was whether the Cree marriage between Suzanne and William was valid. The lawyer for Julia Woolrich argued that it was not valid. He maintained that English common law was in force in the northwest in 1803 and that the union between Suzanne and William did not meet its requirements. Moreover, he said, in an argument that catered to the worst prejudices of the times, the marriage customs of so-called uncivilized and pagan nations could not be recognized by the court as validating a marriage even between two Aboriginal people, much less between an Aboriginal and a non-Aboriginal person.

The Quebec Superior Court rejected Julia Woolrich's arguments. It held that the Cree marriage between Suzanne and William was valid and that their eldest son was entitled to his rightful share of the estate. This decision was maintained on appeal to the Quebec Court of Queen's Bench.

In his judgement, Justice Monk of the Superior Court stated that he was prepared to assume, for the sake of argument, that the first European traders to inhabit the northwest brought with them their own laws as their birthright. Nevertheless, the region was already occupied by "numerous and powerful tribes of Indians; by Aboriginal nations, who had been in possession of these countries for ages." Assuming that French or English law had been introduced in the area at some point, "will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants?" Answering his own question in the negative, Justice Monk wrote: "In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives."

Justice Monk supported this conclusion by quoting at length from *Worcester v. Georgia*, a landmark case decided in 1832 by the United States Supreme Court under Chief Justice Marshall. Justice Marshall, describing the policy of the British Crown in America before the American Revolution, states:

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies;

but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only. [Emphasis supplied by Justice Monk.]

According to this passage, the British Crown did not interfere with the domestic affairs of its Indian allies and dependencies, so that they remained self-governing in internal matters. Adopting this outlook, Justice Monk concluded that he had no hesitation in holding that “the Indian political and territorial rights, laws, and usages remained in full force” in the northwest at the relevant time. This decision portrays Aboriginal peoples as autonomous nations living within the protection of the Crown but retaining their territorial rights, political organizations and common laws.

A number of lessons can be drawn from *Connolly v. Woolrich*. First, the sources of law and authority in Canada are more diverse than is sometimes assumed. They include the common laws and political systems of Aboriginal nations in addition to the standard range of Euro-Canadian sources.

Second, in earlier times, the history of Canada often featured close and relatively harmonious relations between Aboriginal peoples and newcomers. The fur trade, which played an important role in the economy of early Canada, was based on long-standing alliances between European fur traders and Aboriginal hunters and traders. At the personal level, these alliances resulted in people of mixed origins, who sometimes were assimilated into existing groups but in other cases coalesced into distinct nations and communities, as with the Métis of Red River.

Connolly v. Woolrich demonstrates that newcomers have sometimes found it convenient to forget their early alliances and pacts with Aboriginal peoples and to construct communities that excluded them and suppressed any local roots. Despite these efforts, however, the courts have periodically upheld the original relationship between newcomers and Aboriginal peoples and enforced the rights it embraced. Among these was the right of Aboriginal peoples to conduct their affairs under their own laws, within a larger constitutional framework linking them with the Crown.

The decision in *Connolly v. Woolrich* stands in contrast, then, to the common impression that Aboriginal peoples do not have any general right to govern themselves. It is often thought that all governmental authority in Canada flows from the Crown to Parliament and the provincial legislatures, as provided in the constitution acts—the basic enactments that form the core of our written constitution. According to this view, since the constitution acts do not explicitly recognize the existence of Aboriginal governments, the only governmental powers held by Aboriginal peoples are those delegated to them by Parliament or the provincial legislatures

This outlook assumes that all law is found in statutes or other written legal instruments. Under this view, if a right has not been enshrined in such a document, it is not a legal right. At best, it is regarded as only a moral or political right, which does not have legal status and so cannot be enforced in the ordinary courts. Since the constitution acts do not explicitly acknowledge an Aboriginal right of self-government, such a right does not exist as a matter of Canadian law.

However, this view overlooks important features of our legal system. The laws of Canada spring from a great variety of sources, both written and unwritten, statutory and customary. It has long been recognized, for example, that the written constitution is based on fundamental unwritten principles, which govern its status and interpretation. In Quebec, the general laws governing the private affairs of citizens trace their origins in large part to a body of French customary law, the *Coutume de Paris*, which was imported to Canada in the 1600s and embodied in the *Civil Code of Lower Canada* in 1866. In the other provinces, the foundation of the general private law system is English common law, a body of unwritten law administered by the courts, with its roots in the Middle Ages. English common law has never been

reduced to statutory form, except in partial and fragmentary ways. Over the years, it has become a supple legal instrument, capable of being adapted by the courts to suit changing circumstances and social conditions.

Given the multiple sources of law and rights in Canada, it is no surprise that Canadian courts have recognized the existence of a special body of "Aboriginal rights." These are not based on written instruments such as statutes, but on unwritten sources such as long-standing custom and practice. ...

The doctrine of Aboriginal rights is not a modern innovation, invented by courts to remedy injustices perpetrated in the past. ... [T]he doctrine was reflected in the numerous treaties of peace and friendship concluded in the seventeenth and eighteenth centuries between Aboriginal peoples and the French and British Crowns. Aboriginal rights are also apparent in the *Royal Proclamation of 1763* and other instruments of the same period, and in the treaties signed in Ontario, the west, and the northwest during the late nineteenth and early twentieth century. These rights are also considered in the many statutes dealing with Aboriginal matters from earliest times and in a series of judicial decisions extending over nearly two centuries. As such, the doctrine of Aboriginal rights is one of the most ancient and enduring doctrines of Canadian law.

The principles behind the decision in *Connolly v. Woolrich* form the core of the modern Canadian law of Aboriginal rights. This body of law provides the basic constitutional context for relations between Aboriginal peoples and the Crown and oversees the interaction between general Canadian systems of law and government and Aboriginal laws, government institutions and territories.

Justice Monk's views in *Connolly v. Woolrich* on the territorial and political rights of Indigenous peoples initially received little judicial attention in Canada. In fact, soon after Confederation, Canada worked to undermine nation-to-nation relationships with Indigenous peoples and acted to diminish and marginalize collective and individual capacities. As the Truth and Reconciliation Commission of Canada observed in *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), vol 1, "Honouring the Truth, Reconciling for the Future" at 1-3 (footnotes omitted):

For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."

Physical genocide is the mass killing of the members of a targeted group, and *biological genocide* is the destruction of the group's reproductive capacity. *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.

In its dealing with Aboriginal people, Canada did all these things.

Canada asserted control over Aboriginal land. In some locations, Canada negotiated Treaties with First Nations; in others, the land was simply occupied or seized. The negotiation of Treaties, while seemingly honourable and legal, was often marked by fraud and coercion, and Canada was, and remains, slow to implement their provisions and intent.

On occasion, Canada forced First Nations to relocate their reserves from agriculturally valuable or resource-rich land onto remote and economically marginal reserves. Without legal authority or foundation, in the 1880s Canada instituted a "pass system" that was intended to confine First Nations people to their reserves. Canada replaced existing forms of Aboriginal government with relatively powerless band councils whose decisions it could override and whose leaders it could depose. In the process, it disempowered Aboriginal women, who had held significant influence and powerful roles in many First Nations, including the Mohawks, the Carrier, and Tlingit.

Canada denied the right to participate fully in Canadian political, economic, and social life to those Aboriginal people who refused to abandon their Aboriginal identity. Canada outlawed Aboriginal spiritual practices, jailed Aboriginal spiritual leaders, and confiscated sacred objects.

And, Canada separated children from their parents, sending them to residential schools. This was done not to educate them, but primarily to break their link to their culture and identity. In justifying the government's residential school policy, Canada's first prime minister, Sir John A. Macdonald, told the House of Commons in 1883:

When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.

These measures were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will. Deputy Minister of Indian Affairs Duncan Campbell Scott outlined the goals of that policy in 1920, when he told a parliamentary committee that "our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic." These goals were reiterated in 1969 in the federal government's *Statement on Indian Policy* (more often referred to as the "White Paper"), which sought to end Indian status and terminate the Treaties that the federal government had negotiated with First Nations.

Indeed, it was only in 1973, with the decision of the Supreme Court of Canada in *Calder*, above, that Canadian law began to return to recognizing pre-existing Aboriginal rights. In that year, the Court recognized Aboriginal title as a common law entitlement separate and distinct from the *Royal Proclamation* of 1763. With Judson and Hall JJ writing the principal judgments, the Court split evenly on the major issue of whether Nisga'a Aboriginal title to ancestral territory had been extinguished by general land enactments in British Columbia. The Court also split on the issue of whether the *Royal Proclamation* was applicable to Indigenous territory in that province. Justices Judson and Hall were in agreement, however, that Aboriginal title existed in Canada (at least where it has not been extinguished by appropriate legislative action) independently of the *Royal Proclamation* of 1763. Justice Judson stated expressly that the Proclamation was not the "exclusive" source of Indian title (at 322-23, 328). Justice Hall said that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment" (at 390).

In 1884, in a case called *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25, the Supreme Court of Canada agreed with Hall J and found that Indian title was an independent legal interest which predated and survived in spite of Crown assertions of sovereignty. Only Dickson J discussed the nature of Indian interests in land as it relates to governmental obligations as follows:

Guerin v The Queen

[1984] 2 SCR 335, 1984 CanLII 25

DICKSON J (Beetz, Chouinard, and Lamer JJ concurring):

In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), and *Worcester v. State of Georgia*, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.

In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was none the less of [the] opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. Marshall C.J. explained this principle as follows, at pp. 573-74:

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. ... It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

These relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired. *They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it*, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. [Emphasis is mine.]

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria (Secretary)*, [1921] 2 A.C. 399. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, none the less predates it. ...

In the *St. Catherine's Milling* case, *supra*, the Privy Council held that the Indians had a "personal and usufructuary right" [at 54] in the lands which they had traditionally occupied. Lord Watson said that "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished" (at p. 55). He reiterated this idea, stating that the Crown "has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden" (at p. 58). This view

of aboriginal title was affirmed by the Privy Council in the *Star Chrome* case. In *Amodu Tijani, supra*, Viscount Haldane, advertising to the *St. Catherine's Milling* and *Star Chrome* decisions, explained the concept of a usufructuary right as a "mere qualification of or burden on the radical or final title of the Sovereign" (p. 403). He described the title of the Sovereign as a pure legal estate, but one which could be qualified by a right of "beneficial user" that did not necessarily take the form of an estate in land. Indian title in Canada was said to be one illustration "of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle" [at 403]. Chief Justice Marshall took a similar view in *Johnson v. M'Intosh, supra*, saying, "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy" (p. 588). ...

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

NOTE

In *Guerin*, Dickson CJ interpreted *Calder* as deriving common law Aboriginal title from Indigenous peoples' historic occupation and possession of their ancestral lands. No mention is made of *Connolly v Woolrich* or the possibility that Indigenous legal systems might be the source of Aboriginal rights. As you read the cases in the remainder of this chapter, look for instances in which the judiciary treats Indigenous laws and Indigenous legal orders to be potential legal sources of Aboriginal rights.

IV. THE CONSTITUTIONAL ENTRENCHMENT OF ABORIGINAL RIGHTS

Despite the development of a common law framework for Indigenous rights in Canada, the centuries-long legal history of Indigenous–Crown relations did not resolve many issues of basic justice and fairness between the parties. In an attempt to remedy this failure, Aboriginal and treaty rights were entrenched in Canada's newly patriated *Constitution Act* in 1982, as part II of that instrument, outside its *Charter of Rights and Freedoms*. Section 35(1) protects these rights by stating that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The problem with this language was that no one was quite sure what Aboriginal and treaty rights existed as of that date, and therefore what, if anything, was being protected. After the failure to define these rights through four high-profile first ministers' conferences mandated by s 37 of the *Constitution Act, 1982* and a nationally negotiated Charlottetown Accord, the task of defining Aboriginal rights passed to the country's highest court.

The following cases analyze the nature and scope of Aboriginal rights recognized and affirmed by s 35(1).

R v Sparrow

[\[1990\] 1 SCR 1075, 1990 CanLII 104](#)

DICKSON CJ and La FOREST J (Lamer, Wilson, L'Heureux-Dubé, and Sopinka JJ concurring):

This appeal requires this Court to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada," and provides as follows:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish

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... On November 24, 1987, the following constitutional question was stated:

Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations* and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?

[An account of the arguments of the parties and the regulatory regime is omitted.]

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Analysis

We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed," and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations

... [A]cademic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slatery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at pp. 781-82, has observed the following about reading regulations into the rights:

This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

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The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

... [T]he phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. ... [A]n approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

The Aboriginal Right

We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the City of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the Band's right to fish in another area of the Fraser River estuary ... some 16 kilometres (about 10 miles) from the reserve. ...

The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the Band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 307-8:

Dr. Suttles ... thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the Fraser River, including the waters of the three channels by which that river reaches the ocean. As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.

Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times," established a bond with human beings requiring the salmon to come each year to give their bodies to the

humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, was "not the subject of serious dispute." It is not surprising, then, that, taken with other circumstances, that court should find, at p. 320, that "the judgment appealed from was wrong in ... failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right."

In this Court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.

The history of the regulation of fisheries in British Columbia is set out in *Jack v. The Queen*, [1980] 1 SCR 294, especially at pp. 308 et seq., and we need only summarize it here.

[An account of this history is omitted.]

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It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights The consent to its extinguishment before the *Constitution Act, 1982* was not required; the intent of the Sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The *Fisheries Act* and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.

[A discussion of authority is omitted.]

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... The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact

that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. . . .

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... While no commercial fishery existed prior to the arrival of European settlers, it is contended [before this Court] that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

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In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

We now turn to the impact of s. 35(1) of the *Constitution Act, 1982* on the regulatory power of Parliament and on the outcome of this appeal specifically.

Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). ... Section 35(1) is not subject to s. 1 of the Charter nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its

extent are set by the word "inconsistent" in s. 52(1) of the *Constitution Act, 1982* and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aborigines engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures *might qualify*" (emphasis added)—where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the *Charter*.

In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown . . . And there can be no doubt that over the years the rights of the Indians were often honoured in the breach. . . As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the Indians to their aboriginal lands—certainly as legal rights—were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community." In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably [*Calder v British Columbia (AG)*, [1973] SCR 313, 1973 CanLII 4] in this Court to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal Government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians," which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests

in land in this country." (Emphasis added.) See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility." But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government," it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

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It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. ...

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, says the following about s. 35(1), at p. 100:

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

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The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. ...

In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, the following principle that should govern the interpretation of Indian treaties and statutes was set out:

... [T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

In *R. v. Agawa*, *supra*, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its

execution. He also cautioned against determining Indian rights "in a vacuum." The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. ...

... In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (Ont. CA), ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aborigines is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

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... [I]t is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen, supra*.

Professor Slattery's "Understanding Aboriginal Rights," *supra*, ... at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown ... that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. ...

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

Taking the above framework as guidance, we propose to set out the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. ...

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aborigines, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin, supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. ...

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

If a *prima facie* interference is found, the analysis moves to the issue of justification. ... The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by

conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*." (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial

... Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, ... the guiding interpretive principle [is that] ... the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aborigines must be the first consideration in determining whether the legislation or action in question can be justified.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J. ... in *Jack v. The Queen*, [[1980], 1 SCR 294, 1979 CanLII 175 at 313], for such guidelines.

... We therefore repeat the following passage from *Jack*, at p. 313:

Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

I agree with the general tenor of this argument. ... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. ... [T]he Indians' food requirements must be met first The significance of giving the aboriginal

right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

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To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. ... The appellants have, to employ the words of their counsel, a "right to share in the available resource." This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

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We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

Application to This Case: Is the Net Length Restriction Valid?

The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

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According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this Court. We also would order a re-trial which would allow findings of fact according to the tests set out in these reasons.

The appellant would bear the burden of showing that the net length restriction constituted a *prima facie* infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians.

In conclusion, we would dismiss the appeal and the cross-appeal and affirm the Court of Appeal's setting aside of the conviction. We would accordingly affirm the order for a new trial on the questions of infringement and whether any infringement is nonetheless consistent with s. 35(1), in accordance with the interpretation set out here.

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Appeal and cross-appeal dismissed.

NOTES AND QUESTIONS

1. The Court in *Sparrow* did not provide detailed reasons why fishing was an Aboriginal right. Nor did it address the difficult issue of the scope of protection accorded by s 35(1) to Indigenous commercial fishing practices, stating that "[i]n the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes" (at 1101). What are the implications of *Sparrow* for an Indigenous community that seeks to rely on Aboriginal rights as a justification for commercial fishing contrary to federal or provincial law? What if the community in question could point to a historical Indigenous practice of bartering fish for other commodities?

2. In *Sparrow*, the Court acknowledged that there was no explicit language in s 35 to authorize an assessment of the legitimacy of any governmental action that might restrict Aboriginal rights. Nevertheless, the Court developed a test that allowed the government to justify the infringement of Aboriginal rights. How did the Court arrive at this proposition, and is its formulation persuasive?

R v Van der Peet

[\[1996\] 2 SCR 507, 1996 CanLII 216](#)

LAMER CJ (La Forest, Sopinka, Gonthier, Cory, Iacobucci, and Major JJ concurring):

II. Statement of Facts

[5] The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. At the time at which the appellant was charged s. 27(5) read:

27(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

[6] The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. ... The appellant, a member of the Stó:lō, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant [takes] the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982*.

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V. Analysis

Introduction

[15] I now turn to the question which ... lies at the heart of this appeal: How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?

[16] In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are *rights* and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

[17] While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal *rights*, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*.

[18] In the liberal enlightenment view, ... [r]ights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected

[19] *Aboriginal* rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality." ...

[20] The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

[21] The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of aboriginal rights will be comprehended. ... A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and

affirming are "rights." Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect" (*Big M Drug Mart Ltd.*, *supra*, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.

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General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown

[23] Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In [*R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104], this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples. ...

[24] This interpretive principle, articulated first in the context of treaty rights, ... arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aborigines the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

[25] The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. ...

Purposive Analysis of Section 35(1)

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[27] When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

[28] In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law. ...

[29] ... The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights

[30] In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were *already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

[31] More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aborigines lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

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[35] The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery [Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 739] both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States." ...

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[38] The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. ... Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1, is persuasive in the Canadian context.

[39] The *Mabo* judgment resolved the dispute between the Merriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Merriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title

[40] ... Brennan J., writing for a majority of the Court ... consider[ed] the nature and basis of aboriginal title:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. ... [Emphasis added.]

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. ... To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

[41] Academic commentators have also been consistent in identifying the basis and foundation of the s. 35(1) claims of aboriginal peoples in aboriginal occupation of North America prior to the arrival of Europeans. ...

[42] ... In his comment on *Delgamuukw v. British Columbia* ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 Queen's L.J. 350), Mark Walters suggests at pp. 412-13 that the

essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. ... [A] morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added.]

Similarly, Professor Slattery has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities" (Brian Slattery, "The Legal Basis of Aboriginal Title," in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* ([Lantzville, BC: Oolichan Books, 1992]), at pp. 120-21)

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The Test for Identifying Aboriginal Rights in Section 35(1)

[44] In order to fulfil the purpose underlying s. 35(1)—i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions—the test for identifying [aboriginal rights ...] must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

[45] In *Sparrow, supra*, this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J. and La Forest J. identified the Musqueam right to fish for food in the fact that ... participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.

[46] In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

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Factors to Be Considered in Application of the Integral to a Distinctive Culture Test

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Courts Must Take into Account the Perspective of Aboriginal Peoples Themselves

[49] In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow, supra*, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake." It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been

noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives." The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

[50] ... [T]he only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

Courts Must Identify Precisely the Nature of the Claim Being Made in Determining Whether an Aboriginal Claimant Has Demonstrated the Existence of an Aboriginal Right

[51] ... [I]n order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. ...

[52] ... The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.

[53] To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.

[54] ... [A] characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. ... [T]he activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

In Order to Be Integral a Practice, Custom or Tradition Must Be of Central Significance to the Aboriginal Society in Question

[55] To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive—that it was one of the things that truly *made the society what it was*.

[56] This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is *to what makes those societies distinctive* that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. ...

[57] Moreover, ... [t]o reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.

[58] ... The significance of the practice, custom or tradition does not serve to identify the nature of a claim of acting pursuant to an aboriginal right; however, it is a key aspect of the court's inquiry into whether a practice, custom or tradition has been shown to be an integral part of the distinctive culture of an aboriginal community. The significance of the practice, custom or tradition will inform a court as to whether or not that practice, custom or tradition can be said to be truly integral to the distinctive culture in question.

[59] A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

The Practices, Customs and Traditions Which Constitute Aboriginal Rights Are Those Which Have Continuity with the Practices, Customs and Traditions That Existed Prior to Contact

[60] The time period that a court should consider ... is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

[61] The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed *prior to the arrival of Europeans in North America*. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

[62] That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices,

customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[63] ... Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

[64] The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra*, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time." The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

[65] I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

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Courts Must Approach the Rules of Evidence in Light of the Evidentiary Difficulties Inherent in Adjudicating Aboriginal Claims

[68] In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to Aboriginal Rights Must Be Adjudicated on a Specific Rather Than General Basis

[69] Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger [v The Queen, [1978] 1 SCR 104, 1977 CanLII 3]*

this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. ... [T]he existence of an aboriginal right will depend entirely on the practices, customs and traditions of the *particular aboriginal community claiming the right*. ... The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a Practice, Custom, or Tradition to Constitute an Aboriginal Right It Must Be of Independent Significance to the Aboriginal Culture in Which It Exists

[70] In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

The Integral to a Distinctive Culture Test Requires That a Practice, Custom, or Tradition Be Distinctive; It Does Not Require That That Practice, Custom, or Tradition Be Distinct

[71] The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is *not* that it be *distinct* to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is *distinctive*. A tradition or custom that is *distinct* is one that is unique—"different in kind or quality; unlike" (*Concise Oxford Dictionary of Current English*, 9th ed by Della Thompson (Oxford: Clarendon Press, 1995)). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is *distinctive*—"distinguishing, characteristic"—makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture *what it is*, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

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The Influence of European Culture Will Only Be Relevant to the Inquiry if It Is Demonstrated That the Practice, Custom, or Tradition Is Only Integral Because of That Influence

[73] The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question

can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim . . . On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

Courts Must Take into Account Both the Relationship of Aboriginal Peoples to the Land and the Distinctive Societies and Cultures of Aboriginal Peoples

[74] As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

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Application of the Integral to a Distinctive Culture Test to the Appellant's Claim

[76] The first step in the application of the integral to a distinctive culture test requires the court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. In this case the most accurate characterization of the appellant's position is that she is claiming *an aboriginal right to exchange fish for money or for other goods*. She is claiming, in other words, that the practices, customs and traditions of the Stó:lō include as an integral part the exchange of fish for money or other goods.

[77] That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold ten salmon for \$50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, cannot be said to constitute a sale on a "commercial" or market basis. These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.

[Chief Justice Lamer then held that the trial judge made no error in justifying an appellate court's substituting its finding of fact. These findings included: (1) prior to contact, exchanges of fish were only "incidental" to fishing for food purposes (at para 86); (2) there was no "regularized trading system" among the Stó:lō prior to contact (at para 88); (3) the trade engaged in between the Stó:lō and the Hudson's Bay Company, while certainly of significance to the Stó:lō society of the time, was

found by the trial judge to be qualitatively different from that which was typical of the Stó:lō culture prior to contact; and (4) the Stó:lō exploitation of the fishery was not specialized and that suggested that the exchange of fish was not a central part of Stó:lō culture. As a result, Lamer CJ held that the appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Stó:lō culture that existed prior to contact, and he dismissed the appeal.]

NOTES

1. Justices L'Heureux-Dubé and McLachlin issued dissenting judgments in *Van der Peet*. Justice L'Heureux-Dubé outlined and critiqued the majority's approach to characterizing the nature and extent of Aboriginal rights under s 35(1). She advocated describing Aboriginal rights at a fairly high level of abstraction, rather than focusing on the particular Indigenous practice, custom, or tradition. Justice L'Heureux-Dubé rejected the majority's approach as overly majoritarian, unduly restrictive, and as misconstruing *Sparrow*'s use of the words "distinctive culture" (*Sparrow* at 1099):

[157] [Section] 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves.

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[162] ... The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

Regarding the period of time necessary for an activity to be recognized as an Aboriginal right, L'Heureux-Dubé J adopted what she termed a flexible "dynamic-right" (at para 171) approach in preference to a "frozen-right" approach (at para 171), which, in her view, overstates the impact of European influence, crystallizes Indigenous practices as of an arbitrary date, imposes a heavy burden on those claiming an Aboriginal right, and embodies inappropriate and unprovable assumptions about Indigenous culture and society. To qualify as an Aboriginal right, in her view, an Indigenous activity must have formed an integral part of the distinctive Indigenous culture for a substantially continuous period of time. In the instant case, L'Heureux-Dubé J distinguished the activity in question from commercial fishing, characterizing it instead as the right to sell, trade, and barter fish for livelihood, support, and sustenance. Fishing for this limited purpose, in her view, formed part of the Stó:lō's distinctive Indigenous culture and was protected under s 35(1). Justice L'Heureux-Dubé would have remitted to trial the questions of extinguishment, *prima facie* infringement, and justification because she found that there was insufficient evidence before the Court to decide these issues.

Justice McLachlin's dissent differed in both reasoning and result. She emphasized the distinction between an Aboriginal right, which is to be broadly conceived and constant over time, and the exercise of that right, which may vary over time and take modern forms. Unlike L'Heureux-Dubé J, she considered the activity in these cases to be undeniably commercial. Nevertheless, she identified the crucial issue to be whether the sale could be defended as the

exercise of a basic Aboriginal right to continue a historic use of the resource. Justice McLachlin considered and rejected the "integral part," "dynamic rights," and "integral–incidental" tests, favouring instead an empirical, historical approach to defining Aboriginal rights. She wrote at para 230:

[Section] 35(1) ... recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

Applying this view, she found the Stó:lō to have an Aboriginal right to continue to use the resource, though this use would not extend beyond providing for the traditional sustenance needs in their modern form. McLachlin J also articulated and applied a limited view of justification, by which the Crown may prohibit exploitation of a resource only for conservation and the prevention of harm to others. Subject to these limitations, Indigenous people would have a priority to fish for food, ceremony, and supplementary sustenance. Finally, in both cases, she found that the Crown failed to justify the regulations at issue.

2. Requiring Aboriginal rights to manifest continuity with practices, customs, and traditions that existed prior to contact raises conceptual problems with respect to Métis rights recognized by s 35(1), given that Métis peoples are post-contact communities: see *R v Powley*, [2003 SCC 43](#), excerpted below in Section VIII, to learn how the Court has addressed this problem.

3. There were two companion cases to *Van der Peet*. In the first, *R v NTC Smokehouse*, [\[1996\] 2 SCR 672, 1996 CanLII 159](#), the issue was whether the Sheshaht and Opetchesaht peoples possessed an existing Aboriginal right to exchange fish for money. Chief Justice Lamer (La Forest, Sopinka, Gonthier, Cory, Iacobucci, and Major JJ concurring) affirmed the findings of fact of the trial judge, which did not support the claim that prior to contact the exchange of fish for money was an integral part of the distinctive cultures of the Sheshaht and Opetchesaht peoples. The exchange of fish incidental to social and ceremonial occasions was not a sufficiently central, significant, or defining feature of these societies to be recognized as an Aboriginal right under s 35(1). Justice L'Heureux-Dubé dissented on the basis that the evidence showed that the sale, trade, and barter of fish for livelihood purposes was sufficiently significant and fundamental to the culture and social organization of the groups in question to constitute an Aboriginal right and that the right had not been extinguished prior to 1982. Justice McLachlin also dissented on the basis that there existed an unextinguished right to sell fish, limited to equivalence with what the Sheshaht and Opetchesaht historically took from the fishery in accordance with Indigenous law and custom.

In the second companion case, *R v Gladstone*, [\[1996\] 2 SCR 723, 1996 CanLII 160](#), the Supreme Court of Canada also addressed the application of the justification test outlined in *Sparrow* to laws that unduly interfered with the exercise of Aboriginal commercial fishing rights. Gladstone was a member of the Heiltsuk Band, charged with attempting to sell herring spawn on kelp without a proper licence. His defence to the charge was that he was exercising a pre-existing right to fish for commercial purposes. After his conviction was upheld by both the Supreme Court of British Columbia and the Court of Appeal, the accused appealed to the Supreme Court of Canada. A majority of the Court (La Forest J dissenting) found that there was an Aboriginal right that had not been extinguished, and that there was a *prima facie* infringement. Chief Justice Lamer held the commercial sale or barter of herring spawn on kelp to be an Aboriginal right because it was found to constitute a central, significant, and defining feature of the culture of the Heiltsuk prior to contact. The majority also found that there was no clean and plain intention to extinguish the right, and therefore the regulation of the right was *prima facie* an infringement. Chief Justice Lamer then turned to the issue of justification.

R v Gladstone[1996] 2 SCR 723, 1996 CanLII 160

LAMER CJ (Sopinka, Gonthier, Iacobucci, and Major JJ concurring):

Justification

[54] In [R v Sparrow, [1990] 1 SCR 1075, 1990 CanLII 104], Dickson CJ and La Forest J articulated a two-part test for determining whether government actions infringing aboriginal rights can be justified. ...

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[56] ... In this case, where, particularly at the stage of justification, the context varies significantly from that in Sparrow, it will be necessary to revisit the Sparrow test and to adapt the justification test it lays out in order to apply that test to the circumstances of this appeal.

[57] Two points of variation are of particular significance. First, the right recognized and affirmed in this case—to sell herring spawn on kelp commercially—differs significantly from the right recognized and affirmed in Sparrow—the right to fish for food, social and ceremonial purposes. That difference lies in the fact that the right at issue in Sparrow has an inherent limitation which the right recognized and affirmed in this appeal lacks. The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited—at a certain point the band will have sufficient fish to meet these needs. The commercial sale of the herring spawn on kelp, on the other hand, has no such internal limitation; the only limits on the Heiltsuk's need for herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource. This is particularly so in this case where the evidence supports a right to exchange fish on a genuinely commercial basis; the evidence in this case does not justify limiting the right to harvest herring spawn on kelp on a commercial basis to, for example, the sale of herring spawn on kelp for the purposes of obtaining a "moderate livelihood." ...

[58] The significance of this difference for the Sparrow test relates to the position taken in that case that, subject to the limits of conservation, aboriginal rights holders must be given priority in the fishery. In a situation where the aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in Sparrow, makes sense. In that situation it is understandable that in an exceptional year, when conservation concerns are severe, it will be possible for aboriginal rights holders to be alone allowed to participate in the fishery, while in more ordinary years other users will be allowed to participate in the fishery after the aboriginal rights to fish for food, social and ceremonial purposes have been met.

[59] Where the aboriginal right has no internal limitation, however, what is described in Sparrow as an exceptional situation becomes the ordinary: in the circumstance where the aboriginal right has no internal limitation, the notion of priority, as articulated in Sparrow, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one. Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in Sparrow would be to give the right-holder exclusivity over any person not having an aboriginal right to participate in the herring spawn on kelp fishery.

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[61] The basic insight of *Sparrow*—that aboriginal rights holders have priority in the fishery—is a valid and important one; however, the articulation in that case of what priority means, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances which arise when the aboriginal right in question has no internal limitations.

[62] Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

[63] The content of this priority—something less than exclusivity but which nonetheless gives priority to the aboriginal right—must remain somewhat vague pending consideration of the government's actions in specific cases. ... [U]nder *Sparrow*'s priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.

[64] That no blanket requirement is imposed under the priority doctrine should not suggest, however, that no guidance is possible in this area, or that the government's actions will not be subject to scrutiny. Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives ... take into account the priority of aboriginal rights holders, the extent of the [aboriginal] participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. These questions ... do not represent an exhaustive list[;] ... they give some indication, however, of what such an inquiry should look like.

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[69] I now turn to the second significant difference between this case and *Sparrow*. In *Sparrow*, while the Court recognized at p. 1113 that, beyond conservation, there could be other “compelling and substantial” objectives pursuant to which the government could act in accordance with the first branch of the justification test, the Court was not required to delineate what those objectives might be. Further, in delineating the priority requirement, and the relationship between aboriginal rights-holders and other users of the fishery, the only objective considered by the Court was conservation. ...

[70] ... [I]n this case ... almost no evidence has been provided to this Court about the objectives the government was pursuing in allocating the herring resource as it did. Absent some concrete objectives to assess, it is difficult to identify the objectives other than conservation that will meet the "compelling and substantial" standard laid out in *Sparrow*. That being said, however, it is possible to make some general observations

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[73] Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

[74] ... Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective

[75] Although by no means making a definitive statement on this issue, I would suggest that ... after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*

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[77] Other than with regards to the first aspect of the government's regulatory scheme, the evidence and testimony presented in this case is insufficient for this Court to make a determination as to whether the government's regulatory scheme is justified. [The Court outlined what it viewed as the evidentiary deficiencies.] It is not that the Crown has failed to discharge its burden of demonstrating that the scheme for allocating the 20% of the herring stock was justified; it is simply that the question of whether or not that scheme of allocation was justified was not addressed at trial, at least in the sense necessary for this Court to decide the question of whether, under the *Sparrow* test, it was justified.

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[83] A new trial on the question of justification will remedy this deficiency A new trial is not, however, necessary with regards to the first aspect of the government's scheme; the evidentiary record clearly demonstrates that this aspect of the

government's scheme was justified. Witnesses testified as to the conservation objectives of setting the stock at 20 per cent and as to the difficulties encountered by the herring fishery when the catch was set at much higher levels, as was the case in the 1960s. Moreover, the defence witness Dr. Gary Vigers testified that "fisheries management is full of uncertainty"; in the context of such uncertainty this Court must grant a certain level of deference to the government's approach to fisheries management.

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[85] In the result, the appeal is allowed and a new trial directed on the issue of guilt or innocence and, with regards to the constitutionality of s. 20(3), on the issue of the justifiability of the government's allocation of herring.

[Justice L'Heureux-Dubé, in separate reasons, concurred with Lamer CJ. Justice McLachlin, in separate reasons, would have allowed the appeal to the extent of confirming the existence of an Aboriginal right of the Heiltsuk to sell herring spawn on kelp for sustenance purposes and would have ordered a new trial to decide whether that right had been infringed and, if so, whether such an infringement had been justified.]

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Appeal allowed.

NOTES

1. The justification test for the infringement of Aboriginal rights as modified by Gladstone has not been without controversy. Justice McLachlin warned of this in *Van der Peet* when she observed:

[306] ... The extension of the concept of compelling objectives to matters like economic development and regional fairness and the interests of aboriginal fishers ... would negate the very Aboriginal right to fish itself, on the ground that this is required for the reconciliation of Aboriginal rights, and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation based on the economic demands of non-aboriginal individuals. It is a limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

2. Aboriginal rights in Quebec are not treated any differently from the way they are in the rest of the country, despite the historic presence of French sovereignty in the region. In *R v Côté*, [1996] 3 SCR 139, 1996 CanLII 170, Lamer CJ (Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ concurring) wrote:

[51] I do not believe that the intervention of French sovereignty negated the potential existence of aboriginal rights within the former boundaries of New France under s. 35(1). The entrenchment of aboriginal ancestral and treaty rights in s. 35(1) has changed the landscape of aboriginal rights in Canada. As explained in the *Van der Peet* trilogy, the purpose of s. 35(1) was to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans. If such practices, customs and traditions continued following contact in the absence of specific extinguishment, such practices, customs and traditions are entitled to constitutional recognition subject to the infringement and justification tests outlined in *Sparrow*, *supra*, and *Gladstone*, *supra*.

[52] As such, the fact that a particular practice, custom or tradition continued, in an unextinguished manner, following the arrival of Europeans *but* in the absence of the formal gloss of legal recognition from French colonial law should not undermine the constitutional protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble

purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers. I should stress that the French Regime's failure to recognize legally a specific aboriginal practice, custom or tradition (and indeed the French Regime's tacit toleration of a specific practice, custom or tradition) clearly cannot be equated with a "clear and plain" intention to extinguish such practices under the extinguishment test of s. 35(1). See *Sparrow, supra*, at p. 1099; *Gladstone, supra*, at para. 34.

[53] The respondent's view, if adopted, would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country. In my respectful view, such a static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies. To quote the words of Brennan J. in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.), at p. 42:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

3. Two unsuccessful claims for recognition of Aboriginal rights under the *Van der Peet* test are found in Section X, "Indigenous Rights of Self-Government": *R v Pamajewon*, [1996] 2 SCR 821, 1996 CanLII 161 (no right to conduct high stakes gambling on a reserve) and *Mitchell v MNR*, 2001 SCC 33 (no right to cross the border into Canada from the United States without paying customs and excise tax).

NOTE: R V SAPPIER; R V GRAY

In *R v Sappier; R v Gray*, 2006 SCC 54, at issue was whether the Maliseet and Mi'kmaq peoples in New Brunswick possessed an Aboriginal right to harvest timber on Crown lands for personal use. In holding for the Maliseet and Mi'kmaq, Bastarache J, for a majority of the Court, held that "an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right" (at para 21). Instead, attention must be paid to the significance of the resource to the community in question:

[22] ... [I]n order to grasp the importance of a resource to a particular aboriginal people, the Court seeks to understand how that resource was harvested, extracted and utilized. These practices are the necessary "aboriginal" component in aboriginal rights. ... The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.

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[24] In the present cases, the relevant practice for the purposes of the *Van der Peet* test is harvesting wood. It is this practice upon which the respondents opted to found their claims. However, the respondents do not claim a right to harvest wood for any and all

purposes—such a right would not provide sufficient specificity to apply the reasoning I have just described. The respondents instead claim the right to harvest timber for personal uses; I find this characterization to be too general as well. As previously explained, it is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community. The claimed right should then be delineated in accordance with that practice: see *Van der Peet*, at para. 52. The way of life of the Maliseet and of the Mi'kmaq during the pre-contact period is that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. Thus, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community.

Justice Bastarache went on to discuss the meaning of "distinctive culture":

[42] ... [T]his Court in *Van der Peet* set out to interpret s. 35 of the Constitution in a way which captures both the aboriginal and the rights in aboriginal rights. Lamer CJ spoke of the "necessary specificity which comes from granting special constitutional protection to one part of Canadian society" (para. 20). It is that aboriginal specificity which the notion of a "distinctive culture" seeks to capture. However, it is clear that "Aboriginality means more than interesting cultural practices and anthropological curiosities worthy only of a museum" (C.C. Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997), 55 *U.T. Fac. L. Rev.* 419, at p. 434). R. L. Barsh and J. Y. Henderson argue that as a result of the *Van der Peet* decision, "'culture' has implicitly been taken to mean a fixed inventory of traits or characteristics" ("The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993, at p. 1002).

[43] Many of these concerns echo those expressed by McLachlin J (as she then was) and by L'Heureux-Dubé J in dissenting opinions in *Van der Peet*. L'Heureux-Dubé J was of the view that "the approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted" (para. 150). McLachlin J opined that "different people may entertain different ideas of what is distinctive," thereby creating problems of indeterminacy in the *Van der Peet* test (para. 257).

[44] Culture, let alone "distinctive culture," has proven to be a difficult concept to grasp for Canadian courts. Moreover, the term "culture" as it is used in the English language may not find a perfect parallel in certain aboriginal languages. Barsh and Henderson note that "[w]e can find no precise equivalent of European concepts of 'culture' in Mi'kmaq, for example. How we maintain contact with our traditions is *tan'telo'tlieki-p*. How we perpetuate our consciousness is described as *tlinuo'lti'k*. How we maintain our language is *tlinuita'sim*. Each of these terms connotes a process rather than a thing" (p. 1002, note 30). Ultimately, the concept of culture is itself inherently cultural.

[45] The aboriginal rights doctrine, which has been constitutionalized by s. 35, arises from the simple fact of prior occupation of the lands now forming Canada. The "integral to a distinctive culture" test must necessarily be understood in this context. As L'Heureux-Dubé J explained in dissent in *Van der Peet*, "[t]he 'distinctive aboriginal culture' must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. [British Columbia (AG), [1973] SCR 313, 1973 CanLII 4]*, at p. 328, per Judson J., and *Guerin v The Queen, [1984] 2 SCR 335, 1984 CanLII 25*, at p. 379, per Dickson J. (as he then was)" (para. 159). The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems,

and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct," and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples" (J. Borrow and L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev.* 9, at p. 36).

[46] In post-hearing submissions to the Court of Appeal in the *Sappier* and *Polchies* case, the Crown admitted that gathering birch bark for the construction of canoes or hemlock for basket-making were practices likely integral to the distinctive Maliseet culture (para. 94). But it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes. Instead, the Court must first inquire into the way of life of the Maliseet and Mi'kmaq, pre-contact. As previously explained, these were migratory communities using the rivers and lakes of Eastern Canada for transportation and living essentially from hunting and fishing. The Court must therefore seek to understand how the particular pre-contact practice relied upon relates to that way of life. In the present cases, the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools is directly related to the way of life I have just described. I have already explained that we must discard the idea that the practice must go to the core of a people's culture. The fact that harvesting wood for domestic uses was undertaken for survival purposes is sufficient, given the evidence adduced at trial, to meet the integral to a distinctive culture threshold.

NOTE: SCOPING ABORIGINAL RIGHTS, "DISTINCTIVE CULTURE IS NOT WAYS OF LIFE": *LAX KW'ALAAMS INDIAN BAND V CANADA (AG)* AND *AHOUSAHT INDIAN BAND AND NATION V CANADA (AG)*

In *Lax Kw'alaams Indian Band v Canada (AG)*, [2011 SCC 56](#), the Supreme Court, in a unanimous judgment authored by Binnie J., placed further limits on the interpretation of rights that could be claimed to flow from the period just before European contact. At issue was whether the Lax Kw'alaams had an Aboriginal right to commercial harvesting and sale of "all species of fish" within their traditional waters. The First Nation argued (at para 53) that

sporadic trade in ... fish products was ... part of their ancestral "way of life" and, on that account, they should be allowed to continue to engage in trade in fish generally under the protection of s. 35(1) of the Constitution Act, 1982.

In rejecting this argument, the Court found the Lax Kw'alaams framed their argument too broadly. The Court held that rights to a contemporary commercial fishery could not be founded on a limited ancestral trade in eulachon grease. While the Court recognized that Aboriginal rights can evolve, both in terms of the subject matter and the method of its exercise, in this case the Court wrote that a commercial fishery would create a right qualitatively and quantitatively different from the pre-contact trade in eulachon grease. The Court arrived at this conclusion by finding that "the reference in *Sappier* to a pre-contact 'way of life' should not be read as departing from the 'distinctive culture' test set out in *Van der Peet*" (at para 54). In support of its conclusion, the Supreme Court wrote:

[40] The heart of the Lax Kw'alaams' argument on this point is that "before a court can characterize a claimed aboriginal right, it must *first* inquire and make findings about the pre-contact practices and way of life of the claimant group" ... (emphasis in original). I would characterize this approach as a "commission of inquiry" model in which a commissioner embarks on a voyage of discovery armed only with very general terms of reference. Quite apart from being inconsistent with the jurisprudence that calls for "characterization of the claim" as a first step, the "commission of inquiry" approach is not suitable in civil litigation,

even in civil litigation conducted under rules generously interpreted in Aboriginal cases to facilitate the resolution in the public interest of the underlying controversies.

[41] ... The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight.

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[46] ... [A] court dealing with a s. 35(1) claim would appropriately proceed as follows:

1. First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.
2. Second, determine whether the First Nation has proved, based on the evidence adduced at trial:
 - (a) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
 - (b) that this practice was integral to the distinctive pre-contact Aboriginal society.
3. Third, determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice. In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice? At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. ...

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[55] Counsel for the Lax Kw'alaams argues that, even if pre-contact trade had been limited to eulachon grease (which they deny), the modern right should not be "frozen" but should be generalized and "evolved" to include all other fish species and fish products.

[56] However, such an "evolution" would run counter to the trial judge's clear finding that the ancestors of the Lax Kw'alaams fished all species but did not *trade* in any significant way in species of fish or fish products other than eulachon. Extension of a modern right to all species would directly contradict her view that only the "species-specific" trade in eulachon grease was integral to the distinctive culture of the pre-contact society. A general commercial fishery would represent an outcome qualitatively different from the pre-contact activity on which it would ostensibly be based, and out of all proportion to its original importance to the pre-contact Tsimshian economy.

[57] The "species-specific" debate will generally turn on the facts of a particular case.

In contrast to the result in *Lax Kw'alaams*, in *Ahousaht Indian Band and Nation v Canada (AG)*, [\[2011 BCCA 237\]](#), leave to appeal to SCC refused, [2011] SCCA No 353 (QL), the Nuu-chah-nulth (NCN) people were found to possess a broad right to "fish and sell fish" based on evidence that "at the time of contact, groups comprising ancestors of the NCN fished extensively and used the resources harvested both for food and for trade, regularly exchanging substantial quantities of fisheries resources with other groups for economic purposes" (at para 16). The trial judge had recognized a harvesting right within the NCN's traditional territory (to a limit of nine miles from shore). She had declined to delineate limitations on individual species, which could be harvested and sold on the basis that the evidence had demonstrated the ancestors of the NCN harvested and traded in numerous species of fish within their territories. The BC Court of Appeal affirmed the decision of the trial judge except with respect to one species of clam, the geoduck, which required special technology to harvest:

[69] ... [B]ecause the commercial geoduck fishery is ... a high tech fishery of very recent origin, there can be no viable suggestion that the ancestors of the respondents could have participated in the commercial harvesting and trading of this particular marine resource at some time before contact with explorers and traders late in the 18th century. There is simply no adequate basis in the evidence to support an ancestral practice that would translate into any modern right to participate in harvesting and selling this marine food resource.

2. Scoping Aboriginal rights through geographic considerations: In *R v Desautel*, 2021 SCC 17, the Supreme Court of Canada found that Indigenous peoples now residing in the United States could be recognized as holding constitutionally protected Aboriginal rights in Canada. Desautel was charged under British Columbia's *Wildlife Act*, RSBC 1996, c 488 for hunting without a licence and not being a resident of the province. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State, which is a successor group of the Sinixt people who lived in British Columbia prior to 1930. Since Desautel shot the animal in his ancestral territory, he argued that he had an Aboriginal right to hunt that was a full defence to the charge under the *Wildlife Act*. The Court agreed.

The Court first had to consider whether an Indigenous group who now resided in the United States could be an Indigenous people of Canada. In affirming that they could, after reviewing their earlier case law, the Court wrote:

[31] ... s. 35(1) serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty. These purposes are expressed in the doctrinal structure of Aboriginal law, which gives effect to rights and relationships that arise from the prior occupation of Canada by Aboriginal societies. Implicit in this doctrinal structure, and the purposes that underlie it, is the answer to our question. The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.

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[33] I would add that an interpretation of "aboriginal peoples of Canada" in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of Aboriginal peoples as a result of colonization is well acknowledged:

Aboriginal peoples were displaced physically—they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools—which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions. (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at pp. 139–40)

By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" (*R. v. Côté*, [1996] 3 S.C.R. 139, at para. 53).

[34] Moreover, it bears emphasis that s. 35(1) did not create Aboriginal rights. As *Calder* and indeed the *Royal Proclamation*, 1763 (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1), show, Aboriginal rights long predicated 1982 What s. 35(1) did was to give Aboriginal and treaty rights—which it explicitly recognizes as already "existing"—constitutional protection (*Van der Peet*, at paras. 28–29). Even though some s. 35(1) Aboriginal rights would not have been recognized under pre-1982 Canadian law (Côté, at para. 52), the practices, customs and traditions that underlie these rights existed before 1982. An interpretation of s. 35(1) that limits its scope to those Aboriginal peoples who were located in Canada in 1982 would fail to give effect to this point by treating s. 35(1) as the source of Aboriginal rights.

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[48] In the present case, the trial judge found as a fact that the Sinixt had occupied territory in what is now British Columbia at the time of European contact. She also found that the Lakes Tribe were a modern successor of the Sinixt

After determining that the Sinixt were Indigenous peoples of Canada, the Supreme Court determined that they had Aboriginal rights to hunt by applying the *Van der Peet* case. The Court wrote:

[62] In the present case, the Aboriginal right claimed is a right to hunt for food, social and ceremonial purposes within the traditional territory of the Sinixt in British Columbia. The trial judge found, based on the evidence before her, that at the time of contact this practice was integral to the distinctive culture of the Sinixt. She also found that the modern-day practice of hunting in this territory, as Mr. Desautel did, is a continuation of this pre-contact practice. Indeed, setting aside the periods in which no hunting took place, there was no significant dissimilarity between the pre-contact practice and the modern one As a result, she found that Mr. Desautel was exercising an Aboriginal right.

[63] The Crown and the intervener Attorney General of Alberta submit that this was an error, because continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted. As my discussion of continuity should make clear, this has never been part of the test for an Aboriginal right. Nor is there any basis for adding it to the test, even where the claimant is outside Canada. As Lamer C.J. explained in *Van der Peet*, at para. 65, "an unbroken chain of continuity" is not required. Indeed, as McLachlin J. (dissenting, but not on this point) noted in *Van der Peet*, at para. 249, "it is not unusual for the exercise of a right to lapse for a period of time."

After writing that it was unnecessary to rule on whether recognizing an Aboriginal right for an Indigenous group who now resides in the United States was incompatible with Crown sovereignty, the Court found the Crown had a duty to consult such groups. However, the Supreme Court said the content of this duty depends on the context.

[76] Once the Crown is put on notice, ... [about potential Aboriginal rights for Indigenous groups outside Canada], it has to determine whether a duty to consult arises and, if so, what the scope of the duty is. As I mentioned earlier, consultation is part of a "process of fair dealing and reconciliation" which "arises ... from the Crown's assertion of sovereignty" (*Haida*, at para. 32). Because groups outside Canada are not implicated in this process to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ. Integrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions within Aboriginal communities and with the Crown. While the consultation process may be more challenging when it involves groups outside Canada, as this Court said in *Powley*, at para. 49, "the difficulty of identifying members of the [Aboriginal] community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada."

At the end of the *Desautel* decision the Supreme Court recognized the place for Indigenous law in determining their identity:

[86] In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.

Does the Court's recognition of Indigenous law as having contemporary relevance have any significant constitutional implications?

V. CONSTITUTIONAL RECOGNITION OF ABORIGINAL TITLE

The relationship between Aboriginal title and the Aboriginal rights recognized and affirmed by s 35 of the *Constitution Act, 1982* was first addressed by the Supreme Court of Canada in *R v Adams*, [1996] 3 SCR 101, 1996 CanLII 169. In *Adams*, in the course of dealing with a claim for recognition of Aboriginal fishing rights, a majority of the Court held that under s 35(1), Aboriginal title was a specific subset of Aboriginal rights that could be distinguished from other Aboriginal rights recognized under the *Van der Peet* test, such as site-specific hunting and fishing rights. These “lesser” rights could exist even if a claim for Aboriginal title was not made out. Further elaboration of Aboriginal title under s 35 continued one year later in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302. Building on *Delgamuukw*, in 2014, the Supreme Court of Canada granted its first declaration of Aboriginal title in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

As outlined earlier, historically, one of the primary methods to deal with Aboriginal title has been the signing of treaties following the principles outlined and agreed to in the *Royal Proclamation* of 1763. However, there were places in Canada where these principles were not followed, and land was not the subject of treaty promises. These areas include the Maritimes, parts of the North, southern Quebec, and British Columbia. The existence of Aboriginal title is a contemporary issue in these areas. The issue of Aboriginal title has proven to be a particularly charged and high-profile issue in British Columbia, bringing into question the issue of property and resource use rights in many parts of the province.

When British Columbia entered Confederation in 1871, Indigenous people outnumbered non-Indigenous people by a ratio of 2:1. However, among the first acts of the newly created provincial legislature was the disenfranchisement of Indigenous people from voting and the removal of Indigenous peoples to small reserves. There was also an explicit denial of Aboriginal title, and a disallowance of any attempt by Indigenous peoples to take up land through pre-emption, as was permitted for newly arriving non-Indigenous settlers. These actions all took place against the strong objections of numerous First Nations throughout the province, and numerous commissions were set up to deal with their complaints. Unfortunately, these bodies repeatedly failed to address the underlying conflict concerning Indigenous peoples’ pre-existing interest in land and the provincial government’s non-recognition of Aboriginal title. The federal government also failed to bring any resolution to this issue under its authority for “Indians and Lands reserved for the Indians” in s 91(24) of the *British North America Act, 1867*. When, in 1927, it looked as though the Allied Tribes of British Columbia might finally succeed in pressing a case to the Privy Council, the *Indian Act* was amended to make it illegal to raise funds for or hire a lawyer for land claims purposes. As a result, the issue of Aboriginal title in British Columbia did not appear before the courts until the early 1970s in the *Calder* case and did not receive any treatment under s 35(1) until the groundbreaking case of *Delgamuukw v British Columbia*, immediately below.

Delgamuukw v British Columbia

[\[1997\] 3 SCR 1010, 1997 CanLII 302](#)

LAMER CJ (Cory, Major, and McLachlin JJ concurring):

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[7] This action was commenced by the appellants, who are all Gitksan or Wet’suwet’en hereditary chiefs, who, both individually and on behalf of their “Houses” claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories,

claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) The province of British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

[At the time of trial, the Gitksan consisted of approximately 4,000 to 5,000 persons in the watersheds of the north and central Skeena, Nass, and Babine Rivers. The Wet'suwet'en consisted of approximately 1,500 to 2,000 persons, mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako River systems. There were also approximately 30,000 non-Aborigines living in the territory at the time of the trial. There was archeological evidence, which was accepted at trial, that there was some form of human habitation in the territory and its surrounding areas from 3,500 to 6,000 years ago. The trial judge held that the time of direct contact in the claimed territory was approximately 1820.]

B. What Is the Ability of This Court to Interfere with the Factual Findings Made by the Trial Judge?

(1) General Principles

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[82] ... [A]lthough the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" [R v Van der Peet, [1996] 2 SCR 507, 1996 CanLII 216] (at para. 49). ...

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[84] ... In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. ...

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[86] Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of [that] culture." ... Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations." The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial—the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.

[87] Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with. ...

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[107] The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Van der Peet*. These errors are particularly worrisome because oral histories were of critical importance to the appellants' case. They used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for "ownership." Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.

[108] In the circumstances, the factual findings cannot stand. However, given the enormous complexity of the factual issues at hand, it would be impossible for the Court to do justice to the parties by sifting through the record itself and making new factual findings. A new trial is warranted, at which the evidence may be considered in light of the principles laid down in *Van der Peet* and elaborated upon here. In applying these principles, the new trial judge might well share some or all of the findings of fact of McEachern C.J.

C. What Is the Content of Aboriginal Title, How Is it Protected by Section 35(1) of the Constitution Act, 1982, and What Is Required for its Proof?

(1) Introduction

[109] The parties ... have ... a ... fundamental disagreement over the content of aboriginal title itself, and its reception into the Constitution by s. 35(1). In order to give guidance to the judge at the new trial, it is to this issue that I will now turn.

[110] ... I believe that all of the parties have characterized the content of aboriginal title incorrectly. ...

[111] The content of aboriginal title ... is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. ... [I]t confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit ... flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.

(2) Aboriginal Title at Common Law

(a) General Features

[112] ... Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

[113] The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its *inalienability*. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other

than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

[114] Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation*, 1763 However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law. ... Thus, in [*Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25] Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands." What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty." ... What this suggests is a second source for aboriginal title—the relationship between common law and pre-existing systems of aboriginal law.

[115] A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

(b) The Content of Aboriginal Title

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[117] Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. ...

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[124] ... [T]he content of aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. However, nor does aboriginal title amount to a form of inalienable fee simple, as I will now explain.

(c) Inherent Limit: Lands Held Pursuant to Aboriginal Title Cannot Be Used in a Manner That Is Irreconcilable with the Nature of the Attachment to the Land That Forms the Basis of the Group's Claim to Aboriginal Title

[125] The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land—it is a *sui generis* interest that is distinct from "normal" proprietary interests, most notably fee simple.

[126] I arrive at this conclusion by reference to the other dimensions of aboriginal title which are *sui generis* as well. I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

[127] ... The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.

[128] ... For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

[129] It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. ...

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[131] [T]he continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. ... If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

[132] ... This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land. ...

[A discussion of Aboriginal title under s 35(1) is omitted here, as it will be discussed in greater detail in the *Tsilhqot'in* case, reproduced below.]

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(e) Proof of Aboriginal Title

(i) Introduction

[140] ... To date, the Court has defined aboriginal rights in terms of *activities*. As I said in [*R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216] (at para. 46):

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [Emphasis added.]

Aboriginal title, however, is a *right to the land itself*. ...

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(ii) The Test for the Proof of Aboriginal Title

[143] In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[A discussion of the three criteria Indigenous peoples must satisfy for asserting title is omitted, as it is discussed and applied in *Tsilhqot'in*, reproduced below].

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(f) Infringements of Aboriginal Title: The Test of Justification

(i) Introduction

[160] The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal ... and provincial ... governments. ...

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[165] The general principles governing justification laid down in [*R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104], and embellished by [*R v Gladstone*, [1996] 2 SCR 723, 1996 CanLII 160], operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives ... is fairly broad. Most of these objectives can be traced to the *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. ...

[166] The manner in which the fiduciary duty operates with respect to the second stage of the justification test—both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take—will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

[The portion of the decision dealing with the issue of extinguishment, and specifically the issue of whether provinces are able to extinguish Aboriginal title, is omitted here but can be found below in Section IX, "Distribution of Legislative Authority." In summary, Lamer CJ concluded, for two reasons, that there had been no extinguishment of Aboriginal title by the province prior to 1982: first, provincial laws of general application could not meet the standard of "clear and plain" intent; and, second, the extinguishment of Aboriginal title would be an impermissible intrusion on the core of the federal power over "Indians and Lands reserved for the Indians" under s 91(24) of the *Constitution Act, 1867*.]

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[184] For the reasons I have given above, I would allow the appeal in part, and dismiss the cross-appeal. Reluctantly, I would also order a new trial.

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[186] Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to ... settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... a basic purpose of s. 35(1)—"the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay.

[Justice La Forest (L'Heureux-Dubé J concurring) wrote separate reasons agreeing with Lamer CJ's conclusion but disagreeing with the methodology used to determine the existence of Aboriginal title.]

Appeal allowed (in part) and cross-appeal dismissed.

NOTES AND QUESTIONS

1. In *Delgamuukw*, the Court held (at para 128) that

lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place.

The Court also observed (at para 132) that the inherent limit on Aboriginal title does not amount to

a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on Aboriginal peoples who have a legitimate legal claim to the land.

How are these two propositions reconciled, especially when it seems as if the determination of what constitutes an inherent limit on the use of Aboriginal title lands will have reference to traditional Indigenous uses of land? You will see in *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44](#), below, that the Supreme Court of Canada has subsequently "softened" the inherent limit. Chief Justice McLachlin, writing for the Court, framed the restrictions on Aboriginal title in the following terms:

[74] Aboriginal title, however, comes with an important restriction—it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land.

2. *Delgamuukw* set out a test for the proof of Aboriginal title that revolves around the date of the assertion of British sovereignty. While not reproduced in the excerpt above, the Court wrote: "Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted" (at para 145). How does Crown sovereignty "crystallize" Aboriginal title? Why should sovereignty be the relevant date for proof of title, and contact be the crucial date for the proof of other

Aboriginal rights (as held in *Van der Peet*)? Could other dates be just as appropriately cited for the proof of title or rights—for example, Confederation; the date of a province's union with Canada; or even 1982, when s 35 was enacted? Furthermore, what is the justification for Crown sovereignty as the measure of Aboriginal rights, and why should Indigenous peoples have the burden of proof in showing their title or rights when they were here first?

3. In *Delgamuukw*, Lamer CJ provided an extensive list of activities that could constitute the infringement of Aboriginal title. He wrote (at para 165) that

[i]n my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.

Do these actions merely infringe Aboriginal title, or could some of these activities be tantamount to an extinguishment of Aboriginal title? You will see in *Tsilhqot'in Nation*, below, that the Supreme Court of Canada, drawing on the principle of the Crown's fiduciary obligations, has added another limit to what can constitute a justifiable infringement of Aboriginal title, stating that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land" (at para 86).

NOTE: R V MARSHALL; R V BERNARD

In *R v Marshall; R v Bernard*, [2005 SCC 43](#), the Supreme Court of Canada upheld the convictions of two members of the Mi'kmaq Nation who harvested timber on Crown lands (in Nova Scotia in Marshall's case, and in New Brunswick in Bernard's case) without authorization. In each case, the trial judge rejected the defence that the accused had a right to harvest logs on Crown lands for commercial purposes on the basis of both treaty rights and Aboriginal title. With respect to treaty rights, commercial logging was found not to be the logical evolution of the right to engage in traditional trading activities granted by the Peace and Friendship Treaties of 1760–61. With respect to the claim of Aboriginal title, the evidence was found not to establish sufficiently regular and exclusive pre-sovereignty occupation of the cutting sites; at most, it indicated occasional hunting and fishing trips into the area. In both cases, the trial level decisions were overturned by the respective provincial Courts of Appeal. On further appeal to the Supreme Court of Canada, the Court allowed the appeals and upheld the trial level decisions on both treaty rights and Aboriginal title.

In her reasons on the issue of Aboriginal title, McLachlin CJ, writing for a majority of the Court, acknowledged the importance of taking Indigenous perspectives into account, but also emphasized the need to translate Indigenous practices into a common law right. The task for the Court in title cases was described as determining whether Indigenous practices "indicate possession similar to that associated with title at common law" (at para 54) and whether they correspond to "the core notions of common law title to land" (at para 61). In elaborating on Lamer CJ's holding in *Delgamuukw* that one must prove "exclusive" pre-sovereignty "occupation" of the land in order to establish a valid claim of Aboriginal title, McLachlin CJ dealt with the issue of the application of the tests for title to "nomadic" and "semi-nomadic" peoples:

[66] ... [C]an nomadic and semi-nomadic peoples ... ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. ... possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient "physical possession" to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights

cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (at para. 27). On the other hand, *Delgamuukw* contemplates that "physical occupation" sufficient to ground title to land may be established by "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.

The Supreme Court of Canada returned to the issue of the application of the *Delgamuukw* test to nomadic and semi-nomadic peoples in its 2014 decision in *Tsilhqot'in Nation*, below.

In *Marshall; Bernard*, McLachlin CJ also further elaborated on the use of oral evidence, drawing on her earlier decision in *Mitchell*, excerpted below in Section X:

[68] Underlying all [the issues raised in cases of Aboriginal title] is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v. MNR*, [2001] 1 S.C.R. 911, 2001 SCC 33, are respected. Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.

The most recent case dealing with the issue of Aboriginal title, *Tsilhqot'in Nation v British Columbia*, dealt with the question of whether so-called semi-nomadic Indigenous peoples could prove that their occupation of land was sufficient to meet the *Delgamuukw* case. John Borrows provides some background to the case:

[The case involved the] Tsilhqot'in people [who] are an Athapaskan speaking group who live in the central region of British Columbia ... [with] 3,000 citizens [who] are organized in 6 bands. For the purposes of this case they claimed approximately 438,000 ha (4,380 km²) of land which was recognised and affirmed as Aboriginal title under section 35(1) of Canada's Constitution.

The roots of the Tsilhqot'in case were planted when "[o]n June 4, 1792 Captain George Vancouver stepped ashore and claimed all of the land of what was later to become British Columbia on behalf of the British Crown" ... European traders and explorers had very little contact with the Tsilhqot'in over the next fifty years. Eventually a party of British settlers attempted to unilaterally survey and settle a portion of their territory. The Tsilhqot'in blocked the construction of this road. In the process, in 1864, they killed nineteen settlers and expelled every so-called White person from their territory. While the Tsilhqot'in paid for these acts through the hanging of four of their chiefs under questionable legal proceedings, for the next one hundred years they continued to live on their territory with minimal external demands on their lands. This was the case until 1983 when the Province of British Columbia granted Carrier Lumber Ltd. a forest licence to cut trees in part of their territory.

Over the next 15 years the Tsilhqot'in objected to the province's action through blockades, negotiations and legal action. In 1998 they eventually filed an Aboriginal title claim in the courts. The case began in 2002 and resulted in a 339 day trial which led to a judgment in their favour in 2007 (*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700). Justice Vickers of the British Columbia Supreme Court, who presided over the case, held that the Tsilhqot'in people were entitled to a [broad] declaration of Aboriginal title though he refused to make the declaration for procedural reasons. Nevertheless, the 1,382 paragraph decision

was favourable to the Tsilhqot'in people. It contained detailed findings concerning use, occupation and ownership of land in accordance with Tsilhqot'in legal traditions.

The trial decision was appealed to the British Columbia Court of Appeal where the Tsilhqot'in lost. In 2012 the Court of Appeal overturned the trial judge's decision (*William v. British Columbia*, 2012 BCCA 285). The Court of Appeal applied a narrower test for Aboriginal title—site-specific occupation as opposed to regular and exclusive use of wider territorial lands. It held "that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed."

The Court of Appeal's characterization of Aboriginal title was colloquially labelled "The Postage Stamp" theory of Aboriginal title: see John Borrows, "Aboriginal Title in Tsilhqot'in v. British Columbia, 2014 SCC 44" (August 2014) *Māori L Rev*.

The Supreme Court of Canada's reasons for overturning the conclusion of the British Columbia Court of Appeal are excerpted below.

Tsilhqot'in Nation v British Columbia

2014 SCC 44

McLACHLIN CJ (LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ concurring):

[18] The jurisprudence just reviewed [tracing the evolution of aboriginal land law from *Calder* to *Haida Nation*] establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

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V. Is Aboriginal Title Established?

A. The Test for Aboriginal Title

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the [*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302] test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, per Lamer C.J., at para. 143:

In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[27] The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title: site-specific occupation. It held that ... an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

[30] Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

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[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

[33] The first requirement—and the one that lies at the heart of this appeal—is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

[34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

[36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically

occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

[37] Sufficiency of occupation is a context-specific inquiry. “[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group’s purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

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[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. . . .

[42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is “sufficient” use to ground Aboriginal title, provided that such use . . . evinces an intention . . . to hold or possess the land in a manner comparable to what would be required to establish title at common law.

[43] The Province argues that this Court in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, rejected a territorial approach to title [citing Professor K. McNeil]. In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be “proof of sufficiently regular and exclusive use” of the land in question, a requirement established in *Delgamuukw*.

[44] The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While “[n]ot every nomadic passage or use will ground title to land,” the Court confirmed that *Delgamuukw* contemplates that “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need

to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

2. Continuity of Occupation

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises: continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that ... the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

[47] The third requirement is exclusive occupation of the land at the time of sovereignty. The Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land ... is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access [with permission]. ... [Permission or treaties] may show intention and capacity to control the land. Even the lack of challenges to occupancy may support ... intention and capacity to control.

[49] ... [T]he exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. ...

4. Summary

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. Was Aboriginal Title Established in This Case?

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately

[52] ... The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

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[60] Most of the Province's criticisms ... are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. [That] makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. ... The presence of conflicting evidence does not demonstrate palpable and overriding error.

[61] ... The trial judge was faced with the herculean task of drawing conclusions from a huge body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

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VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (at para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. The Legal Characterization of Aboriginal Title

[69] The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson's concurring judgment in [*Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25]. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation 1763*. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[70] The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land ... for a variety

of purposes," not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land: to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.

[71] What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements: a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*.

[72] The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is: the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership—for example, fee simple—may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts."

B. The Incidents of Aboriginal Title

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

[74] Aboriginal title, however, comes with an important restriction: it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes—even permanent changes—to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

[75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group: most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. Justification of Infringement

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: [*R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104].

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum as discussed in [*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, excerpted in the Section VII, "The Duty to Consult"]. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact [of] contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in [*R v Gladstone*, [1996] 2 SCR 723, 1996 CanLII 160], at para. 72:

... [T]he objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or—and at the level of justification it is this purpose which may well be most relevant—at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation ... by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). *In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.* Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.]

[84] If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.

[85] The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.

[86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

[87] Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out: that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. Remedies and Transition

[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land

about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[91] The practical result may be a spectrum of duties applicable over time in a particular case. [Prior] to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong—for example, shortly before a court declaration of title—appropriate care must be taken to preserve the Aboriginal interest pending final resolution . . . Finally, once title is established, the Crown cannot proceed with development . . . unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. What Duties Were Owed by the Crown at the Time of the Government Action?

[93] Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim . . . and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum . . .

[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

VII. Breach of the Duty to Consult

[95] The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this

time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

[96] The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

[97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

[The portions of the decision dealing with the application of provincial laws to lands held under Aboriginal title can be found in Section IX.]

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XI. Conclusion

[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

Appeal allowed; declaration of Aboriginal title granted over area at issue.

NOTES AND QUESTIONS

1. There is a great deal of discussion in *Tsilhqot'in Nation* about the duty to consult, drawing on a significant evolution in the law since *Delgamuukw* as a result of the Supreme Court of Canada's 2004 decision in *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#). These developments are traced in Section VI.

2. In *Tsilhqot'in*, the Court wrote that "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada" (at para 69). Yet, in the same paragraph, the Court wrote that "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province." John Borrows asks:

If land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in that same land by merely asserting sovereignty, without a version of *terra nullius* being deployed. The Crown's claim to underlying title on this basis "does not make sense." Some kind of legal vacuum must be imagined to create the Crown's radical title. The emptiness at the heart of the Court's decision is disturbing.

See John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v. British Columbia*" (2015) 48 UBC L Rev 701 at 703 ["The Durability of Terra Nullius"].

As a result of the decision's perpetuation of the idea that the Crown acquired underlying title of Aboriginal lands upon the assertion of sovereignty, Professor Borrows has expressed mixed views about the *Tsilhqot'in Nation*:

Canadian law took an important step towards repairing its relationships with Indigenous peoples in the *Tsilhqot'in Nation* decision. It is an exceedingly strong decision. It demonstrates the intelligence, wisdom, honesty, humility and humanity of an extraordinary group of jurists. ... The case is very significant; it contains ground-shifting implications. ...

At the same time, it must be emphasized that *Tsilhqot'in Nation* is only a step in the right direction. Reconciliation between Indigenous peoples and the Crown still remains a long distance down the road. ... The Crown (and the courts) must shed further baggage to ensure the decision's trajectory continues. The Crown's unilateral claims to land in British Columbia must be further attenuated. ... [F]urther attention is needed to erase [the] concept [of the doctrine of discovery] from Canadian law.

See Borrows, "The Durability of Terra Nullius," above at 704-5.

3. The Truth and Reconciliation Commission wrote about the Doctrine of Discovery as follows:

One of the aspects of the Doctrine of Discovery that continues to assert itself to this day is the fact that court cases involving Aboriginal territorial claims have placed a heavy onus on Aboriginal claimants to prove that they were in occupation of land since first contact and that the rights claimed over the territory continued from then to the present. The Commission believes that there is good reason to question this requirement, particularly in view of the fact that much of the record upon which courts rely is documentary proof or oral testimony from acknowledged Elder experts. History shows that for many years after Confederation, Aboriginal claimants were precluded from accessing legal advice or the courts in order to assert their claims, and that many of their best Elder experts have passed on without having had an opportunity to record their evidence.

The Commission believes that it is manifestly unfair for Aboriginal claimants to be held to the requisite standard of proof throughout legal proceedings. However, it is reasonable to require that an Aboriginal claimant establish occupation of specified territory at the requisite period of time. That could be at the time of contact or at the time of Crown assertion of sovereignty. It is our view that once occupation has been proven, then the onus should shift to the other party to show that the claim no longer exists, either through extinguishment, surrender, or some other valid legal means. Therefore, we conclude that Aboriginal claims of title and rights should be accepted on assertion, with the burden of proof placed on those who object to such claims.

See *Honouring the Truth, Reconciling for the Future*, above at 214-15.

4. What impact will *Tsilhqot'in* have on the negotiation of land claims settlements in British Columbia? So far, the impact has been slight. A treaty process put in place in the province in 1993, which reversed the province's long-standing refusal to negotiate treaties, has so far resulted in only seven completed treaties (as of June 2021). Sixty-five First Nations are or have been involved in the BC treaty negotiations process, less than half of the First Nations in the province. Consider Professor Borrows' comment on the impact of the *Tsilhqot'in* decision:

Throughout the opinion the Court makes the distinction between established or confirmed title on the one hand, and unproven title on the other. If Indigenous peoples do not have established or confirmed title, the governments' obligations towards such groups are further diminished until such time as a non-Indigenous body accredits their interests (through treaty, legislation or court declaration).

The fact that Aboriginal title requires some official recognition process illustrates one of the greatest challenges for Indigenous groups flowing from the *Tsilhqot'in* decision. The question is how Aboriginal title can be effectively established, confirmed or proven when the state is arrayed against them. The Crown and Courts have the upper hand in the recognition process. Court cases cost millions of dollars each, and First Nations do not have this kind of money available to them. The *Tsilhqot'in* case was partially a publicly funded test case which allegedly cost tens of millions of dollars to bring to a successful conclusion. The next case will not fall into such a category and thus public funding would not be available to bankroll it. The cost of litigation will place a court-ordered declaration of Aboriginal title beyond the reach of most groups.

Furthermore, the twenty-year-old treaty process in British Columbia has been a dismal failure to this point. First Nations are deeply indebted to Canadian governments from decades-long negotiations with very little to show for their efforts. Very few agreements have been signed. While the Crown may be compelled to change its narrow negotiation mandates in response to the *Tsilhqot'in* decision, the incentives to abide by the Court decision are few. Other than Court pressure (which in addition to finances may take decades to fully mount and implement) one might ask why the province would willingly create a process which significantly divests themselves of decision-making power and land to accommodate broad recognition of Aboriginal title throughout British Columbia. It is not in their narrower economic or political interest. Of course, the provincial or federal government could pass legislation which recognizes wide assertions of Aboriginal title.

See Borrow, "The Durability of Terra Nullius," above at 729-32.

5. Although the Court in *Tsilhqot'in* draws analogies between Aboriginal title and fee simple, there are significant differences. One of these is that Aboriginal title has a jurisdictional component. As Brian Slattery writes:

Aboriginal title has a *jurisdictional dimension*. The fact that it is vested in a community means that there must be some body or bodies endowed with authority to determine which individuals have the right to use the land and to regulate the ways the land may be used.

See Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR (2d) 45 at 46.

This jurisdictional aspect of Aboriginal title, which entails recognition of Indigenous laws and law-making capacity, is explored further below in Section X. The material found there includes a discussion of the ways in which *Tsilhqot'in* law deals with issues of consultation and consent when decisions are being made about land use.

6. What does it mean to label Aboriginal title "*sui generis*"? At para 72 of the *Tsilhqot'in* decision the Supreme Court of Canada once again noted that Aboriginal title is *sui generis*. Does this label expand or diminish Aboriginal title relative to other land rights. Consider the answer to this question as you consider excerpts about the *sui generis* nature of Aboriginal title in the case of *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4.

[25] ... [T]his Court has continually stressed the *sui generis* nature of s. 35 rights, namely the fact that a *sui generis* right is a unique one [translation] "which it is impossible to fit into any recognized category" The unique nature of s. 35 rights flows from both their historical and cultural origins as well as their status as constitutional rights.

[26] In *Van der Peet*—one of the first cases to consider the nature of s. 35 rights in depth—Chief Justice Lamer went to great lengths to stress the unique nature of s. 35 rights:

Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality"

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which

captures *both* the aboriginal and the rights in aboriginal rights. [Emphasis in original; paras. 19-20]

[27] The rights protected by s. 35 range from title to tobacco use and touch all aspects of life from the adoption of children to honouring burial sites of community ancestors: K. Wilkins, *Essentials of Canadian Aboriginal Law* (2018), at p. 195. While many of these rights concern the connection between Aboriginal peoples and the land, this Court has cautioned against “focus[ing] so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights”: *Van der Peet*, at para. 74. Instead, it has encouraged viewing s. 35 rights as existing along a spectrum with more or less intimate connections to the land. When both historic occupation and distinctive cultures are acknowledged as sources of Aboriginal rights, courts better accommodate the diverse histories and realities of Aboriginal societies. ... Aboriginal title is thus a sub-category of Aboriginal rights: *Van der Peet*, at para. 74.

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[29] Aboriginal title pre-dates all other interests in land in Canada, arising from the historic occupation of territory by distinct cultures: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 328; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at pp. 376-78; *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 114. Like Aboriginal rights more generally, Aboriginal title is *sui generis*. Even before *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 72, this Court frequently warned against conflating Aboriginal title with traditional civil or common law property concepts, or even describing title using the classical language of property law: *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54; *Guerin*, at p. 382; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 677-78; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at paras. 6-7; *Van der Peet*, at para. 115 (dissenting reasons of L'Heureux-Dubé J.); *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at paras. 14 et seq.; *Delgamuukw*, at paras. 111 et seq.; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 129 (concurring reasons of LeBel J.); *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 21.

[30] Owing to its origins in the special relationship between Indigenous peoples and the Crown, Aboriginal title has unique characteristics that distinguish it from civil law and common law conceptions of property. Aboriginal title is inherently collective and exists not only for the benefit of the present generation, but also for that of all future generations: *Tsilhqot'in Nation*, at para. 74; see also B. Slattery, “The Constitutional Dimensions of Aboriginal Title” (2015), 71 S.C.L.R. (2d) 45, at pp. 45-47. With its aim of benefiting both present and future generations, Aboriginal title restricts both the alienability of land and the uses to which land can be put: *Tsilhqot'in Nation*, at para. 74. These features are incompatible with property as it is understood in the civil law and common law: see K. Anker, “Translating *Sui Generis* Aboriginal Rights in the Civilian Imagination,” in A. Popovici, L. Smith and R. Tremblay, eds., *Les intraduisibles en droit civil* (2014), 1, at pp. 23-28.

[31] Moreover, Aboriginal perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another. As such, disputes involving title should not be resolved “by strict reference to intractable real property rules” but rather must also be understood with reference to Aboriginal perspectives: *St. Mary's Indian Band*, at para. 15; see also *Delgamuukw*, at para. 112; *Marshall*, at paras. 129-30 (concurring reasons of LeBel J.).

[32] In *Tsilhqot'in Nation*, this Court said that

[t]he characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal

title *sui generis* or unique. Aboriginal title is what it is—the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership—for example, fee simple—may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts.” [para 72]

[33] At the same time, the Court recognized that

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land. [para. 73]

[34] From the civilian perspective, as it is a *sui generis* right, Aboriginal title is properly characterized as neither a personal right nor a real right nor a combination of the two even though it may appear to have characteristics of both real and personal rights. The Quebec Research Centre of Private & Comparative Law defines personal and real rights as follows:

PERSONAL RIGHT

Right of a patrimonial nature that permits its holder, the *creditor*, to claim the performance of a prestation from another person, the *debtor*.

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REAL RIGHT

Right of a patrimonial nature that is exercised directly upon property. [Emphasis in original; citations omitted; pp. 230 and 254.]

(*Private Law Dictionary and Bilingual Lexicons: Obligations* (2003), “personal right,” “real right”)

[35] There is no doubt that Aboriginal title is fundamentally concerned with land. And it is tempting to conclude that Aboriginal title is a purely real right, as its name suggests. But to do so would ignore the fact that Aboriginal title is also firmly grounded in the relationships formed by the confluence of prior occupation and the assertion of sovereignty by the Crown: *Tsilhqot'in Nation*, at para. 72. Sovereignty assured the Crown underlying title to all land in the provinces, but the content of that title has always been burdened by the pre-existing rights of Aboriginal peoples which preceded those of the provinces: paras. 69-70; *Constitution Act, 1867*, s. 109. The nature of the fiduciary relationship arising from the interplay of these rights, steeped as it is in the history of settlement, is what gives rise to the other obligations flowing from the honour of the Crown that are part and parcel of Aboriginal title. Those obligations are clearly more akin to personal rights.

[36] However, no matter the facial similarities, s. 35 rights are not simply an amalgam of real rights and personal rights connected to Aboriginal peoples. As the term *sui generis* makes clear, s. 35 rights are legally distinct and, indeed, [translation] “impossible to fit into any recognized category”: Reid, at p. 607. They are neither real rights nor personal rights as defined in the civil law, but *sui generis* rights. Given the foregoing, s. 35 rights should not be pigeonholed into a category of civil law rights, especially not for the purposes of private international law alone. Rights cannot be characterized differently for different areas of law in civil law. A piecemeal approach, which would, for instance, suggest that a different characterization of s. 35 rights could be used in Book Four (Property) of the C.C.Q., would be, in our view, inappropriate.

VI. TREATY RIGHTS

Section 35(1) of the *Constitution Act, 1982* protects two broad classes of rights: (1) Aboriginal rights, and (2) *treaty* rights. By and large, treaty-making in Canada can be divided into three eras: (1) pre-Confederation, (2) post-Confederation, and (3) modern treaties. Prior to the British conquest, the French Crown concluded treaties with Indigenous nations, the most famous one being the Great Peace of 1701, a treaty that fostered peaceful relationships between France, its Indigenous allies, and the Haudenosaunee federation. From 1764 until 1867, there were approximately 375 treaties between the British Crown and First Nations. From 1867 until 1923, there were approximately another 150 treaties between the Crown and Indigenous peoples north of the 49th parallel. Finally, as of 2021, there have been another 26 so-called modern treaties between Indigenous peoples and Canada, now covering 40 percent of Canada's land mass, starting with the James Bay and Northern Quebec Agreement in 1973. Each of these historical eras had its own social, economic, and political distinctiveness, which must be considered to approach a satisfactory understanding of the treaties signed within these eras. For example, Indigenous peoples had relatively greater bargaining power prior to Confederation, although this slowly began to wane between 1814 and 1867. In the period after Confederation, particularly with the numbered treaties on the prairies, the Crown took a more dominant role in the negotiations, although they never fully succeeded in overwhelming the agency of Indigenous peoples in this period. Last, in the modern era, Indigenous peoples have seen their power somewhat expand relative to the era immediately prior, and thus they have been able to realize a growing influence in the negotiation of treaties.

Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination"

(1991) 36 McGill LJ 382 at 428-29 (footnotes omitted)

With respect to the legal status of treaties, treaty rights [prior to 1982 were] imagined in law in such a way as to render them either unenforceable or enforceable only against state inaction. More specifically, judicial attitudes toward the legal status of treaties entered into by native peoples and the Crown historically has involved a shift from an approach that imagines native people as different than, and inferior to, non-native people, toward an approach that imagines native people as the same as non-native people and therefore not worthy of special consideration. The earlier approach viewed agreements between the Crown and native peoples as essentially political agreements not enforceable in a court of law. Traditional international law principles provide that an agreement between two "independent powers" constitutes a treaty binding on the parties to the agreement. Courts viewed native people as "uncivilized" and as belonging to an inferior race and thus agreements between native peoples and the Crown were not binding on the Crown in law. Contemporary jurisprudence has rejected the view that native people are different than, and inferior to, non-native people, with the result being that treaties are elevated from the level of nonbinding political agreement to that of contractual right. Native people are imagined under this approach as possessing legal personality similar to that possessed by non-native people in Canada and therefore capable of entering into binding agreements with the Crown. Because such agreements are not viewed as anything more than contractual agreements with the Crown, despite exhortations by the courts that treaties are "unique," they are seen as subject to legislative authority. Prior to 1982, this had the effect of permitting Parliament to regulate or extinguish existing treaty rights.

With respect to judicial interpretation of the content of treaty guarantees, there has been a shift in the opposite direction, namely, toward the embrace of native difference. More specifically, early judicial pronouncements on the content of treaty guarantees were blind to native cultural difference. Treaty rights historically were rendered concrete and given determinate meaning by reference to Anglo-Canadian public and private law norms and values. The "plain meaning" of a treaty guarantee was determined by a process that accepted without question the legitimacy of basic categories of Anglo-Canadian legal consciousness. This resulted in expansive definitions of the meaning of land surrenders and narrow interpretations of treaty benefits flowing to native people. Recent jurisprudence is more sensitive to native expectations about treaty negotiation and thus is more accommodating of native difference. This shift has resulted in more expansive definitions of treaty benefits to native people, though the meaning of land surrenders effected by treaty continues to be steeped in Anglo-Canadian notions concerning title and transfer.

At issue in *R v Sioui*, [1990] 1 SCR 1025, 1990 CanLII 103 was the constitutionality of actions of members of the Huron nation on the Lorette Indian reserve in Quebec. They were convicted of cutting down trees, camping, and making fires in a provincial park, contrary to provincial legislation. They alleged that they were engaged in ancestral customs and religious rites protected by a treaty entered into by the Huron and the Crown in 1760. In his analysis of the scope of the treaty right, Lamer J provided a broad interpretation of the treaty's provision for "the free Exercise of [the Huron] religion [and] their Customs" (at 1031, 1066-70). Because the text of the treaty made no mention of the territory over which treaty rights may be exercised, Quebec argued that the treaty right did not extend to activities performed in park territory. Justice Lamer held that this issue had to be resolved "by determining the intention of the parties ... at the time it was concluded" (at 1068). He acknowledged the possibility of different interpretations of the parties' common intention and, adding another principle to the interpretive framework articulated in *Simon v The Queen*, [1985] 2 SCR 387, 1985 CanLII 11, stated that the Court must choose "from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conquerer" (at 1069). Justice Lamer was of the opinion (at 1027-28) that

the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory.

In *R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236, Cory J for the Supreme Court identified several canons of treaty interpretation that inform contemporary jurisprudence on the subject:

[41] ... First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow, supra*, at pp. 1107-08 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983]

1 S.C.R. 29, at p. 36; *Simon, supra*, at p. 402; *Sioui, supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon, supra*, at pp. 405-06; *Sioui, supra*, at p. 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404.

To what extent are these canons consistent with the interpretive approach adopted by Lamer J in *Sioui*? To what extent are they consistent with the approach adopted in the following case?

R v Marshall

[1999] 3 SCR 456, 1999 CanLII 665

[Donald Marshall Jr, a Mi'kmaq citizen, was charged with selling 463 pounds of eels for \$787.10 without a licence, contrary to federal regulations made pursuant to the *Fisheries Act*, RSC 1985, c F-14. Marshall's defence was that he was entitled to sell the eels by virtue of a treaty right agreed to by the British Crown in 1760. The only issue at trial was whether Marshall had an existing treaty right exempting him from compliance with the federal legislation, thus mandating his acquittal. In 1760-61, Indigenous leaders in the Maritimes asked for truckhouses—that is, trading posts—"furnishing them with necessaries, in Exchange for their Peltry" (at para 29) during negotiations leading up to the treaties. However, the written document recording the treaty contained only the promise by the Mi'kmaq not to "traffick, barter or Exchange any Commodities in any manner but with such persons, or the manager of such Truck houses as shall be appointed or Established by His Majesty's Governor" (at para 5). As such, the dispute in this case was over whether this "trade clause," framed in negative terms as a restraint on trade, reflected the grant of the positive right to Mi'kmaq people (like Marshall) to bring the products of their hunting, fishing, and gathering to a truckhouse to trade. The trial judge held that there was no positive right to trade embodied in the trade clause and thus rejected Marshall's defence that he had a treaty right to catch and sell fish. Marshall appealed, and the Nova Scotia Court of Appeal dismissed his appeal. Marshall then appealed to the Supreme Court of Canada.]

BINNIE J (Lamer CJ and L'Heureux-Dubé, Cory, and Iacobucci JJ concurring):

[5] The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms. In this case, the task is complicated by the fact the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence. The trial judge, Embree Prov. Ct. J., found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. Some of these documents are missing. Despite some variations among some of the documents, Embree Prov. Ct. J. was satisfied that the written terms applicable to this dispute were contained in a Treaty of Peace and Friendship entered into by Governor Charles Lawrence on March 10, 1760, which ... provides as follows:

Treaty of Peace and Friendship concluded by [His Excellency Charles Lawrence] Esq. Govr and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of [Nova Scotia] or Acadia.

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And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. *And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.*

[6] The [emphasized] portion of the document, the so-called "trade clause," is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals. A "truckhouse" was a type of trading post. The evidence showed that the promised government truckhouses disappeared from Nova Scotia within a few years and by 1780 a replacement regime of government licensed traders had also fallen into disuse while the British Crown was attending to the American Revolution. ...

[7] The appellant's position is that the truckhouse provision not only incorporated the alleged right to trade, but also the right to pursue traditional hunting, fishing and gathering activities in support of that trade. It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant's argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mi'kmaq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant's activities that are the subject of the prosecution. ...

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Evidentiary Sources

[9] The Court of Appeal took a strict approach to the use of extrinsic evidence when interpreting the Treaties of 1760-61. Roscoe and Bateman J.J.A. stated at p. 194: "While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity." I think this approach should be rejected

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[14] [Recent] cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger* [*R v Badger*, [1996] 1 SCR 771, 1996 CanLII 236], at para. 52:

... [W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement. ... The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added.]

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining

what in fact was agreed to. ... The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown ([*R v Sioui*, [1990] 1 SCR 1025, 1990 CanLII 103], *per* Lamer J., at p. 1069 (emphasis added)). ...

[A discussion of a 1752 Mi'kmaq treaty and the trial judge's factual findings are omitted.]

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The 1760 Negotiations

[22] I propose to review briefly the documentary record to emphasize and amplify certain aspects of the trial judge's findings. He accepted in general the evidence of the Crown's only expert witness, Dr. Stephen Patterson, a Professor of History at the University of New Brunswick, who testified at length about what the trial judge referred to (at para. 116) as British encouragement of the Mi'kmaq "hunting, fishing and gathering lifestyle." That evidence puts the trade clause in context, and answers the question whether there was something more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses.

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[23] I take the following points from the matters particularly emphasized by the trial judge at para. 90 following his thorough review of the historical background:

1. The 1760-61 treaties were the culmination of more than a decade of intermittent hostilities between the British and the Mi'kmaq. Hostilities with the French were also prevalent in Nova Scotia throughout the 1750's, and the Mi'kmaq were constantly allied with the French against the British.
- • •
6. The British wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia.
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[26] The trial judge concluded that in 1760 the British Crown entered into a series of negotiations with communities of first nations spread across what is now Nova Scotia and New Brunswick. These treaties were essentially "adhesions" by different Mi'kmaq communities to identical terms because, as stated, it was contemplated that they would be consolidated in a more comprehensive and all-inclusive document at a later date, which never happened. The trial judge considered that the key negotiations took place not with the Mi'kmaq people directly, but with the St. John River Indians, part of the Maliseet First Nation, and the Passamaquody First Nation, who lived in present-day New Brunswick.

[27] The trial judge found as a fact, at para. 108, that the relevant Mi'kmaq treaty did "make peace upon the *same conditions*" (emphasis added) as the Maliseet and Passamaquody. Meetings took place between the Crown and the Maliseet and the Passamaquody on February 11, 1760, twelve days before these bands signed their treaty with the British and eighteen days prior to the meeting between the Governor and the Mi'kmaq representatives, Paul Laurent of LaHave and Michel Augustine of the Richibucto region, where the terms of the Maliseet and Passamaquody treaties were "communicated" and accepted.

[28] The trial judge found (at para. 101) that on February 29, 1760, at a meeting between the Governor in Council and the Mi'kmaq chiefs, the following exchange occurred:

His Excellency then Ordered the Several Articles of the Treaty made with the Indians of St. John's River and Passamaquody to be *Communicated* to the said Paul Laurent and Michel Augustine who expressed their satisfaction therewith, and *declar'd that all the Tribe of Mickmacks would be glad to make peace upon the same Conditions.* [Emphasis added.]

Governor Lawrence afterwards confirmed, in his May 11, 1760 report to the Board of Trade, that he had treated with the Mi'kmaq Indians on "the same terms."

[29] The genesis of the Mi'kmaq trade clause is therefore found in the Governor's earlier negotiations with the Maliseet and Passamaquody First Nations. In that regard, the appellant places great reliance on a meeting between the Governor and their chiefs on February 11, 1760 for the purpose of reviewing various aspects of the proposed treaty. The following exchange is recorded in contemporaneous minutes of the meeting prepared by the British Governor's Secretary:

His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose any thing further than that *there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry,* and that it might, at present, be at Fort Frederick.

Upon which His Excellency acquainted them that *in case of their now executing a Treaty* in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, *a Truckhouse should be established at Fort Frederick, agreeable to their desire,* and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Trafic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. *Of all which the Chiefs expressed their entire Approbation.* [Emphasis added.]

[30] It is true ... that the British made it clear from the outset that the Mi'kmaq were not to have any commerce with "any of His Majesty's Enemies." A Treaty of Peace and Friendship could not be otherwise. ...

[31] At a meeting of the Governor's Council on February 16, 1760 (less than a week later), the Council and the representatives of the Indians proceeded to settle the prices of various articles of merchandise. ...

[32] In furtherance of this trade arrangement, the British established six truck-houses following the signing of the treaties in 1760 and 1761. ... The existence of advantageous terms at the truckhouses was part of an imperial peace strategy. ... The British were concerned that matters might again become "troublesome" if the Mi'kmaq were subjected to the "pernicious practices" of "unscrupulous traders." The cost to the public purse of Nova Scotia of supporting Mi'kmaq trade was an investment in peace and the promotion of ongoing colonial settlement. The strategy would be effective only if the Mi'kmaq had access both to trade and to the fish and wildlife resources necessary to provide them with something to trade.

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[35] In my view, all of this evidence, reflected in the trial judgment, demonstrates the inadequacy and incompleteness of the written memorial of the treaty terms by selectively isolating the restrictive trade covenant. Indeed, the truckhouse system offered such advantageous terms that it hardly seems likely that Mi'kmaq traders had to be compelled to buy at lower prices and sell at higher prices. At a later date, they objected when truckhouses were abandoned. The trade clause would not have

advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade.

[A review of Dr Patterson's comments at trial is omitted.]

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[40] In my view, the Nova Scotia judgments erred in concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760, whether construed flexibly (as did the trial judge) or narrowly (as did the Nova Scotia Court of Appeal). The findings of fact made by the trial judge taken as a whole demonstrate that the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people. It is their common intention in 1760—not just the terms of the March 10, 1760 document—to which effect must be given.

Ascertaining the Terms of the Treaty

[41] Having concluded that the written text is incomplete, it is necessary to ascertain the treaty terms not only by reference to the fragmentary historical record ... , but also in light of the stated objectives of the British and Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled.

[42] ... The appellant asserts the right of Mi'kmaq people to catch fish and wildlife in support of trade as an alternative or supplementary method of obtaining necessities. The right to fish is not mentioned in the March 10, 1760 document, nor is it expressly noted elsewhere in the records of the negotiation put in evidence. This is not surprising. As Dickson J. mentioned with reference to the west coast in [Jack v The Queen, [1980] 1 SCR 294, 1979 CanLII 175], at p. 311, in colonial times the perception of the fishery resource was one of "limitless proportions."

[43] The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract, e.g., where it meets the "officious bystander test": ... Here, if the ubiquitous officious bystander had said, "This talk about truckhouses is all very well, but if the Mi'kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course." If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. The honour of the Crown was, in fact, specifically invoked by courts in the early 17th century to ensure that a Crown grant was effective to accomplish its intended purpose. ...

[44] An example of the Court's recognition of the necessity of supplying the deficiencies of aboriginal treaties is [R v Sioui, [1990] 1 SCR 1025, 1990 CanLII 103], where Lamer J. considered a treaty document that stated simply (at p. 1031) that the Huron tribe "are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English." Lamer J. found that, in order to give real value and meaning to these words, it was necessary that a territorial component be supplied, as follows, at p. 1067:

The treaty gives the Hurons the freedom to carry on their customs and their religion. No mention is made in the treaty itself of the territory over which these rights may be

exercised. There is also no indication that the territory of what is now Jacques-Cartier park was contemplated. However, *for a freedom to have real value and meaning*, it must be possible to exercise it somewhere. [Emphasis added.]

Similarly, in [*R v Sundown*, [1999] 1 SCR 393, 1999 CanLII 673], the Court found that the express right to hunt included the implied right to build shelters required to carry out the hunt. See also [*R v Simon*, [1985] 2 SCR 387, 1985 CanLII 11], where the Court recognized an implied right to carry a gun and ammunition on the way to exercise the right to hunt. These cases employed the concept of implied rights to support the meaningful exercise of express rights ... where no such implication might necessarily have been made absent the *sui generis* nature of the Crown's relationship to aboriginal people. While I do not believe that in ordinary commercial situations a right to trade implies any right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations.

Rights of the Other Inhabitants

[45] ... [I]t is ... true that a general right enjoyed by all citizens can nevertheless be made the subject of an enforceable treaty promise. ...

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[47] ... The settlers and the military undoubtedly hunted and fished for sport or necessities as well, and traded goods with each other. The issue here is not so much the content of the rights or liberties as the level of legal protection thrown around them. A treaty could, to take a fanciful example, provide for a right of the Mi'kmaq to promenade down Barrington Street, Halifax, on each anniversary of the treaty. Barrington Street is a common thoroughfare enjoyed by all. There would be nothing "special" about the Mi'kmaq use of a common right of way. The point is that the treaty rights-holder not only has the right or liberty "enjoyed by other British subjects" but may enjoy special treaty protection against interference with its exercise. So it is with the trading arrangement. On June 25, 1761, following the signing of the Treaties of 1760-61 by the last group of Mi'kmaq villages, a ceremony was held at the farm of Lieutenant Governor Jonathan Belcher, the first Chief Justice of Nova Scotia, who was acting in the place of Governor Charles Lawrence, who had recently been drowned on his way to Boston. In reference to the treaties, including the trade clause, Lieutenant Governor Belcher proclaimed:

The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.

[48] Until enactment of the *Constitution Act, 1982*, the treaty rights of aboriginal peoples could be overridden by competent legislation. ... The hedge offered no special protection, as the aboriginal people learned in earlier hunting cases such as *Sikyea v. The Queen*, [1964] S.C.R. 642, and *R. v. George*, [1966] S.C.R. 267. On April 17, 1982, however, this particular type of "hedge" was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to the test laid down in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1112 et seq., as adapted to apply to treaties in *Badger, supra, per Cory J.*, at paras. 75 et seq. The fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.

The Honour of the Crown

[49] ... [T]he honour of the Crown is always at stake in its dealings with aboriginal people. ...

[50] This principle that the Crown's honour is at stake when the Crown enters into treaties with first nations dates back at least to this Court's decision in 1895, *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 25 S.C.R. 434. In that decision, Gwynne J. (dissenting) stated, at pp. 511-12:

... [W]hat is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that *the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.* [Emphasis added.]

[A review of authorities is omitted.]

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[52] I do not think an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Lieutenant Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. This was not a commercial contract. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. In my view, with respect, the interpretation adopted by the courts below left the Mi'kmaq with an empty shell of a treaty promise.

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The Limited Scope of the Treaty Right

[57] The Crown expresses the concern that recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources. Whereas hunting and fishing for food naturally restricts quantities to the needs and appetites of those entitled to share in the harvest, it is argued that there is no comparable, built-in restriction associated with a trading right, short of the paramount need to conserve the resource. ... The ultimate fear is that the appellant, who in this case fished for eels from a small boat using a fyke net, could lever the treaty right into a factory trawler in Pomquet Harbour gathering the available harvest in preference to all non-aboriginal commercial or recreational fishermen. (This is indeed the position advanced by the intervener [of] the Union of New Brunswick Indians.) This fear (or hope) is based on a misunderstanding of the narrow ambit and extent of the treaty right.

[58] The recorded note of February 11, 1760 was that "there might be a Truckhouse established, for the furnishing them with *necessaries*" (emphasis added). What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessities. The treaty right is a regulated right and can be contained by regulation within its proper limits.

[59] The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood." Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities," but not the accumulation of wealth (*Gladstone* [*R v Gladstone*, [1996] 2 SCR 672, 1996 CanLII 160], at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

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[61] Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the *Badger* standard.

Application to the Facts of This Case

[62] The appellant is charged with three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. ... For Marshall to have satisfied the regulations, he was required to secure a licence under either the *Fishery (General) Regulations*, SOR/93-53, the *Maritime Provinces Fishery Regulations*, SOR/93-55, or the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

[63] All of these regulations place the issuance of licences within the absolute discretion of the Minister. ...

[64] Furthermore, there is nothing in these regulations which gives direction to the Minister to explain how she or he should exercise this discretionary authority in a manner which would respect the appellant's treaty rights. [The Court cited the test for infringement set out in *Sparrow*.] Lamer C.J. in [*R v Adams*, [1996] 3 SCR 101, 1996 CanLII 169] applied this test to licensing schemes and stated as follows at para. 54:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, *Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance*. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. [Emphasis added.]

Cory J. in *Badger*, *supra*, at para. 79, found that the test for infringement under s. 35(1) of the *Constitution Act, 1982* was the same for both aboriginal and treaty rights There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected. ... [U]nder the applicable regulatory regime, the appellant's exercise of his treaty right

to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(a)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test.

[65] Further, the appellant was charged with fishing during the close season with improper nets, contrary to s. 20 of the *Maritime Provinces Fishery Regulations*. Such a regulation is also a *prima facie* infringement, as noted by Cory J. in *Badger, supra*, at para. 90: "This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty," apart, I would add, from a treaty limitation to that effect.

[66] The appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal.

Disposition

[67] The constitutional question stated by the Chief Justice on February 9, 1998, as follows:

Are the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish, contained in ss. 4(1)(a) and 20 of the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations*, inconsistent with the treaty rights of the appellant contained in the Mi'kmaq Treaties of 1760-61 and therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

Should be answered in the affirmative. I would therefore allow the appeal and order an acquittal on all charges.

[Justices McLachlin and Gonthier dissented.]

Appealed allowed.

NOTES

1. Following the release of the judgment in *R v Marshall*, there were numerous clashes between Indigenous and non-Indigenous fishers in Nova Scotia and New Brunswick. The commercial fishers widely condemned the ruling for its potential to disrupt their livelihoods, while Indigenous fishers strongly praised it as a means to enhance their access to economic opportunity. In this climate of unrest and instability, the West Nova Fishermen's Coalition applied for a rehearing of the case. They wanted "to have the Court address the regulatory authority of the Government of Canada over the east coast fisheries" (at para 1) and requested an order that the Court's earlier judgment be stayed to allow the Crown to justify restrictions on the exercise of Marshall's treaty right. In *R v Marshall*, [1999] 3 SCR 533, 1999 CanLII 666 (Marshall No 2), the Court dismissed West Nova's application, but, in an unprecedented move, it reframed its judgment of only a month earlier. Some commentators observed that the

Court's "clarification" arguably had the effect of emphasizing certain aspects of the original judgment at the expense of other elements of the original decision. Some criticized the Court for bowing to public pressure and compromising its independence, while others applauded it for bringing order to an unstable situation.

2. In 2014, the Supreme Court of Canada did not apply the liberal principles of treaty interpretation deployed in *Marshall No 1*. In *Grassy Narrows First Nation v Ontario (Natural Resources)*, the Court did not once refer to these canons of construction. Instead, the Court chose to prioritize other constitutional norms, as evident in the following excerpt.

Grassy Narrows First Nation v Ontario (Natural Resources)

2014 SCC 48

[This case involved the Keewatin area of Northwestern Ontario, a portion of land that was included in Treaty 3 of 1873 between the Ojibway First Nation and the Dominion of Canada. By virtue of Treaty 3, the Ojibway yielded ownership of their territory (except for certain reserve lands), receiving in return the right to harvest the non-reserve lands surrendered by them until such time as that land was "taken up," for example, for settlement, mining, and lumbering by the Dominion of Canada. The Keewatin area was annexed to Ontario in 1912.

The appellants before the Supreme Court were the descendants of the Ojibway signatories to Treaty 3. They challenged a forestry licence issued by the province of Ontario that authorized forestry operations in the Keewatin area. The trial judge found that the province of Ontario could not take up lands within the Keewatin area so as to limit the harvesting rights of First Nations without the approval of the federal government. Accordingly, she interpreted the taking-up clause of Treaty 3 as imposing a two-step process (involving provincial authorization and then federal approval) before any lands covered by the treaty could be taken up.

The Ontario Court of Appeal reversed the ruling of the trial judge, and held that several provisions of the *Constitution Act, 1867* gave Ontario beneficial ownership of, and the right of management over, the lands in question.]

McLACHLIN CJ (LeBel, Abella, Rothstein, Cromwell, Moldaver, and Wagner JJ concurring):

[3] ... The legal issue in this case is whether Ontario can "take up" lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether it needs federal authorization to do so.

[4] I conclude that Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3. By virtue of ss. 109, 92A, and 92(5) of the *Constitution Act, 1867*, Ontario alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the *Constitution Act, 1982*. A two-step process involving federal approval for provincial taking up was not contemplated by Treaty 3.

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[31] Once the Keewatin lands came within Ontario's borders in 1912, s. 109 of the *Constitution Act, 1867* became applicable. Section 109 provides:

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are

situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Section 109 establishes conclusively that Ontario holds the beneficial interest in the Keewatin lands and the resources on or under those lands. In addition, s. 92(5) of the *Constitution Act, 1867* gives the Province exclusive power over the "Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" and s. 92A gives the Province exclusive power to make laws in relation to non-renewable natural resources, forestry resources, and electrical energy. Together, these provisions give Ontario the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes, such as forestry.

[32] The view that only Canada can take up, or authorize the taking up of, lands under Treaty 3 rests on a misconception of the legal role of the Crown in the treaty context. It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty.

[33] The theory of the trial judge, supported by the appellants, was that since the treaty was made with the federal Crown, only the federal Crown has obligations and powers over matters covered by the treaty. But this reasoning does not apply in the treaty context. For example, this Court has held that Crown obligations to First Nations such as the duty to consult are owed by both levels of government (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511) and that a change in the level of government responsible for regulating hunting rights did not constitute a modification of a treaty (*R. v. Horseman*, [1990] 1 S.C.R. 901). Furthermore, in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), Lord Watson concluded that Treaty 3 purported to be "from beginning to end a transaction between the Indians and the Crown," not an agreement between the government of Canada and the Ojibway people (p. 60). In the same vein,

it is abundantly clear that the Commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867.

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[35] The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act, 1867*. Thus, when the lands covered by the treaty were determined to belong to the Province of Ontario, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, subject to the terms of the treaty. It follows that the Province is entitled to take up lands under the treaty for forestry purposes.

[36] The appellants further argue that s. 91(24) of the *Constitution Act, 1867* grants Canada a residual and continuing role in respect of the taking up of Treaty 3 lands. Section 91(24) provides that Canada has jurisdiction over "Indians, and Lands reserved for the Indians." Thus, the appellants submit that the trial judge's two-step process is merely a restatement of the double aspect doctrine: to the extent that any taking up displaces or limits the federally promised treaty rights, both aspects of the land or resource must be addressed: the provincial aspect of the land *qua* proprietary rights and the federal aspect of the land as subject to a treaty right (Grassy Narrows' factum, at para. 66).

[37] Section 91(24) does not give Canada the authority to take up provincial land for exclusively provincial purposes, such as forestry, mining, or settlement. Thus, s. 91(24) does not require Ontario to obtain federal approval before it can take up land under Treaty 3. While s. 91(24) allows the federal government to enact legislation dealing with Indians and lands reserved for Indians that may have incidental effects on provincial land, the applicability of provincial legislation that affects treaty rights through the taking up of land is determined by *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and by s. 35 of the Constitution Act, 1982.

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[50] I conclude that as a result of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. However, this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government*—be it the federal or a provincial government—exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.

[51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.

[52] Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset. Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right ... , a potential action for treaty infringement will arise (*Mikisew*, at para. 48).

[53] I have concluded that Ontario has the power to take up lands in the Keewatin area under Treaty 3, without federal approval or supervision. Provided it ... respects the requirements set out in *Mikisew*, doing this does not breach Treaty 3 harvesting rights. If Ontario's taking up of Keewatin lands amounts to an infringement of the treaty, the Sparrow/Badger analysis under s. 35 of the *Constitution Act, 1982* will determine whether the infringement is justified (*R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771). The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). While it is unnecessary to consider this issue, this Court's decision in *Tsilhqot'in Nation* is a full answer.

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Appeal dismissed.

NOTES AND QUESTIONS

- Evaluate the following critique by John Borrows:

The *Grassy Narrows* case permits the province to take up lands under Treaty 3 without being subject to federalism's constraints. The Supreme Court held that the province is fully vested with the beneficial interest of the so-called surrendered Treaty 3 lands. The Court found that the province was unrestrained by federal authority in taking up Treaty 3 lands for settlement because it held the beneficial interest in these lands under section 109 of the *Constitution Act, 1867*. The Supreme Court strengthened the province's hand despite the specific wording of the Treaty, which placed the power to "take up" treaty lands in the hands of the federal government. Furthermore, the province was vindicated as the Supreme Court of Canada overturned the Trial Judge's findings of fact which had been based on First Nations perspectives. First Nations perspectives were subordinated to provincial views.

The Supreme Court wrote that Treaty 3 was with the Crown, not Canada. In taking this approach it did not resolve ambiguities in the treaty in favour of the Indians. Chief Justice McLachlin did not apply a large, liberal and generous perspective of the agreement which interprets the treaty in this light. Section 109 prevailed over a longer 250-year narrative which would shield First Nations from the very approach taken by the Court. The Supreme Court of Canada has acted to enhance provincial development and control of First Nations lands. The shielding of First Nations from local governments has been abandoned. It strikes against the heart of First Nations political rhetoric which claims a nation-to-nation relationship with the Crown, not a nation-to-province relationship. Many First Nations call this colonialism—allowing the local colonies (now called provinces) to set the framework for Indigenous lives. In reinforcing the provincial narrative, First Nations treaty rights have been placed in the very hands of the party which has the most to gain from undermining the treaties. As the United States Supreme Court once observed, "the people of the States where they are found are often their [the Indians] deadliest enemies" because [of] their adverse interests (*United States v. Kagama*, (1888) 118 US 375 at 383). The federal government may have been an exceedingly poor fiduciary but at least that level of government did not stand to receive the direct benefits of First Nations dispossession in the same way. The Supreme Court of Canada has diminished a centuries-old Indigenous-centric constitutional narrative. It has replaced this older constitutional framework with a balancing test under section 35(1) of the Constitution which allows the provinces to justifiably infringe Aboriginal and treaty rights.

See John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right(s) Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2016) 17 at 17, 31-32.

As this critique reveals, *Grassy Narrows* raises issues about the distribution of legislative powers over Indigenous peoples. These issues are dealt with in more detail below in Section X.

2. The "taking up" of land under a treaty may involve the duty to consult: see *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), discussed in Note 2 following *Haida Nation* in Section VII, and *Beckman v Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), noted in Section VII.

3. Modern treaties have been negotiated and passed into law in the past 35 years, starting with the James Bay and Northern Quebec Agreement in 1975. These modern land claims agreements are constitutionally protected by virtue of s 35(3) of the *Constitution Act, 1982*, which reads, "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired." Should the courts take the same approach to modern treaties as they do with historic treaties? See *R v Howard*, [\[1994\] 2 SCR 299, 1994 CanLII 86](#) and *Beckman v Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), where a majority of the Court, in a decision authored by Binnie J had this to say:

[12] The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties such as the 1760–61 Treaty at issue in *R. v. Marshall*, [1999] 3 S.C.R. 456, and post-Confederation treaties such as Treaty No. 8 (1899) at issue in *R. v. Badger*, [1996] 1 S.C.R. 771, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability.

A note related to *Beckman*, further elaborating on the principles to be applied in administering modern treaty relationships, can be found below in Section VII.

4. Many modern treaties are not only comprehensive land claims agreements but also provide for a measure of self-government. Of the 24 modern treaties that have been brought into effect since 1973, 18 have self-government provisions. For an example, see the *Nisga'a Final Agreement* (2000), discussed below in Section X.

5. In some cases, agreements between Indigenous peoples and the Crown have been converted into constitutional provisions. Should the principles of treaty interpretation be applied, or those of constitutional interpretation? See *Manitoba Metis Federation Inc v Canada (AG)*, [2013 SCC 14](#), excerpted below in Section VIII.

VII. THE DUTY TO CONSULT

You will recall this chapter began with a discussion of Anishinaabe constitutionalism. Throughout this chapter, you have been introduced to varied ways by which Indigenous legal traditions challenge the foundation of Canadian constitutional law through different ways of conceiving and creating law. Constitutional law is changing because Indigenous actors are asserting their right to be recognized as this nation's founders and first polities.

The resurgence of Indigenous law is perhaps most visible to the public in the natural resource sector. Disputes about pipelines, oil and gas exploration, forestry, mining, and other developments bring Indigenous peoples into conflict with resource companies and others. In the face of these challenges, Indigenous peoples are insisting that they have the right to free, prior, and informed consent when development impacts their lives. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) contains clauses that recognize this right. Article 32.2 states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

See *United Nations Declaration on the Rights of Indigenous Peoples*, UN GA res 61/295.

In conjunction with UNDRIP's recognition, Indigenous nations are creating laws related to free, prior, and informed consent to guide their deliberations with governments, corporations, and entrepreneurs. Likewise, Canada and British Columbia have passed legislation that

obliges their governments to affirm UNDRIP as applying to their laws. This legislation also mandates pathways to implement UNDRIP, including obtaining free, prior, and informed consent from Indigenous peoples in connection with development.

The challenge in finding the intersection between Indigenous constitutionalism and s 35(1) of the *Constitution Act 1982* is revealed in a case called *Coastal GasLink Pipeline Ltd v Huson*, [2019 BCSC 2264](#). The case involved an injunction application to remove Indigenous peoples from a blockade because they were preventing the construction of a pipeline. In the hearing, the judge had to consider the argument that Wet'suwet'en authorization was also required in order for the pipeline to be built on Wet'suwet'en territories and such authorization has not been obtained.

You will remember that the Wet'suwet'en people were plaintiffs who sought a declaration of Aboriginal title in the *Delgamuukw* case. The Supreme Court of Canada sent the parties back to trial to test Wet'suwet'en claims against the new principles identified in the case. The Court also urged the parties to negotiate. In the end, negotiations failed to recognize Wet'suwet'en ownership. Furthermore, the case was not re-litigated, likely due to cost and Wet'suwet'en views regarding the injustice they continue to face from the courts and others.

Therefore, bolstering their earlier claims to being the territory's owners, in relation to the strong principles set out in the *Delgamuukw* case, the Wet'suwet'en argued that they have a legal right to block access to what they regard as their Aboriginal title territories. They argued this authority flowed from Wet'suwet'en law.

The judge found she could not give effect to Wet'suwet'en law. In commenting on the challenge of recognizing Wet'suwet'en law in an injunction action, Church J of the British Columbia Supreme Court wrote:

[127] As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations

[128] There has been no process by which Wet'suwet'en customary laws have been recognized in this manner. The Aboriginal title claims of the Wet'suwet'en people have yet to be resolved either by negotiation or litigation. While Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law.

This quote illustrates the reluctance courts may have in giving effect to Indigenous laws without executive, legislative, or judicial recognition.

In critiquing Church J's reasoning, Joshua Nichols and Sarah Morales argue the following in "Finding Reconciliation in Dark Territory: Coastal Gaslink, Coldwater, and the Possible Futures of DRIPA" (2021) 53:4 UBC Law Rev 1185 at 1199-1206:

Even at first glance, this "general rule" should give us pause. After all, the common law tradition is no stranger to customary law and unwritten principles. ... What would the *Persons Case* or the *Secession Reference* say if this were indeed the "general rule"? ... It seems that this "general rule" would only apply to Indigenous customary law. ...

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It would appear that Aboriginal customary law which has not been extinguished is given legal effect in Canadian domestic law through Court declarations, including Aboriginal title or rights jurisprudence, or by statutory provisions. We would also suggest Aboriginal customary law may also be given legal effect by incorporation into Indian treaties. It may be that there are other means by which Aboriginal customary law could be recognized but that is not a question for me to address here.

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... The simple fact is that there is no "general rule" that Indigenous laws can be set aside as not legally effective in the way that Church J suggests. Nor is there any amount of interpretive acrobatics that can support the reading of both the standing of the defendants and the status of the laws they cite in *Coastal GasLink* 2. ... But this leaves us stranded on the horns of a very troubling dilemma indeed. Who decides which laws are legally effective and how they are to be applied in these kinds of situations? ... If we buy her version of the "general rule" regarding Indigenous law, then the Crown has the ability to pick and choose which Indigenous laws have legal effect by enacting enabling legislation, creating agreements and so forth. In this case we would have difficulty explaining much of our own jurisprudence from pre-confederation cases like *Connolly v Woolrich*, through to *Calder, Delgamuukw*, and beyond. As Hall J put it in *Calder*, Aboriginal rights owe their origin to the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." If Indigenous law were not "an effectual part of Canadian common law" until it is positively incorporated in legislation or treaty, or proven at law, then it would not have legal effects and thus the entire *Haida* framework (which is designed to deal with asserted but unproven rights) would not exist [the case of *Haida Nation v. BC* is examined in the next excerpt].

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... We believe that this dilemma is only necessary if we insist that the question of the status of Indigenous law in Canada should be settled unilaterally. If we follow those aspects of our constitutional tradition that draw from mutual recognition and treaty making, there are many points of light that could help us pull back from the dead end that we find in the *Coastal GasLink* cases. ... [As] Grammond J states in *Pastion v Dene Tha' First Nation, 2018 FC 648* at para. 8: ... "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."

Professors Nichols and Morales' critique of the *Coastal Gaslink* case raises questions that lie at the heart of this chapter. How can Indigenous law be implemented when the executive, legislative, or judicial branches of government have not themselves recognized its force? Twenty-two years before the *Coastal Gaslink* case, the Supreme Court of Canada wrote that the government had a duty to consult with Indigenous peoples when developments affected their rights.

Recall that in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302, extracted above in Section V, "Constitutional Recognition of Aboriginal Title," the Court stated:

[168] ... There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

In an extraordinary series of cases, beginning with *Haida Nation*, immediately below, the Supreme Court of Canada has elaborated on and strengthened this "duty to consult," grounding it in the principle that the honour of the Crown is at stake in all its dealings with Indigenous peoples. The Court has established that the government has a duty to consult with Indigenous groups whenever government decision-making could adversely affect an Aboriginal right or Aboriginal title, and that the duty extends to cases where claims of

Aboriginal rights or title have been asserted but not yet proven. The "duty to consult" has also become a principle that informs the interpretation and implementation of treaties. This principle has given rise to much recent litigation because of uncertainty about the specific content of the duty in different contexts.

Haida Nation v British Columbia (Minister of Forests)

2004 SCC 73

[The Haida Nation challenged the BC government's unilateral replacements and transfer of tree-farming licences (TFLs) over lands to which the Haida claimed Aboriginal title. The replacements and transfer were made over the objections of the Haida. The Court, in a unanimous decision authored by McLachlin CJ, held that the provincial government had a duty to consult with and accommodate the Haida with respect to harvesting timber in the block of land in issue. The Court grounded the duty to consult in the principle of the honour of the Crown.]

McLACHLIN CJ (Major, Bastarache, Binnie, LeBel, Deschamps, and Fish JJ concurring):

[16] The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples

[17] The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

[Recognizing that the honour of the Crown gives rise to different duties in different contexts, the Court went on to discuss the implications of the principle in the context of negotiating claims to Aboriginal rights and title.]

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[25] Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[26] Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

[27] The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[The Court dismissed the provincial government's argument that any duty to consult and accommodate Aboriginal interests arose only after there had been a final determination of the scope and content of any Aboriginal right.]

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[32] The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. ...

[33] To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: [*R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104], at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

[The Court found that the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. As for the exact content of the duty to consult, the Court left much to be determined by developing case law.]

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[39] The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[40] In [*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302], at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

The nature and scope of the duty of consultation will vary with the circumstances. ... [W]hen the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith In most cases, it

will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

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[42] At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Indigenous] concerns" as they are raised (*Delgamuukw* [abovel], at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached

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[47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation."

[On the facts of the case, the Court found that the Crown's obligation to consult the Haida was engaged. The Haida's claims to title and an Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the province knew that the potential Aboriginal rights and title applied to the block of land in question and could be affected by the decision to replace the TFLs. TFL decisions were found to reflect strategic planning for use of the resource and, potentially, to have a serious impact on Aboriginal rights and title. In the Court's view, for consultation to be meaningful, it must take place at the stage of granting or renewing TFLs. The Court went on to state that the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggested that the honour of the Crown might also require significant accommodation to preserve the Haida's interest pending resolution of their claims.]

NOTES AND QUESTIONS

1. *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 was decided at the same time as *Haida Nation*. In this case, which arose in the context of ongoing treaty negotiations, the Court determined that the provincial government's duty to consult with the Taku River Tlingit First Nation (TRTFN) was engaged because the proposed action—the construction of a 160 km long road through the group's traditional territory to reopen an old mine—could significantly and negatively affect the TRTFN. However, the Court went on to hold that the provincial government had consulted and fulfilled its duty to accommodate before approving the reopening of the mine.

The province met the duty to consult through the environmental assessment that was conducted, which included consultation with interested Indigenous groups, including the TRTFN. Not all the broad concerns of the TRTFN were addressed when the final construction

plan was approved. However, the Court was satisfied that the assessment committee had given sufficient attention to the specific issues raised by the TRTFN both in the initial assessment process and when the group brought forward additional concerns after the assessment's report was written. The Court stated explicitly that "[t]he Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN" (at para 22). Furthermore:

[40] ... The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

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[42] As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

2. The duty to consult and historic treaties: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#) involved the Crown taking up lands surrendered under a treaty to build a winter road to meet regional transportation needs. The proposed road would have the effect of reducing the territory over which the Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish, and trap. The Court found that the Crown had a duty to consult, which it had breached.

The Court found that although the Crown had the authority under the treaty to "take up" surrendered lands, it was nevertheless under the obligation to inform itself about the impact its project would have on the Mikisew's exercise of their treaty hunting, fishing, and trapping rights and to communicate its findings to the Mikisew. The Crown was then required to attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. On the facts, the Court found that the impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew's hunting and trapping rights over the lands in question and that the duty to consult was thereby triggered.

However, given that the Crown was proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights were expressly subject to the taking-up limitation, the content of the Crown's duty of consultation, in this case, was found to lie at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them. This engagement was to include providing information about the project and addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was also required to solicit and listen carefully to the Mikisew's concerns and attempt to minimize adverse impacts on its treaty rights.

The Crown was found not to have discharged its obligations when it unilaterally declared that the road realignment would be shifted from the reserve itself to a track along its boundary. It had failed to demonstrate an intention of substantially addressing Indigenous concerns through a meaningful process of consultation.

3. The duty to consult in modern treaties: In *Beckman v Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), the Supreme Court of Canada for the first time addressed the Crown's duty to consult Indigenous peoples in the context of modern treaties. The case is also important because of the discussion of the duty's nature, specifically when dealing with third-party

interests. It raises issues similar to those related to historic treaties discussed in *Mikisew Cree* (see Note 2, immediately above) and *Grassy Narrows* (excerpted above in Section VI, "Treaty Rights"). The question in the case concerned the Crown's obligations to a First Nation when Crown land was transferred for individual, non-native use. The Yukon government took the position that the Treaty was a complete code and that no consultation was required when Crown land was transferred from public to private status, unless a duty to consult was specifically included in the terms of the Treaty.

A majority of the Court, in a decision written by Binnie J, found that the Crown had a duty to consult the First Nation about this change of land use. This duty existed outside the treaty, as part of the Crown's ongoing constitutional duty to First Nations. Justice Binnie wrote:

[10] The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[11] Equally, however, the LSCFN is bound to recognize that the \$34 million and other treaty benefits it received in exchange for the surrender has earned the territorial government a measure of flexibility in taking up surrendered lands for other purposes.

[12] The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties . . . Modern comprehensive land claim agreements, . . . while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. . . .

On the facts of the case, given that the duty to consult was at the "lower end of the spectrum" (at para 6), the consultation was adequate. The LSCFN had been given notice and an opportunity to state its concerns. The Yukon government was entitled to conclude that the impact of the land transfer on the LSCFN was not significant, and there was no duty to accommodate. Justice Deschamps, with LeBel J concurring, wrote separate reasons concurring in the result but expressing the view that, where there was a treaty, the duty to consult would apply only if the parties had failed to address the issue of consultation.

4. The duty to consult in the legislative process: In *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018 SCC 40](#) [*Mikisew* (2018)], the Supreme Court of Canada considered whether the Crown had a duty to consult Indigenous peoples when passing environmental legislation that could affect treaty and/or Aboriginal rights. This case allowed the Court to address the relationship between s 35(1) rights and the broader constitutional separation of powers and parliamentary sovereignty. In four separate opinions, the Court ultimately found that the development, passage, and enactment of legislation does not trigger the duty to consult. The judges disagreed, however, about the extent to which courts could ever review or restrict Parliament's power to pass legislation (which is different from reviewing the content of legislation after it has been passed). Generally, *Mikisew* (2018) holds that the duty to consult does not bind Parliament.

Recent legislative action has potentially modified the practical effect of the *Mikisew* (2018) ruling, as the government of Canada has seemingly committed itself to consulting and cooperating with Indigenous peoples before adopting legislative measures that may affect them.

In 2021, Parliament passed legislation to implement the UNDRIP called *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14 (see Section X below). Section 5 of the Act states: "The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." Article 19 of UNDRIP states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

How might s 5 of *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2021 change the practical result of the *Mikisew* (2018) case?

In discussing the duty to consult in the legislative process in the *Mikisew* case, Karakat-sanis J (joined by Wagner CJ and Gascon J) wrote:

[32] ... I conclude that the law-making process—that is, the development, passage, and enactment of legislation—does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult doctrine is ill-suited for legislative action.

[33] The *Mikisew* ask us to recognize that the duty to consult applies to ministers in the development of legislation. There is no doubt overlap between executive and legislative functions in Canada; Cabinet, for instance, is "a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state" (*Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 559 I do not accept, however, the *Mikisew*'s submission that ministers act in an executive capacity when they develop legislation. The legislative development at issue was not conducted pursuant to any statutory authority; rather, it was an exercise of legislative powers derived from Part IV of the *Constitution Act, 1867*

[34] The development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight. ...

[35] Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is "an essential feature of our constitution" Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain.

[36] Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. While the adoption of the *Canadian Charter of Rights and Freedoms* transformed the Canadian system of government "to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72), democracy remains one of the unwritten principles of the Constitution (*Secession Reference*, at paras. 61–69). Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

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[38] Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. ...

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[42] That said, parliamentary sovereignty and the separation of powers are not the only constitutional principles relevant to this appeal. The duty to consult was recognized to help protect the constitutional rights enshrined in s. 35 and uphold the honour of the Crown—itself a constitutional principle (*Little Salmon*, at para. 42).

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[45] ... [I]t is worth noting that the duty to consult is not the only means to give effect to the honour of the Crown when Aboriginal or treaty rights may be adversely affected by legislation. Other doctrines may be developed to ensure the consistent protection of s. 35 rights and to give full effect to the honour of the Crown through review of enacted legislation.

[46] For example, it may not be consistent with s. 35 to legislate in a way that effectively removes future Crown conduct which would otherwise trigger the duty to consult. I note that, in *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100, the Yukon Court of Appeal held that “[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist” (para. 37; see also *Constitution Act, 1982*, s. 52(1)).

[47] Other forms of recourse may also be available. For example, declaratory relief may be appropriate in a case where legislation is enacted that is not consistent with the Crown’s duty of honourable dealing toward Aboriginal peoples (see *Manitoba Metis*, at paras. 69 and 143). A declaration is available without a cause of action (*ibid*, at para. 143). ...

[48] To be clear, legislation cannot be challenged on the basis that the legislature failed to fulfill the duty to consult. The duty to consult doctrine does not apply to the legislature. However, if other forms of recourse are available, the extent of any consultation may well be a relevant consideration, as it was in *Sparrow*, when assessing whether the enactment is consistent with constitutional principles. In *Sparrow*, this Court held that, when there has been a *prima facie* infringement of a s. 35 right, the “first consideration” in determining whether the legislation or action can be justified is the honour of the Crown (p. 1114). And an important part of that inquiry is whether the Aboriginal group in question was consulted on the impugned measure (*Sparrow*, at p. 1119; see also *Badger*, at para. 97; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at paras. 77, 80 and 125; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168).

Writing for herself and Martin J, Abella J would have allowed a duty to consult in the legislative process:

[55] The honour of the Crown governs the relationship between the government of Canada and Indigenous peoples. This obligation of honour gives rise to a duty to consult and accommodate that applies to all contemplated government conduct with the potential to adversely impact asserted or established Aboriginal and treaty rights, including, in my view, legislative action. The duty to consult arises based on the effect, not the source, of the government action. The Crown’s overarching responsibility to act honourably in all its dealings with Indigenous peoples does not depend on the formal label applied to the type of action that the government takes with respect to Aboriginal rights and interests protected by s. 35 of the *Constitution Act, 1982*. As a constitutional imperative, the honour of the Crown cannot be undermined, let alone extinguished, by the legislature’s assertion of parliamentary sovereignty.

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[62] I see this duty as being more than a “means” to uphold the honour of the Crown. The obligation arises because it would not be honourable to make important decisions that have an adverse impact on Aboriginal and treaty rights without efforts to consult and, if appropriate, accommodate those interests. ... The question is not whether the duty to consult is *appropriate* in the circumstances, but whether the decision is one to which the duty to consult applies.

[63] Because the honour of the Crown infuses the entirety of the government’s relationship with Indigenous peoples, the duty to consult must apply to all exercises of authority which are subject to scrutiny under s. 35. This includes, in my view, the enactment of legislation. Like the infringement analysis under *Sparrow*, the duty to consult does not discriminate

based on the type of government action, but rather is triggered based on the potential for adverse effects.

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[78] Because the rationale for the duty to consult applies equally as in the executive context, it would make little sense to adopt a different analytical approach where legislative action is impugned. Ongoing consultation is preferable to the backward-looking approach of subsequent challenges, since it protects s. 35 rights from irreversible harm and enhances reconciliation. Most importantly, this approach recognizes that the legislative sphere is not excluded from the honour of the Crown, which attaches to all exercises of sovereignty. Both grounded in the honour of the Crown, the *Haida Nation* and *Sparrow* frameworks cover all arenas of decision-making equally, providing for consultation where the potential for adverse effects arises, and the obligation to provide justification where infringements result. To revive a pre-*Haida Nation* state of affairs in this context would essentially extinguish the honour of the Crown in the legislative process by conflating the government's duty to consult with its distinct obligation to justify infringements.

[79] Endorsing such a void in the honour of the Crown would also leave a corresponding gap in the s. 35 framework. *Haida Nation* provides consultation remedies on a reduced threshold, based on the potential for adverse effects on a claimed or asserted right. If legislative decisions were only subject to the *Sparrow* framework, Indigenous groups with established rights would be required to meet the more onerous infringement threshold in order to access consultation rights, and those with unproven claims would be excluded entirely. Adverse effects which do not rise to the level of a *prima facie* infringement would be without remedy, leaving Aboriginal rights-holders vulnerable to the same government objectives carried out through legislative, rather than executive, action.

[80] This result would be contrary to the spirit of the Court's decision in *Haida Nation* and would sit uncomfortably with the approach adopted in *Mikisew Cree*. Where the government takes up land under Treaty No. 8, it is not appropriate to move directly to a *Sparrow* analysis; the court must first consider whether the process was compatible with the honour of the Crown (*Mikisew Cree*, at paras. 57 and 59). Action which would adversely affect the Mikisew's guaranteed rights to hunt, fish, and trap, triggers a duty to consult, whether or not an infringement results (para. 34). The underlying premise of the decision in *Mikisew Cree* would be frustrated if the same action could be carried out through legislation without consultation. Notably, while *Mikisew Cree* dealt with the "taking up" clause, Treaty No. 8 similarly subjects the Mikisew's treaty rights to "such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty." This process, too, must be carried out with honour.

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[87] The fact that these rights are political in implication does not detract from their enforceability in law, but highlights their essential role in reconciling Aboriginal and Crown sovereignty. Our Constitution places a responsibility on the executive and legislative branches, along with Indigenous leaders, to collaborate and reconcile competing claims and historical grievances (Dickson, at p. 146). This has been described as a generative constitutional order, which "mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society" (Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 436; *Carrier Sekani*, at para. 38). This process is supported by the judiciary's role in enforcing the honour of the Crown, and holding the Crown accountable where that standard is not met. Unilateral action is the very antithesis of honour and reconciliation, concepts which underlie both the duty to consult and the very premise of modern Aboriginal law (*Mitchell*, at para. 11).

[88] Cases which advocate against intrusion into the parliamentary process must therefore be read in the context of a duty that is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself. The unique nature of s. 35 means that its limits can be distinguished from cases which considered the impact of other rights and obligations on parliamentary sovereignty. . . .

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[91] While the judiciary must respect the separate roles of each institution in our constitutional order, its own role is to maintain the rule of law and protect the rights guaranteed by the Constitution (*Criminal Lawyers' Association*, at paras. 28-29; *New Brunswick Broadcasting Co.*, at p. 389). It would be a mistake, in my respectful view, to interpret parliamentary sovereignty in a way that eradicates the obligations under the honour of the Crown that arose at its assertion. Like all constitutional principles, parliamentary sovereignty must be balanced against other aspects of our constitutional order, including the duty to consult.

5. The duty to consult, administrative tribunals, and Indigenous law: In July 2017, the Supreme Court of Canada held that the National Energy Board (NEB) could act on behalf of the Crown when considering treaty rights in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017 SCC 41](#) and *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, [2017 SCC 40](#). This means the NEB has the power to judge whether Aboriginal and treaty rights exist or are justifiably infringed by government action. In other words, an administrative agency created by Parliament is now unequivocally empowered to decide when, where, and how Aboriginal and treaty rights can be reasonably limited or sustained in Canada.

In the *Chippewas of the Thames* case, the Court found that the Chippewa of the Thames had been adequately consulted and accommodated through participation in an independent decision-making process (the NEB) which accounted for and mitigated impacts on their Aboriginal and treaty rights. The Court found that the NEB provided the Chippewa with notice, a hearing, funded their participation, and provided written reasons related to potential impacts on their rights.

On the other hand, in the *Clyde River* case, the Court found that the Clyde River Inuit did not receive adequate consultation and accommodation in relation to their rights. Despite the need for "deep consultation," the NEB did not provide oral hearings, participant funding, translation of documents, or written reasons for their decision. The Court held that "[n]o mutual understanding on the core issues—the potential impact on treaty rights, and possible accommodations—could possibly have emerged from what occurred here" (para 49).

The Chippewa of the Thames and Clyde River cases stand within a broader context. In the shadow of pipeline protests, oil and gas development is increasingly being scrutinized for its local and international effects. Disputes like those related to Keystone XL, Trans Mountain, Northern Gateway, and Energy East have raised significant concerns. While these developments also have their supporters, Indigenous peoples are often their most visible critics. There is widespread recognition that there is a crisis of confidence related to the NEB's operations, which is particularly pronounced in matters related to Indigenous peoples.

Research related to the NEB's operation has led scholars to conclude that "the NEB has adopted an approach that is fundamentally at odds with a culture of legality promoted by the Courts in the last thirty years of jurisprudence" (Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65 UTLJ 382 at 415). For example, after an exhaustive review of NEB decisions, Sari Graben and Abbey Sinclair concluded (at 415):

The NEB has approved nearly 100 per cent of the applications in which consultation remains an issue but it relies on three types of justifications for still recommending approval: (i) that it lacks the jurisdiction to consider the consultation at issue; (ii) that outstanding consultation can be addressed through ongoing consultation; and/or (iii) that there are no impacts on rights.

Thus, when the Supreme Court held that the NEB has authority to evaluate Aboriginal and treaty rights, it did so against a background of deep Indigenous concern and opposition.

Since administrative tribunals can fulfill the Crown's constitutional obligations, this raised questions about how these bodies will deal with Indigenous law and governance. The Chippewa of the Thames leadership signed a series of treaties with the British Crown between 1818 and 1822, known as the Longwoods Treaty. They also signed treaties alongside other Anishinaabe groups from 1764 to 1827. Many of these treaties problematically read like real estate transactions. They do not generally contain Anishinaabe perspectives. The Anishinaabe do not see themselves as having surrendered sovereignty and other powers of governance throughout their traditional territories. They believe they have continuing responsibilities to manage and govern their territory in an environmentally sustainable manner. As the Chippewa of the Thames announce on their website:

Our leaders past and present continue to act as a sovereign people. This determination and commitment to action comes from who we are [as a] people. We are Anishinaabek people rich in culture, language, traditional knowledge, governance systems, and our own Indigenous laws.

See "Duty to Consult" (last visited 10 October 2021), online: *Chippewas of the Thames First Nation* <www.cottfn.com/consultation> [perma.cc/MV5C-JALG].

The Chiefs of Ontario Intervener's Factum in the Chippewas of the Thames case before the Supreme Court of Canada also expresses this broader point when it outlines the historical basis underlying the Chippewas' arguments. It asserts that historic treaties affirmed Anishinaabe sovereignty, but the Crown has failed to live in accordance with these agreements by acting in a unilateral fashion. The Factum says:

First Nations in Ontario have a centuries-long relationship with the Crown that can be traced to the beginnings of contact with European nations, and was formalized in the Niagara Treaty of 1764. The Niagara Treaty, following quickly on the heels of the Royal Proclamation of 1763, held out the promise of a nation-to-nation relationship between the Crown and First Nations, based on mutual autonomy and respect. This understanding extended to use and management of Upper Canada's abundant, but not infinite, land and natural resources. Over time, that promise has given way to the very opposite: unilateral decision-making by the Crown in regard to natural resources, fed by an attitude of paternalism and the policies of assimilation.

Today's First Nations in Ontario are the successor nation beneficiaries of the signatories to the Niagara Treaty. The instant cases represent the latest in a line of decisions that help shape the progression of the Crown-Indigenous relationship—and in particular whether it will be animated by a return to the spirit and intent of the Niagara Treaty: cooperation, consultation, mutual respect and reconciliation, based on an underlying nation-to-nation relationship.

The decisions below on both appeals, if left to stand, would help beat a path for the Crown to continue its historical pattern of unilateralism, and of evading its duty of consultation. Such a result would be antithetical to the nation-to-nation relationship that was the initial organizing principle of the Crown-First Nation founding compacts, and that must form the basis for that relationship in the 21st century. Chippewa of the Thames (Factum of the Intervener, The Chiefs of Ontario at paras 2-4), online (pdf): <www.scc-csc.ca/WebDocuments/DocumentsWeb/36776/FM090_Intervener_Chiefs-of-Ontario.pdf> [perma.cc/T3ZX-G6JT].

The Court did not reference this argument. The Court did not discuss Chippewa treaties' significance for Indigenous governance. In fact, the Court failed to acknowledge the nation-to-nation relationship as found in the Royal Proclamation and Treaty of Niagara. Instead, the

Supreme Court focused on the Chippewa's material circumstances before European's arrived, and not their political activities. The Court wrote of the *Chippewas of the Thames* case:

[6] The Chippewas of the Thames are the descendants of a part of the Anishinaabe Nation that lived along the shore of the Thames River in southwestern Ontario prior to the arrival of European settlers in the area at the beginning of the 18th century. Their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory.

Since neither the Supreme Court of Canada nor the NEB considered Anishinaabe law, the decisions leave unanswered questions regarding the role of Indigenous law in Canada's constitution. This is unfortunate because, logically speaking, Indigenous law must be necessary to the consultation process. If an Indigenous community does not use its decision-making systems to apply some normative standards, it cannot give its free, prior, and informed consent when consulted about development that might impact Aboriginal and treaty rights.

The failure of the Supreme Court or NEB to consider the role of Indigenous law within Canada's constitution means this will be a future issue. Indigenous peoples are increasingly putting their laws in written form to direct their own and others' expectations when being consulted and accommodated.

An example of the nature of Chippewa of the Thames law and governance is found in a document released after the *Chippewa of the Thames* case was decided. In November of 2016, the Deshkan Ziibiing/Chippewas of the Thames First Nation passed *Wiindmaagewin, a Consultation Protocol* for the protection of their lands. See Deshkan Ziibiing/Chippewas of the Thames First Nation, "Wiindmaagewin Consultation Protocol, Final" (26 November 2016), online (pdf): www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf [perma.cc/MLM4-3NNF]. The document begins by stating the law's purpose, which is to ensure the protection of their watersheds, relationships, and rights. To accomplish this purpose, the Chippewa of the Thames declared rights to land and governance in their territories recognized in their treaties with the Crown from the 1760's forward. Building on this treaty relationship, the Protocol outlines "principles of inter-societal governance and communication" (at 7-10). The First Nation asserts that it shares responsibility for maintaining healthy environments under headings related to government, communication, co-existence, and economy.

Principles of environmental governance in the document are as follows: Gdinawendim, Mno-bmaadiziwin, Naaknigewin, and Anishinaabe dbendizawin. Principles of environmental communication are outlined as Zgaswediwin, Ginoondiwin, Gii-nenmaasiinaawaan, and Chidibaakinigewin. Finally, principles of environmental co-existence and economy are identified as Gdoonaaganinaan, Maatookiwin, Gnawenjigewin, and Niigaan-inabiwin. After a detailed discussion of these principles, the *Consultation Protocol* identifies consultation processes, requirements, and dispute resolution principles. The Protocol law is 21 pages long, with an additional 11 pages of maps and appendices. These principles reveal the contours of a legal tradition that uses land and relationships with that land as resources for regulatory and dispute resolution structures. While It is true these principles were released to the public after the *Chippewa of the Thames* case was decided, they are not new principles. Anishinaabe sovereignty as a vehicle for environmental sustainability has motivated this community throughout its history. A brief excerpt (at 8) from the document reveals the depth of these convictions:

(1) Gdinawendimi: "We are all related." A basic truth of our creation story is that we are related to everything that shares the world with us. Our original Anishinaabe doodem ancestors: Ajijaak "Crane," Waabizhesh "Marten," Bneshiinh "Bird," Wawashkesh "Deer," Maang "Loon," Giigoonh "Fish," Mko "Bear;" all demonstrate that we humans are related to, that is, are family with, beings who are other than human. That our ancestors shaped our treaties

with Britain by inscribing many of those same doodemag on treaty texts indicates that they extended the web of kinship relations to include settlers. We expect that all consultation and discussion with governments and third parties will focus on how the proposed project will foster this relatedness.

(2) Mn̄o-bmaadiwiin: "The good life." We understand that the Creator placed us within our world's web of spiritual and bio-physical relationships in order for life to flourish, for all to enjoy the world. Life flourishes when we base our relationships on the gifts of the Seven Grandfathers: Nbwaakaawin "wisdom," Zaagidiwin "love," chi "respect," Aakde'ewin—or Zoongide'ewin "bravery," Gwakwaadiziwin "honesty," Dbaadendiziwin "humility," Debewin "truth." We expect that all proposals from and discussions with governments and third parties will demonstrate how the proposed project enhances the good life for all our relations.

(3) Naaknigewin: "Law." This measure for our decisions and determinations is the gift of the Creator. We expect that all consultation and discussion with governments and third parties will aim to respect and embody law as the measure for our decisions provided by the Creator.

(4) Anishinaabe dbendizawin: "Anishinaabe independence," or "self-determination." Some of our elders overcame their repressive years spent within the local residential school, and were able to play crucial roles in entrenching the recognition of our rights into sec. 35(1) of *Canada's Constitution Act, 1982*. Their personal struggles have taught us that we were created to live as an independent people, and are therefore able to ally with, but not to become subject to, other independent peoples. Many British treaty negotiators failed to understand this. Canada's unilateral imposition of regulations on our people, and its presumptuous administration of our lands, stems from its own consistent failure to understand this. Nevertheless, we have seen in some settler leaders, such as Sir William Johnson and his work at Niagara in 1764, the enduring possibility that our peoples might finally create a relationship of equality. William Johnson's Two Row Wampum embodies this alliance of equals, each party free to follow its own way without interference, but each also attentive to the wellbeing of the other. We expect that all proposals from governments will respect this most basic tenet of the Two Row Wampum.

One sees in these principles that Anishinaabe people see their laws as underlying and creating their constitutional relationships with Canadian governments. They contain the idea that treaties are an invitation for the Crown to abide by Anishinaabe laws.

Since the Supreme Court of Canada was unable or unwilling to consider these views, Chippewa sovereignty and governance is submerged. In the *Chippewas of the Thames* case, the Court devoted their reasons to examining which emanation of the federal government could fulfill the Crown's duties for the purposes of consultation and accommodation of Aboriginal and treaty rights. The Court did not step back and question the implications they drew, which unfortunately conceals Indigenous law and governance in this decision.

VIII. MÉTIS RIGHTS

Recall that in *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216, the Supreme Court of Canada stated that "the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada" (at para 67).

The existence of the Métis in the west prior to Confederation was centrally significant to the economic development and expansion of the east. Without their presence, the fur trade would have foundered, and political and economic development on the St Lawrence River and eastern Great Lakes would have been severely delayed or restricted. The Métis Nation was also an integral part of the process ushering western and northern Canada into Confederation and increasing the wealth of the country by opening up the prairies to agriculture and settlement. These developments could not have occurred without their intercession: see

George FG Stanley, *The Birth of Western Canada: A History of the Riel Rebellion* (Toronto: University of Toronto Press, 1960). The Dominion Parliament's unilateral attempt to survey the old North-Western Territory around the Red River in 1869 was strongly resisted by the local Métis settlements. The Métis resisted becoming a part of the Dominion without their participation and consent. Therefore, after blocking the surveyors from their work, and thereby preventing Canada's expansion into this region, the Métis compelled the government of Sir John A Macdonald to recognize their interests.

In particular, the Red River Métis formed a provisional government that was given authority to negotiate the terms of union with Ottawa and bring the area into Confederation. Representatives of this government travelled to Ottawa, as delegates of the Métis people, to negotiate conditions for western Canada's entry. They brought with them a locally developed bill of rights that expressed their demands. The negotiations were challenging, but an agreement was reached and its terms were embodied in the *Manitoba Act of 1870 (UK)*, 32 & 33 Vict, c 3. The democratic legitimacy of this process was sealed through the Métis provisional government's acceptance of the agreement before the Dominion and Imperial Parliament's statutory endorsement that made it part of the constitutional law of Canada.

The people of the Métis Nation regard the *Manitoba Act* as embodying a treaty that recognizes and affirms their nation-to-nation relationship with Canada, even though its provisions concerning land and resources were not fulfilled. The Supreme Court of Canada addressed these issues in *Manitoba Metis Federation Inc v Canada (AG)*, [2013 SCC 14](#), excerpted below. However, we begin this section not with that case but with *R v Powley*, the Supreme Court of Canada's 2003 decision in which it addressed for the first time the treatment of Métis rights under s 35 of the *Constitution Act, 1982*.

R v Powley

[2003 SCC 43](#)

[Steve Powley and his son Roddy were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the *Game and Fish Act*, RSO 1990, c G.1. They both entered pleas of not guilty. They admitted to having killed the moose without a hunting licence; however, they claimed that, as Métis, they had an Aboriginal right to hunt for food in the Sault Ste Marie area and that this right could not be infringed by the government of Ontario without justification. The trial Court, Superior Court, and Ontario Court of Appeal agreed with the Powleys.]

THE COURT (McLachlin CJ and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, and Deschamps JJ):

A. The Van der Peet Test

[15] The core question in [*R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216] was: "How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?" (para. 15, *per* Lamer C.J.). Lamer C.J. wrote for the majority, at para. 31:

[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aborigines lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose

[16] ... [I]n *Van der Peet* ... , the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

[T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

[17] As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

[18] ... We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

(1) Characterization of the Right

[19] The first step is to characterize the right being claimed: *Van der Peet, supra*, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

[20] We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

(2) Identification of the Historic Rights-Bearing Community

[21] The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find

no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: In the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis—the children of unions between European traders and Indian women, and their descendants (A.J. Ray, "An Economic History of the Robinson Treaty Areas Before 1860" (1998) ("Ray Report"), at p. 17). According to Dr. Ray, by the early nineteenth century, "[t]he settlement at Sault Ste. Marie was one of the oldest and most important [Métis settlements] in the upper lakes area" (Ray Report, at p. 47). The Hudson Bay Company operated the St. Mary's post primarily as a depot from 1821 onwards (Ray Report, at p. 51)

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(3) Identification of the Contemporary Rights-Bearing Community

[24] Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge's determination that the Sault Ste. Marie Métis community was to a large extent an "invisible entity" ([1999] 1 C.N.L.R. 153, at para. 80) from the mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

[25] Dr. Lytwyn [states]:

[T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past—fishing, hunting, trapping and harvesting other resources for their livelihood. (Lytwyn Report, at p. 31 (emphasis added); see also J. Morrison, "The Robinson Treaties of 1850: A Case Study," at p. 201.)

[26] The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that "[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters" (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their "removal to the peripheries of the town," and "their own disinclination to be identified as Métis" in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media (Lytwyn Report, at p. 33).

[27] We conclude that the evidence supports the trial judge's finding that the community's lack of visibility was explained and does not negate the existence of the contemporary community. There was never a lapse; the Métis community went underground, so to speak, but it continued. Moreover, as indicated below, the "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself, as indicated below.

[28] The trial judge's finding of a contemporary Métis community in and around Sault Ste. Marie is supported by the evidence and must be upheld.

(4) Verification of the Claimant's Membership in the Relevant Contemporary Community

[29] While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect [its] purpose ... to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. ...

[30] We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit ourselves to indicating the important components of a future definition As a general matter, we would endorse the guidelines proposed by Vaillancourt Prov. J. and O'Neill J. in the courts below. In particular, we would look to three broad factors[:] ... self-identification, ancestral connection, and community acceptance.

[31] First, the claimant must *self-identify* as a member of a Métis community. This self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

[32] Second, the claimant must present evidence of an *ancestral connection* to a historic Métis community. This objective requirement ensures that beneficiaries ... have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum," but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement In this case, the Powleys' Métis ancestry is not disputed.

[33] Third, the claimant must demonstrate that he or she is *accepted by the modern community* whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant ... , but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

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(5) Identification of the Relevant Time Frame

[36] As indicated above, the pre-contact aspect of the *Van der Peet* test requires adjustment in order to take account of the post-contact ethnogenesis of the Métis and the purpose of s. 35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s. 35 is not reducible to the Métis' Indian ancestry. The unique status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.

[37] The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

[38] We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). ... [A]s long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.

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[40] The historical record indicates that the Sault Ste. Marie Métis community thrived largely unaffected by European laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century. The trial judge found, and the parties agreed ... , that "effective control [of the Upper Great Lakes area] passed from the Aboriginal peoples of the area (Ojibway and Métis) to European control" in the period between 1815 and 1850 (para. 90). The record fully supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area, which the Crown agreed was the critical date in its pleadings below.

(6) Determination of Whether the Practice Is Integral to the Claimants' Distinctive Culture

[41] The practice of subsistence hunting and fishing was a constant in the Métis community, even though the availability of particular species might have waxed and waned. The evidence indicates that subsistence hunting was an important aspect of Métis life and a defining feature of their special relationship to the land (J Peterson, "Many Roads to Red River: Métis Genesis in the Great Lakes Region, 1680-1815," in *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University

of Manitoba Press, 1985)], at p. 41; Lytwyn Report, *supra*, at p. 6). A major part of subsistence was the practice at issue here, hunting for food.

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[43] Dr. Ray emphasized in his report that a key feature of Métis communities was that "their members earned a substantial part of their livelihood off of the land" (Ray Report, *supra*, at p. 56). Dr. Lytwyn concurred: "The Métis of Sault Ste. Marie lived off the resources of the land. They obtained their livelihood from hunting, fishing, gathering and cultivating" (Lytwyn Report, at p. 2). ... He elaborated at p. 6:

In the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.

[44] This evidence supports the trial judge's finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850.

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

[45] Although s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary ... in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys falls squarely within the bounds of the historical practice grounding the right.

(8) Determination of Whether or Not the Right Was Extinguished

[46] ... There is no evidence of extinguishment here, as determined by the trial judge. The Crown's argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.

(9) If There Is a Right, Determination of Whether There Is an Infringement

[47] Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever (appellant's record, at p. 1029). This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

(10) Determination of Whether the Infringement Is Justified

[48] The main justification advanced by the appellant is that of conservation. Although conservation is clearly a very important concern, we agree with the trial judge that the record here does not support this justification. If the moose population in this part of Ontario were under threat, and there was no evidence that it is, the

Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. While preventative measures might be required for conservation purposes in the future, we have not been presented with evidence to support such measures here. ... Ontario's blanket denial of any Métis right to hunt for food cannot be justified.

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Appeal and cross-appeal dismissed.

NOTE

R v Blais, [2003 SCC 44](#), released on the same day as *Powley*, considered the question of whether "Métis" people could be considered to be "Indians" under the hunting rights provisions of the Manitoba Natural Resources Transfer Agreement (NRTA), incorporated as Schedule (1) to the *Constitution Act, 1930*. (The NRTAs were agreements between the government of Canada and the three prairie provinces intended to put these provinces on an equal footing with the other provinces by giving them jurisdiction over and ownership of their natural resources.) In concluding that "Métis" were not "Indians," the Court reviewed historical evidence related to Métis/Indian distinctions at the time the NRTA was enacted. The Court's treatment of this issue revolved around a discussion of the proper interpretive approach to the NRTA. In a unanimous judgment the Court wrote:

[16] ... [W]e turn to the issue before us: whether "Indians" in para. 13 of the *NRTA* include the Métis. The starting point in this endeavour is that a statute—and this includes statutes of constitutional force—must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve

[17] The *NRTA* is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure "for individuals the full benefit of the [constitutional] protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. "At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [constitutional provision] was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344. This is essentially the approach the Court used in 1939 when the Court examined the historical record to determine whether the term "Indians" in s. 91(24) of the *British North America Act, 1867* includes the Inuit (*Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104).

[18] Applied to this case, this means that we must fulfill—but not "overshoot"—the purpose of para. 13 of the *NRTA*. We must approach the task of determining whether Métis are included in "Indians" under para. 13 by looking at the historical context, the ordinary meaning of the language used, and the philosophy or objectives lying behind it.

By applying this approach, the Court determined that when the NRTA was enacted the term "Indians" did not include "Métis." This was affirmed by reference to history, the language of the NRTA, and the NRTA's objectives. In rejecting a "living tree" approach to constitutional interpretation, the Court wrote:

[39] We decline the appellant's invitation to expand the historical purpose of para. 13 on the basis of the "living tree" doctrine enunciated by Lord Sankey L.C. with reference to the 1867 *British North America Act*: *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. The appellant, emphasizing the constitutional nature of para. 13, argues that this provision must be read broadly as providing solutions to future problems. He argues

that, regardless of para. 13's original meaning, contemporary values, including the recognition of the Crown's fiduciary duty towards Aboriginal peoples and general principles of restorative justice, require us to interpret the word "Indians" as including the Métis.

[40] This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. ... But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344 Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binns J. emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that "[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.

[41] We conclude that the term "Indians" in para. 13 of the *NRTA* does not include the Métis, and we find no basis for modifying this intended meaning. This in no way precludes a more liberal interpretation of other constitutional provisions, depending on their particular linguistic, philosophical and historical contexts.

John Borrows has criticized the Court's rejection of the living tree interpretative approach in *Blais*, arguing that it reflects larger patterns in the Court's approach to interpreting Aboriginal and treaty rights that overemphasize the past and risk perpetuating the discrimination against Indigenous peoples that saturates Canada's legal history: see John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 352. When you read the Supreme Court of Canada's recent decision in *Daniels v Canada (Indian Affairs and Northern Development)*, [2016 SCC 12](#), excerpted in Section IX, think about whether the Court has addressed the concerns raised by Professor Borrows.

NOTE: MANITOBA METIS FEDERATION INC V CANADA (AG)

Manitoba Metis Federation Inc v Canada (AG), [2013 SCC 14](#) considered the contemporary constitutional effect of promises made to the Métis by the Canadian government in the period immediately following Confederation as Canada embarked on a policy to bring the Western territories within its boundaries and open them up for settlement. In 1870, the Métis comprised 85 percent of the population of the territory that subsequently became Manitoba. When settlers began pouring into the region, resistance and conflict produced negotiations between the Canadian government and a Métis-led provisional government. The product of these negotiations was the *Manitoba Act, 1870*, SC 1870, c 3, a constitutional document that made Manitoba a province of Canada. As described by McLachlin CJ and Karakatsanis J, writing for the majority:

[5] ... These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.

As a result, over a century later, the Manitoba Métis Federation (MMF) went to court seeking a declaration that Canada breached its obligation to implement the promises it made to the Métis people in the *Manitoba Act*. In particular, the MMF (at para 7) sought a

declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*.

In finding that the federal Crown had failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown, a majority of the Court concluded:

[9] ... [Section] 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.

The basis for the Court's ruling that the Crown did not act with honour when implementing s 31 of the *Manitoba Act, 1870* was outlined as follows:

[91] As outlined above, the honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals—the Métis children. Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community. The honour of the Crown is thus engaged here.

[92] To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its treaty-like history and character. Section 31 sets out solemn promises—promises which are no less fundamental than treaty promises. ... It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown's claim to sovereignty. ...

[93] Section 31, though, is not a treaty. The trial judge correctly described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba. When the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. ...

[94] Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

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[96] The trial judge indicated that, although they did not act in bad faith, the government servants may have been negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown's discretion and that it had a discretion to act negligently: "*Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion in its implementation of the grant*" (para. 943 (emphasis added)). The Court of Appeal took a similar view

[97] Based on the arguments before them and the applicable precedents, the trial judge and the Court of Appeal did not focus on what we take as the central issue in the case: whether the government's implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives. The question is whether the Crown's conduct, viewed as a whole and in context, met this standard. We conclude that it did not.

[98] The broad purpose of s. 31 of the *Manitoba Act* was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a more concrete measure—the prompt and equitable transfer of the allotted public lands to the Métis children.

[99] The prompt and equitable implementation of s. 31 was fundamental to the project of reconciliation and the entry of Manitoba into Canada. As the trial judge found, s. 31 was designed to give the Métis a head start in the race for land and a place in the new province. This required that the grants be made while a head start was still possible. Everyone concerned understood that a wave of settlement from Europe and Canada to the east would soon sweep over the province. ...

[100] The Métis allege Canada failed to fulfill its duties to the Métis people in relation to the children's grant in four ways: (1) inexcusably delaying distribution of the s. 31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure s. 31 grant recipients were not taken advantage of by land speculators; and (4) giving some eligible Métis children \$240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land.

At this point in the judgment, the Court reviewed the evidence and found that the Crown's honour was breached through the delay of distribution of s 31 lands, along with the disadvantages suffered through speculators and scrip caused by such delay. Thus the Court concluded:

[128] The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner." Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

Further discussion of the history of Métis peoples and their place in our constitutional framework can be found in two other decisions of the Supreme Court of Canada.

The first is *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011 SCC 37](#), in which the Supreme Court of Canada considered a challenge to provisions in the *Metis Settlements Act*, RSA 2000, c M-14 [MSA] that precluded status Indians from becoming formal members of any Métis settlement. Status Indians who were also Métis applied for a declaration that this denial of membership violated the equality guarantee in s 15 of the Charter. The Supreme Court concluded that the MSA was an ameliorative program under s 15(2) and thus did not violate s 15. The Court found that the purpose of the MSA was to benefit Métis, as distinct from Indians, by setting up a land base that would strengthen an independent

Métis identity, culture, and desire for self-governance and that the exclusion of status Indians from membership in the new Métis land base served and advanced this purpose.

The second is the Court's recent decision in *Daniels v Canada (Indian Affairs and Northern Development)*, [2016 SCC 12](#). *Daniels*, which addresses the issue of whether Métis and non-status Indians are "Indians" for the purposes of s 91(24) of the *Constitution Act, 1867*, is excerpted Section IX.

IX. DISTRIBUTION OF LEGISLATIVE AUTHORITY

A remaining gap in our review of the Court's treatment of Aboriginal rights is the distribution of governmental powers relative to Indigenous peoples in Canada's federal system. Before 1982, Parliament and the provincial legislatures were viewed as free to pass laws that interfered with the exercise of common law Aboriginal rights as long as each level of government acted within its sphere of legislative authority. Federal legislative competence in this regard was seen to stem from s 91(24) of the *Constitution Act, 1867*, which confers on Parliament the authority to pass laws in relation to "Indians, and Lands reserved for the Indians." For example, the federal *Indian Act*, RSC 1985, c I-5, which provides for the establishment of elected band councils and the management and protection of Indian reserve land, owes its constitutional validity to s 91(24). Provincial legislative competence was, as we explain below, more complicated. Section 35 of the *Constitution Act, 1982* now imposes constraints on the exercise of legislative authority by the federal and provincial governments, as do various mechanisms that recognize Indigenous self-government (discussed in Section X). However, the division of powers found in ss 91 and 92 of the *Constitution Act, 1982* continues to play a significant role in structuring the legal relationship between the Crown and Indigenous peoples.

The materials that follow deal with two issues: first, the scope of the federal power found in s 91(24) of the *Constitution Act, 1867*; and, second, the scope of provincial legislative competence to pass laws affecting Indigenous peoples.

A. THE SCOPE OF SECTION 91(24)

On the first issue, the scope of federal legislative competence, the major issue that has arisen is the meaning of the term "Indians." In 1939, the Supreme Court decided that Inuit people were "Indians" for the purposes of s 91(24) of the *Constitution Act, 1867*: see *Reference as to whether "Indians" includes in s 91(24) of the BNA Act includes Eskimo in habitants of the Province of Quebec*, [\[1939\] SCR 104, 1939 CanLII 22](#). In 2016, the Supreme Court of Canada addressed the same issue with respect to Métis and non-status Indians. In the case of *Daniels v Canada (Indian Affairs and Northern Development)*, [2016 SCC 12](#), the Court found that Métis and non-status Indians were "Indians" within s 91(24). In coming to this conclusion, the Supreme Court heard that both federal and provincial governments denied responsibility with regard to Métis. In outlining the problems with this approach, Abella J wrote for the Court:

[14] This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences, as was recognized by Phelan J.:

One of the results of the positions taken by the federal and provincial governments and the "political football—buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs. ...

... the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8] ...

[15] With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. ... A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.

Daniels v Canada (Indian Affairs and Northern Development)

2016 SCC 12 (footnotes omitted)

ABELLA J (McLachlin CJ and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, and Brown JJ concurring):

[23] ... "Indians" has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. The term was created by European settlers and applied to Canada's Aboriginal peoples without making any distinction between them. As author Thomas King explains in *The Inconvenient Indian* [(2013)]:

No one really believed that there was only one Indian. No one ever said there was only one Indian. But as North America began to experiment with its "Indian programs," it did so with a "one size fits all" mindset. Rather than see tribes as an arrangement of separate nation states in the style of the Old World, North America imagined that Indians were basically the same. [p. 83]

[24] Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Métis were considered "Indians" for pre-Confederation treaties such as the Robinson Treaties of 1850. Many post-Confederation statutes considered Métis to be "Indians," including the 1868 statute entitled *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, c. 42.

[25] Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis. The trial judge found that expanding British North America across Rupert's Land and the North-West Territories was a major goal of Confederation and that building a national railway was a key component of this plan. At the time, that land was occupied by a large and diverse Aboriginal population, including many Métis. A good relationship with all Aboriginal groups was required to realize the goal of building "the railway and other measures which the federal government would have to take." With jurisdiction over Aboriginal peoples, the new federal government could "protect the railway from attack" and ensure that they did not resist settlement or interfere with construction of the railway. Only by having authority over *all* Aboriginal peoples could the westward expansion of the Dominion be facilitated.

[26] The work of Prof. John Borrows supports this theory:

The Métis Nation was ... crucial in ushering western and northern Canada into Confederation and in increasing the wealth of the Canadian nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without Métis intercession and legal presence.

(*Canada's Indigenous Constitution* (2010), at pp. 87-88).

In his view, it would have been impossible for Canada to accomplish its expansionist agenda if "Indians" under s. 91(24) did not include Métis. The threat they posed to Canada's expansion was real. On many occasions Métis "blocked surveyors from doing their work" and "prevented Canada's expansion into the region" when they were unhappy with the Canadian government: Borrows, at p. 88.

[27] In fact, contrary to its position in this case, the federal government has at times assumed that it could legislate over Métis as "Indians." The 1876 *Indian Act* banned the sale of intoxicating liquor to "Indians." In 1893 the North-West Mounted Police wrote to the federal government, expressing their difficulty in distinguishing between "Half-breeds and Indians in prosecutions for giving liquor to the latter." To clarify this issue, the federal government amended the *Indian Act* in 1894 to broaden the ban on the sale of intoxicating liquor to Indians or any person "who follows the Indian mode of life," which included Métis.

[28] In October 1899, Indian Affairs Minister Clifford Sifton wrote a memorandum that would become the basis of the federal government's policy regarding Métis and Indian Residential Schools for decades. He wrote that "I am decidedly of the opinion that all children, even those of mixed blood ... should be eligible for admission to the schools": *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 3, *The Métis Experience* (2015), at p. 16. This policy was applied haphazardly. Provincial public school systems were reluctant to admit Métis students, as the provinces saw them as a federal responsibility: p. 26. Many Métis attended Residential Schools because they were the only educational option open to them.

[29] In some cases, the federal government directly financed these projects. In the 1890s, the federal government provided funding for a reserve and industrial school at Saint-Paul-des-Métis in Alberta, run by Oblate missionaries: *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 3, at p. 16. The reserve consisted of two townships, owned by the Crown, and included a school for teaching trades to the Métis. As long as the project lasted, it functioned equivalently to similar reserves for Indian peoples.

[30] Many Métis were also sent to Indian Residential Schools, another exercise of federal authority over "Indians," as *The Final Report of the Truth and Reconciliation Commission of Canada* documents. According to the Report, "[t]he central goal of the Canadian Residential School system was to 'Christianize' and 'civilize' Aboriginal people . . . In the government's vision, there was no place for the Métis Nation": vol. 3, at p. 3. The Report notes that

[t]he existing records make it impossible to say how many Métis children attended residential school. But they did attend almost every residential school discussed in this report at some point. They would have undergone the same experiences—the high death rates, limited diets, crowded and unsanitary housing, harsh discipline, heavy workloads, neglect, and abuse . . . [p. 4]

The federal government has since acknowledged and apologized for wrongs such as Indian Residential Schools.

[31] Moreover, throughout the early twentieth century, many Métis whose ancestors had taken scrip continued to live on Indian reserves and to participate in Indian treaties. In 1944 a Commission of Inquiry in Alberta was launched to investigate this issue, headed by Justice William Macdonald. He concluded that the federal government had the constitutional authority to allow these Métis to participate in treaties and recommended that the federal government take steps to clarify the status of these Métis with respect to treaties and reserves: *Report of Mr. Justice W.A. Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act*, August 7, 1944 . . .

[32] Justice Macdonald noted that the federal government had been willing to recognize Métis as Indians whenever it was convenient to do so:

It would appear that whenever it became necessary or expedient to extinguish Indian rights in any specific territory, the fact that Halfbreeds also had rights by virtue of their Indian blood was invariably recognized. . . .

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... [M]ixed blood did not necessarily establish white status, nor did it bar an individual from admission into treaty. The welfare of the individual and his own desires in the matter were given due weight, no cast-iron rule was adopted. [pp. 557-58]

In 1958, the federal government amended the *Indian Act*, enacting Justice Macdonald's recommendation that Métis who had been allotted scrip but were already registered as Indians (and their descendants), remain registered under the *Indian Act*, thereby clarifying their status with respect to treaties and reserves. In so legislating, the federal government appeared to assume that it had authority over Métis under s. 91(24).

[33] Not only has the federal government legislated over Métis as "Indians," but it appears to have done so in the belief it was acting within its constitutional authority. In 1980, the Department of Indian Affairs and Northern Development wrote a document for Cabinet entitled *Natives and the Constitution*. This document clearly expressed the federal government's confidence that it had constitutional authority to legislate over Métis under s. 91(24):

Métis people ... are presently in the same legal position as other Indians who signed land cession treaties. Those Métis who have received scrip or lands are excluded from the provisions of the *Indian Act*, but are still "Indians" within the meaning of the *BNA Act*. . . .

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Should a person possess "sufficient" racial and social characteristics to be considered a "native person," that individual will be regarded as an "Indian" . . . within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the *Indian Act*. [p. 43]

[34] Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35[2] of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 10. And in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: para. 62, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 69.

[35] The term "Indian" or "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. As will be noted later in these reasons, this Court in *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104 ("Re Eskimo"), held that s. 91(24) includes the Inuit. Since the federal government concedes that s. 91(24) includes non-status Indians, it would be constitutionally anomalous, as the Crown also conceded, for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).

[36] The *Report of the Royal Commission on Aboriginal Peoples*, released in 1996, stressed the importance of rebuilding the Crown's relationship with Aboriginal peoples in Canada, including the Métis: see vol. 3, *Gathering Strength*. The Report called on the federal government to "recognize that Métis people ... are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*": vol. 2, *Restructuring the Relationship*, at p. 61. The importance of this reconstruction was also recognized in the final report of the *Truth and Reconciliation Commission of Canada: Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at p. 183

[37] The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal.

[38] The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). There is no case directly on point, but by identifying which groups have already been recognized as "Indians" ... by establishing principles governing who can be considered "Indians," the existing cases provide guidance.

[39] In *Re Eskimo*, this Court had to determine whether the Inuit were "Indians" under s. 91(24) of the *Constitution Act, 1867*. ... [T]he Court drew heavily from the 1858 *Report from the Select Committee on the Hudson's Bay Company*. Acting on behalf of the federal government, the Hudson's Bay Company had conducted a survey of Rupert's Land and the North-Western territories in which the Inuit were classified as Indians. The Court found that while the Inuit had their own language, culture, and identities separate from that of the "Indian tribes" in other parts of the country, they were "Indians" under s. 91(24) on the basis of this survey. It follows from this case that a unique culture and history, and self-identification as a distinct group, are not bars to being included as "Indians" under s. 91(24).

[40] In *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, this Court traced the outer limits of the "Indian" power under s. 91(24). An Indian couple lived on a reserve most of the year except for a few weeks each summer during which they lived off the reserve and the husband worked on a farm. The husband died during one of the weeks he was away from the reserve. This resulted in the superintendent in charge of the Indian district (which included their reserve) being appointed as administrator of his estate, pursuant to s. 43 of the *Indian Act*. His wife challenged s. 43 on the grounds that it violated the *Canadian Bill of Rights*, S.C. 1960, c. 44. While the Court held that s. 43 of the *Indian Act* did not violate the *Bill of Rights*, Beetz J. concluded that in determining who are "Indians" under s. 91(24), "it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages": p. 207.

[41] These two cases left jurisprudential imprints that assist in deciding whether Métis are part of what is included in s. 91(24). ...

[42] There is no doubt that the Métis are a distinct people. Their distinctiveness was recognized in two recent cases from this Court—*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670 and *Manitoba Metis Federation*. ... In commenting on the unique history of the Métis, the Court [in *Cunningham*] noted that they are "widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities": para. 7.

[43] And in *Manitoba Metis Federation*, this Court granted declaratory relief to the descendants of Manitoba's Red River Métis Settlement. ... In so deciding, the Court stated that the Métis of the Red River Settlement are a "distinct community": para. 91.

[44] The Crown, however, submits that including Métis as "Indians" under s. 91(24) is contrary to this Court's decision in *R. v. Blais*, [2003] 2 S.C.R. 236. With

respect, I think *Blais* can be easily distinguished. The issue in *Blais* was whether a provision of Manitoba's *Natural Resources Transfer Agreement*, which allowed "Indians" to hunt out of season, included Métis. It is true that the Court concluded that "Indians" in the *Natural Resources Transfer Agreement* did not include Métis, but what was at issue was a constitutional agreement, not the Constitution. This, as this Court noted in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, is a completely different interpretive exercise:

... [I]t is submitted that the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais* That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here. [para. 30]

[45] ... [T]his Court itself expressly stated in *Blais* that it was not deciding whether s. 91(24) included the Métis. ... [T]he Court emphasized that it left "open for another day the question of whether the term 'Indians' in s. 91(24) of the *Constitution Act, 1867* includes the Métis—an issue not before us in this appeal": para. 36.

[46] A broad understanding of "Indians" under s. 91(24) as meaning "Aboriginal peoples," resolves the definitional concerns raised by the parties in this case. Since s. 91(24) includes all Aboriginal peoples, including Métis and non-status Indians, there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples.

[47] Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future.

Appeal allowed in part.

B. PROVINCIAL LEGISLATIVE COMPETENCE

Federal legislative competence to pass laws affecting Indigenous peoples is clearly established in s 91(24) of the *Constitution Act, 1867*. Provincial authority to pass laws affecting Indigenous peoples is a more complicated issue. Although a province, generally speaking, is not entitled to "single out" Indigenous people (see *The Queen v Sutherland*, [1980] 2 SCR 451 at 455, 1980 CanLII 18), it may in some circumstances regulate Indigenous peoples by "laws of general application" (at 455). The applicability of provincial laws of general application is governed by the federalism doctrine of interjurisdictional immunity, discussed in Chapter 8, Interpreting the Division of Powers, which operates to preclude the application of provincial laws that intrude on the "core" of the federal power. The contours of that core, which in the past has been referred to as the "core of Indianness" (*Dick v The Queen*, [1985] 2 SCR 309 at 326, 1985 CanLII 80), remain, however, somewhat uncertain.

The following excerpt from *Delgamuukw* deals specifically with the issue of whether provinces have the power to extinguish Aboriginal rights, including Aboriginal title, with the Court ruling that they do not. In the course of dealing with this issue, Lamer CJ reviews the past law on the scope of provincial legislative competence over Indigenous peoples and suggests that the core of Indianness immune from provincial regulation includes all Aboriginal rights recognized by s 35 of the *Constitution Act, 1982*. However, in its 2014 decision in *Tsilhqot'in Nation*, excerpted below, you will see that the Supreme Court of Canada has subsequently narrowed the operation of the doctrine of interjurisdictional immunity in this area, leaving fewer matters within the core of the federal power and thus beyond the scope of provincial regulation.

Delgamuukw v British Columbia[1997] 3 SCR 1010, 1997 CanLII 302

LAMER CJ (Cory, Major, and McLachlin JJ concurring):

[The main part of this decision, laying out the legal framework for Aboriginal title under s 35 of the *Constitution Act, 1982*, can be found above in Section V. This extract deals with the specific issue of whether the province of British Columbia had the power to extinguish Aboriginal title before 1982. The province had argued that, even if Aboriginal title had existed, it was extinguished by provincial grants of fee simple.]

(2) Primary Jurisdiction

[173] Since 1871, the exclusive power to legislate in relation to "Indians, and Lands reserved for the Indians" has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.

[The discussion of the second part of s 91(24)—the federal power over "Lands reserved for the Indians"—has been omitted. Chief Justice Lamer rejected the argument that this power covers only reserve lands and holds that it includes jurisdiction over lands subject to Aboriginal title, including the power to legislate with respect to the surrender or extinguishment of title. Chief Justice Lamer then turned to the first part of s 91(24)—the power over "Indians."]

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[177] The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. ... The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction—whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

[178] It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians ..., [land] encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians." But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians." Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

(3) Provincial Laws of General Application

[179] The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade

federal jurisdiction. ... However, it is a well-established principle that (*Four B Manufacturing Ltd. [v United Garment Workers of America, [1980] 1 SCR 1031, 1979 CanLII 11]*):

The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.

In other words, notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands. ...

[180] What must be answered, however, is whether the same principle allows provincial laws of general application to extinguish aboriginal rights. I have come to the conclusion that a provincial law of general application could not have this effect ... First, a law of general application cannot, by definition, meet the standard ... for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in [*R v Sparrow, [1990] 1 SCR 1075*] ... as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights" (*Gladstone [[1996] 2 SCR 723, 1996 CanLII 160]*), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

[181] Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness" ... [*Dick v The Queen, [1985] 2 SCR 309, 1985 CanLII 80*]. The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B* [above]) and the driving of motor vehicles [*R v Francis, [1988] 1 SCR 1025, 1988 CanLII 31*]. The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were "at the centre of what they do and what they are" (at p. 320). But in [*R v Van der Peet, [1996] 2 SCR 507, 1996 CanLII 216*], I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.

Tsilhqot'in Nation v British Columbia2014 SCC 44

McLACHLIN CJ (LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ concurring):

[The portion of this case related to proof of Aboriginal title can be found above in Section V. Although not necessary for resolution of the case, the Court went on to deal with the issue of the application of provincial laws, such as the *Forest Act*, to Aboriginal title land. The Court stated that, as a starting point, provincial laws of general application apply to land held under Aboriginal title, subject to the constitutional limitations imposed by s 35 of the *Constitution Act, 1982* and by the division of powers, specifically the federal power over "Indians, and Lands reserved for the Indians" under s 91(24) of the *Constitution Act, 1867*.

With respect to s 35, the Court found that some provincial laws of general application might not constitute an infringement of Aboriginal rights, and for those that did, absent consent, the infringement would have to be justified.]

VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[104] This Court suggested in [R v Sparrow, [1990] 1 SCR 1075, 1990 CanLII 104] that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. ...

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

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[120] Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, para. 166).

[122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: [R v Gladstone, [1996] 2 SCR 723, 1996 CanLII 160]. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example—a direct transfer of Aboriginal property rights to a third party—will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement

was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] ... I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province—the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation—were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[127] Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

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[With respect to the division of powers, in a bold move, the Court ruled that the doctrine of interjurisdictional immunity should not be used to limit provincial power to legislate with respect to Aboriginal rights, but instead that s 35 should be the primary constitutional constraint on both federal and provincial legislative power to infringe Aboriginal rights. The doctrine of interjurisdictional immunity precludes the application of laws of one level of government that impair the protected core of jurisdiction possessed by the other level of government. In the past, as shown in the extract from *Delgamuukw*, above, the doctrine of interjurisdictional immunity has been applied to prevent provincial laws of general application from dealing with the "core of Indianness" (*Dick v The Queen*, [1985] 2 SCR 309, 1985 CanLII 80 at para 12). However, the issue of what falls within the core of federal jurisdiction, and specifically whether all rights protected by s 35 fall within that protected core, had not been fully resolved. In *Delgamuukw*, Lamer CJ had suggested that the core included all Aboriginal rights protected by s 35, and this was the view followed by the trial judge. The Court's restriction of the doctrine of interjurisdictional immunity in the context of Aboriginal rights is consistent with the approach it has taken to the doctrine more generally in its federalism jurisprudence: see *Canadian Western Bank v Alberta*, 2007 SCC 22, excerpted in Chapter 8.]

[138] ... [T]he jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid federal law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework

governs the law's applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered: does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework? ...

[139] As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

[140] What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

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[144] The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

[145] Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

[146] First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: how far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

[147] Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests: some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

[148] Interjurisdictional immunity—premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments—is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up

until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[149] This Court has recently stressed the limits of interjurisdictional immunity. "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of "limited application" and should be applied "with restraint" (paras. 67 and 77). ...

[150] ... I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government—an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this—but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

NOTES AND QUESTIONS

1. What are the implications of the Court's ruling on interjurisdictional immunity in *Tsilhqot'in*? The Court is clear that the mere fact that a provincial law affects an Aboriginal right protected by s 35 doctrine does not trigger the application of interjurisdictional immunity and thus that the doctrine does not prevent the application of provincial laws that regulate

Aboriginal title lands. But has the Court completely eliminated the application of the doctrine to matters falling within the federal power over "Indians and Lands reserved for the Indians" or has it simply returned the law to its state prior to *Delgamuukw*, such that the federal power has a narrower core?

2. John Borrows is critical of the Court's "rewriting" of the law of interjurisdictional immunity and Aboriginal rights so as to allow provincial laws to apply to Aboriginal title lands. He argues that this violates a long-standing constitutional principle:

[T]he Supreme Court has eroded "The Aboriginal Constitution." The Aboriginal Constitution prevented local colonial governments from molesting or disturbing First Nations in their use and occupation of land. Governments (like provinces) who are the closest to First Nations have the greatest incentive to benefit from Indigenous lands. ... Therefore, the law in North America developed to ensure that local governments had substantial obstacles placed in their path in dealing with First Nations. The *Royal Proclamation* and 250 years of Canadian law, as affirmed in section 91(24) of the *Constitution Act, 1867*, interposed a more distant imperial or federal power between First Nations and colonial/state/local/provincial governments. The exclusion of the provinces for dealing with First Nations was one of the few checks and balances Indigenous peoples enjoyed under Canadian law throughout history.

See John Borrows, "The Durability of Terra Nullius," above at 735–36. Do you agree with this criticism? Note that similar issues were raised in *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48](#), excerpted above in Section VI.

X. INDIGENOUS RIGHTS OF SELF-GOVERNMENT

Indigenous peoples organized their affairs and exercised governing authority for millennia prior to the arrival of Europeans and others in North America. These powers of governance varied according to clan and nation and were suited to the varieties of languages, economies, and cultures represented on the continent. There were alliances, confederacies, powerful families, democracies, and empires. Traditions of governance were often closely connected to the land, and many emphasized the connection of the spiritual, familial, economic, and political spheres. The nature, scope, and existence of these ancient powers are the subject of debate in contemporary Canada. Through negotiation and litigation, many Indigenous nations are attempting to articulate their rights of self-government.

Self-government might receive protection through s 35 of the *Constitution Act, 1982* in at least five ways:

1. as a cultural practice (*Van der Peet* and *Pamajewon*, below);
2. as an incident of collective title to land, given that it entails the need to make decisions or laws about access to and use of land and resources (*Delgamuukw* and *Tsilqhot'in*);
3. as a treaty right (modern and historic treaties);
4. as a free-standing right (*United Nations Declaration on the Rights of Indigenous Peoples*; *Mitchell*, below; and the US approach); and
5. as a delegated right.

Under any scenario, Indigenous peoples' own legal norms and practices form an important part of self-government. The remainder of this chapter explores these issues in turn.

A. SECTION 35(1) FRAMEWORK FOR SELF-GOVERNMENT AS A CULTURAL PRACTICE

As you recall, *Van der Peet* created a framework for recognizing Aboriginal rights. If a practice, custom, or tradition was integral to the distinctive culture of an Indigenous group prior to the arrival of Europeans, and it had not been clearly and plainly extinguished prior to 1982, an Indigenous group can claim such practices as contemporary rights under s 35(1) of the *Constitution Act, 1982*. The first Supreme Court case to test this framework for the recognition of self-government was *R v Pamajewon*.

R v Pamajewon

[1996] 2 SCR 821, 1996 CanLII 161

[Pamajewon and his co-accused, each a member of either the Shawanaga First Nation or Eagle Lake Band, were convicted of keeping a common gaming house contrary to s 201 of the *Criminal Code*. The gaming activities were conducted on reserves, though many of the participants were non-natives. On appeal, the band members argued, *inter alia*, that the activities in question were protected as an Aboriginal right under s 35(1) or as an incident of the inherent right of self-government claimed by the two First Nations. The Ontario Court of Appeal and the Supreme Court of Canada dismissed the appeals.]

LAMER CJ (La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ concurring):

[1] This appeal raises the question of whether the conduct of high stakes gambling by the Shawanaga and Eagle Lake First Nations falls within the scope of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

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[2] The appellants appealed on the basis that the Court of Appeal erred in restricting aboriginal title to rights that are activity and site specific and in concluding that self-government only extends to those matters which were governed by ancient laws or customs. The appellant argued further that the Court of Appeal erred in concluding that the *Code* extinguished self-government regarding gaming and in not addressing whether the *Code*'s gaming provisions unjustifiably interfered with the rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

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[23] The resolution of the appellants' claim in this case rests on the application of the test, laid out by this Court in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, for determining the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The appellants in this case are claiming that the gambling activities in which they took part, and their respective bands' regulation of those gambling activities, fell within the scope of the aboriginal rights recognized and affirmed by s. 35(1). *Van der Peet, supra*, lays out the test for determining the practices, customs and traditions which fall within s. 35(1) and, as such, provides the legal standard against which the appellants' claim must be measured.

[24] The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation. Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet, supra*. Assuming s. 35(1) encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision

and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet, supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.

[25] In *Van der Peet, supra*, the test for identifying aboriginal rights was said to be as follows, at para. 46:

... [I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

In applying this test the Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be (*Van der Peet*, at para. 59) "a defining feature of the culture in question" prior to contact with Europeans.

[26] I now turn to the first part of the *Van der Peet* test, the characterization of the appellants' claim. In *Van der Peet, supra*, the Court held at para. 53 that:

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.

When these factors are considered in this case it can be seen that the correct characterization of the appellants' claim is that they are claiming the right to participate in, and to regulate, high stakes gambling activities on the reservation. ... The statute which they argue violates those rights prohibits gambling subject only to a few very limited exceptions (laid out in s. 207 of the *Code*). Finally, the applicants rely in support of their claim on the fact that the "Ojibwa people ... had a long tradition of public games and sporting events, which pre-dated the arrival of Europeans." ... As such, the most accurate characterization of the appellants' claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands.

[27] The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands." To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

[28] I now turn to the second branch of the *Van der Peet* test, the consideration of whether the participation in, and regulation of, gambling on the reserve lands was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. The evidence presented at both the Pamajewon and Gardner trials does not demonstrate that gambling, or that the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations. In fact, the only evidence ... dealing with ... the importance of gambling was that of James Morrison, who testified at the Pamajewon trial with regards to the importance and

prevalence of gaming in Ojibwa culture. While Mr. Morrison's evidence does demonstrate that the Ojibwa gambled, it does not demonstrate that gambling was of central significance to the Ojibwa people. Moreover, his evidence in no way addresses the extent to which this gambling was the subject of regulation by the Ojibwa community. His account is of informal gambling activities taking place on a small-scale; he does not describe large-scale activities, subject to community regulation, of the sort at issue in this appeal.

[29] I would note that neither of the trial judges in these cases relied upon findings of fact regarding the importance of gambling to the Ojibwa; however, upon review of the evidence I find myself in agreement with the conclusion arrived at by Osborne J.A. when he said first, at p. 400, that there "is no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nations' historic cultures and traditions, or an aspect of their use of their land" and, second, at p. 400, that "there is no evidence that gambling on the reserve lands generally was ever the subject matter of aboriginal regulation." I also agree with the observation made by Flaherty Prov. Ct. J. in the Gardner trial when he said that

commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized.

[30] Given this evidentiary record, it is clear that the appellants have failed to demonstrate that the gambling activities in which they were engaged, and their respective bands' regulation of those activities, took place pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

[Justice L'Heureux-Dubé concurred in separate reasons.]

Appeal dismissed.

NOTES AND QUESTIONS

1. In *Casimel v Insurance Corporation of British Columbia*, [1993 CanLII 1258, 106 DLR \(4th\) 720 \(BCCA\)](#), the Court held that a customary Indigenous adoption should be treated as a legal adoption. The plaintiffs, Louise Casimel and Francis Casimel, raised their grandson, Ernest Casimel, in a parent-child relationship following a customary adoption acknowledged by the Stellaquo Band of the Carrier People. When Ernest was killed in a motor vehicle accident, his adoptive parents sued his insurance company to claim the benefit owed to dependent parents. (It was determined early on that they were, in fact, dependent on him.) The insurance company claimed that the plaintiffs were not Ernest's parents because the adoption had not followed the procedures set out in provincial adoption legislation and were therefore not eligible to claim the benefit. The Court rejected the insurance company's claim. The Court first determined that there was in fact a custom of adoption among the Stellaquo Band and that this custom had been fulfilled by the Casimel family. Second, it held that nothing in statutory or common law had extinguished or limited the Band's right to establish family connections, including those created by adoption, according to custom; this right remained protected by s 35 of the *Constitution Act, 1982*. Louise and Francis Casimel, as dependents to and parents by adoption of Ernest, were therefore successful in their claim against the insurance company. Does *Casimel* reinscribe *Connolly v Woolrich* (1867), 17 RJRQ 75, 1 CNLC 70 (SC) as described by the Royal Commission on Aboriginal Peoples in the excerpt at the outset of this chapter, in constitutional terms? Is *Casimel* consistent with *Pamajewon*?

2. In *Pamajewon*, the Court rejected the appellants' characterization of their claim as "a broad right to manage the use of their reserve lands" (at para 27). Might such a claim have

more success now as a result of the recognition in *Delgamuukw* and *Tsilhqot'in* that Aboriginal title entails a broad right to use the land for all purposes? This basis for self-government is discussed in the readings that follow.

B. INDIGENOUS GOVERNANCE AS AN INCIDENT OF ABORIGINAL TITLE

In *Tsilhqot'in Nation v British Columbia*, excerpted above, the Court stated: "The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders" (at para 76). There are many questions about what this statement means in relation to the recognition of Indigenous governance.

In *Tsilhqot'in*, elders testified about the continuity of their ways of life in their own language, using their legal traditions. Indigenous law was key to establishing a sufficiency of Indigenous social organization, which was necessary to prove title. *Tsilhqot'in* rules of conduct were central to proving that the *Tsilhqot'in* historically and currently occupied land in the contested region. It is possible to argue that, in accepting this evidence as proof of title, the Supreme Court implicitly affirmed that Indigenous legal traditions give rise to enforceable obligations within Canadian law. As a result, it may be argued that Indigenous social organization is treated as a synonym for self-government. When a nation organizes itself socially on a territorial basis and through its own laws controls land, makes decisions about its use, and excludes others, it could be concluded that such a nation governs itself. Indigenous governance may be an important dimension of Aboriginal title because such a right cannot be disproven or exercised without this broader dimension being present. The following excerpt discusses the nature of the link between Aboriginal title and Indigenous governance.

Val Napoleon, "Making the Round: Aboriginal Title in the Common Law from a *Tsilhqot'in* Legal Perspective"

(2015) 43 UBC L Rev 873 at 883-93 (footnotes omitted)

[What follows takes the form of a judgment of the International Indigenous Trickster Court, sitting on an appeal from the judgment of the Supreme Court of Canada in *Tsilhqot'in*. The Court applies *Tsilhqot'in* law.]

In considering *Tsilhqot'in* legal traditions, one must recall that the historic *Tsilhqot'in* political, legal, and economic orders were non-state and decentralized. In other words, the responsibility and authority for the maintenance and application of the larger societal orders inhered in the people and operated through the kinship relationships. It is for this reason that *Tsilhqot'in* law emphasizes and protects individual and collective agency, and relationships within *Tsilhqot'in* society and with those outside their society. ...

[In the *Tsilhqot'in* case] the SCC granted a declaration of Aboriginal title over a portion of *Tsilhqot'in* lands and a declaration that with its land use plan and forestry authorizations under the *Forest Act*, the Province of British Columbia breached the duty to consult with the *Tsilhqot'in* Nation. According to the SCC, governments and other users must seek the consent of Aboriginal title holders when they want to use Aboriginal title lands. The legal question before us is the following: What are the standards of consultation and consent in *Tsilhqot'in* law, and how do they apply to the actions of the Province of British Columbia? ...

Tsilhqot'in society has five authoritative decision-making groups: individuals, family members, chiefs/leaders, elders/medicine people, and community. The type

of legal issue or problem determines which group is responsible for decision making. In the case of issues or harms that could potentially affect or harm the broader community, the decision-making group is the community. There is provision for certain members to be selected from the community, and they may also collaboratively decide on such an issue or problem. In addition, chiefs and leaders are recognized decision makers for issues or legal questions that could affect the broader community. ... [A]s with other law, Tsilhqot'in law and legal institutions change over time to respond to new issues and circumstances.

The Tsilhqot'in make collective decisions through the chiefs and councils of the communities and through the Tsilhqot'in National Government. Continued collective approval of these decisions is signalled by ongoing acceptance and adherence by the Tsilhqot'in people. Given this, the groups that must be consulted and that must give consent to major decisions that will have broad community impact are the wider community, selected members of the community, chiefs and councils, and the Tsilhqot'in National Government.

Tsilhqot'in legal traditions set out a number of procedures to be employed in determining appropriate legal responses or actions. ... The nature of these procedures is about ensuring that there is clarity as to what the harms are and who committed them. ... While these procedures are intended to guide responses to harms, we believe they also set out the terms for consultation when there is a serious issue that may impact all the Tsilhqot'in people. Given this, the standards for consultation under Tsilhqot'in law are to obtain all information and evidence regarding potential harms (such as logging and mining activity on Tsilhqot'in lands), to consult with the collective Tsilhqot'in people and with their experts, to consider the consequences of potential harms (e.g., logging, mining), to determine the appropriate responses to or consequences of the perceived harm, to obtain assistance in carrying out actions that result from any decisions, and to determine whether a ceremony is a necessary part of resolving specific harms.

In Tsilhqot'in legal traditions, there are a number of principles that guide legal responses and resolutions to harm, ranging from deterrence, to temporary or permanent separation, to reintegration, and in the case of the most extreme and ongoing harms, to incapacitation. For our purposes today, the principles that most directly relate to the questions of consultation and consent are the following:

- (i) *Protecting both individual and community safety.* This is a paramount consideration when responding to harms.
- (ii) *Proportionality.* The response to a harm should be proportional to the harm experienced.
- (iii) *Acknowledging and taking responsibility.* This is an essential part of reintegrating those who have committed harms, and often requires some type of restitution or compensation.

[There followed a review of the Tsilhqot'in responses to the BC government's unilateral decision to grant forestry licences over their traditional lands. These included initial talks, direct political action—that is, a blockade of a bridge—and litigation.]

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[These] were ... legal responses to the unauthorized encroachment onto Tsilhqot'in lands, an issue that can be characterized as a matter of community safety. These legal responses were led by leaders organized in the various leadership forms of today, including an overall political alliance known as the Tsilhqot'in National Government. The acceptance and continued observance of the decisions made by the Tsilhqot'in leadership indicates broad community agreement and the legitimacy of those actions.

The Tsilhqot'in people engaged in direct political action and they employed Canadian law—all of which can be understood as being proportional to the potential harms to their land as well as proportional to the failure of the BC government to properly consult with the Tsilhqot'in in a way that reflected their legal perspectives in accordance with Tsilhqot'in law.

We consider consent to be another potential legal response to harms, but it is obvious that the terms of consent to actions with the potential to have broad community impact must be determined by the standards of Tsilhqot'in law. Basically, these standards are contained, at least in part, in the procedures necessary for determining an action or response to issues with broad community impact. Such standards are also implicit in determining who the authoritative decision makers are and their attendant responsibilities; and again, this depends on a comprehensive assessment of the harm and its reach as required by Tsilhqot'in law.

The principle of acknowledging harms committed and taking responsibility for them is an important principle in the determination of appropriate legal responses or actions. In this case, there was a denial of potential harms when the Province authorized the logging permits as well as a denial of Tsilhqot'in people's authority to govern their territories and protect their lands. One elder said that when a person disrespected another person, he or she would have to give that person "something they owned, such as a saddle, some land, or a horse."

Historically, "even people with little had to make amends through restitution, even giving up their own clothes if that was all they had." Since the Province was found to be in breach of their duty to consult according to Canadian law and, as we will show, according to Tsilhqot'in law, it might be the case that before any further discussions with the Province, acknowledgement of its wrongdoing and even payment of compensation may be in order. This of course would depend on the Tsilhqot'in Nation's goals and strategies, and the possible danger of such compensation being misinterpreted or attributed as acquiescence to the provincial agenda without proper regard to the operation of Tsilhqot'in law. ...

There are four key legal obligations that bind Tsilhqot'in people and that have direct bearing on consultation and consent. There are obligations to protect and help one's family and community; to share resources and knowledge; to learn, respect, and communicate laws; and to show respect for generosity or teachings. We will discuss three of these legal obligations.

First, there is the obligation to learn, respect, and communicate laws wherein Tsilhqot'in people are responsible for learning about and respecting the laws of others, and for communicating their laws to outsiders. One Tsilhqot'in elder said that people were expected to heed Tsilhqot'in laws when entering the territory, as they "were greeted and ... told about the laws, right off at the entrance [of Tsilhqot'in lands]." She said "they were told the laws so they knew how to behave while they were visiting."

Another elder said that "upon entering another's territory, she would probably go talk to a [band] councillor, spokesperson elder, or the chief to explain where she was from and why she was there." She also described how "runners" used to be used to communicate with people from outside the territory." Two other elders explained that "runners were important for communication between communities and outside the nation" and that the first thing to do "when wanting to enter another person's territory was to 'send your runners in.'" Tsilhqot'in people engaged fully with Canadian law—from the initial talks with the Province and through three levels of court that concluded with the SCC's *Tsilhqotin* decision. This demonstrates an acknowledgement and a respect for Canadian law, even when that law so severely challenged Tsilhqot'in people's authority over their lands. We take this engagement with

Canadian law as representing the fulfillment of the Tsilhqot'in legal obligation to learn the law of outsiders who come to their lands.

It is time for the Province of British Columbia and Canada to learn Tsilhqot'in law

There is another legal obligation in Tsilhqot'in law that is important for us to consider here: the obligation to share resources and knowledge when asked for or needed." The interviewees described how this obligation was one of the ways of ensuring the survival of the community. They gave examples illustrating the importance of sharing food and other resources, and of the severe consequences of refusing to live up to this obligation, as in the case of theft." These elders specifically explained how this obligation was an important inclusive element in building internal community cohesion and bringing outsiders in because "you're living together, there's no outsider."

Given the importance of these legal obligations, what becomes clear is that Tsilhqot'in people have practices of inclusivity that form part of their legal traditions. At the trial level, the Tsilhqot'in witnesses described their early history with the first European visitors, and it is evident that they were consciously fulfilling their legal obligations to teach their laws and to share knowledge and resources. And as reasonable and reasoning people, they also expected to have these same legal obligations reciprocated by the European outsiders—and perhaps they were, if only initially and only instrumentally for the purposes of facilitating trade and settlement. The thing is, in our view, ... British Columbia and Canada still have these legal obligations to Tsilhqot'in people on Tsilhqot'in lands according to Tsilhqot'in laws.

The third legal obligation is to show respect for generosity or teachings. The early record demonstrates great patience and generosity extended to the Europeans, as well as teachings about Tsilhqot'in law. What is absent is any continuing or meaningful respect for the generosity and teachings on the part of the Europeans in the interactions with Tsilhqot'in peoples on Tsilhqot'in lands.

It is our opinion that ... [t]oday's legal conceptions of consultation and consent must be founded on and informed by these essential Tsilhqot'in legal obligations, and until they are, British Columbia is in breach of Tsilhqot'in law. Furthermore, there is a correlating legal obligation to show respect to the Tsilhqot'in people for their generosity and teachings, which, from contact through to the trilogy of Canadian court cases, the Tsilhqot'in people have now extended to British Columbia and Canada. ...

... Tsilhqot'in legal traditions provide a rich and comprehensive source of legal principles that guide overall legal processes and decisions. The key propositions in these legal principles are that individual agency is important, that relationships are valued and protected, that teaching and learning are important, that one must not waste resources or knowledge, and that there is and always has been law in Tsilhqot'in society. These legal principles underpin Tsilhqot'in governance and actions from first European contact to the present day, and they must inform the building of any relationship with British Columbia and Canada.

Further discussion of the recognition of Indigenous law, including an extract from the final report of the Truth and Reconciliation Commission calling for the revitalization of Indigenous law, can be found below in the materials dealing with self-government as a directly enforceable right.

C. SELF-GOVERNMENT AND TREATIES

On August 4, 1998, representatives of the federal and provincial governments and the Nisga'a Tribal Council initialled the *Nisga'a Final Agreement* in a ceremony in the Nass Valley. The agreement, a comprehensive modern treaty, which came into effect in 2000, not only settled the Nisga'a land claim but also provided for powers of self-government. In terms of its legislative and administrative powers, the Nisga'a government has jurisdiction over a wide range of areas, including culture, language, employment, public works, land use, and marriage. The Nisga'a government also provides health care, child welfare, and education services. Perhaps more important, however, is that the *Nisga'a Final Agreement* makes provisions for which laws will prevail when a conflict arises between Nisga'a laws and federal and provincial laws.

The preamble to the *Nisga'a Final Agreement* reads as follows:

WHEREAS the Nisga'a Nation has lived in the Nass Area since time immemorial;

WHEREAS the Nisga'a Nation is an aboriginal people of Canada;

WHEREAS section 35 of the *Constitution Act, 1982* recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada, which the Courts have stated include aboriginal title;

WHEREAS the Nisga'a Nation has never entered into a treaty with Canada or British Columbia;

WHEREAS the Nisga'a Nation has sought a just and equitable settlement of the land question since the arrival of the British Crown, including the preparation of the Nisga'a Petition to His Majesty's Privy Council, dated 21 May, 1913, and the conduct of the litigation that led to the decision of the Supreme Court of Canada in *Calder v. the Attorney-General of British Columbia* in 1973, and this Agreement is intended to be the just and equitable settlement of the land question;

WHEREAS Canadian courts have stated that the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than through litigation or conflict;

WHEREAS the Parties intend that this Agreement will result in this reconciliation and establish a new relationship among them;

WHEREAS this Agreement sets out Nisga'a section 35 rights inside and outside of the area that is identified in this Agreement as Nisga'a Lands;

WHEREAS the Parties acknowledge the ongoing importance to the Nisga'a Nation of the *Simigat* and *Sigidimhaanak* (hereditary chiefs and matriarchs) continuing to tell their *Adawak* (oral histories) relating to their *Ango'oskw* (family hunting, fishing, and gathering territories) in accordance with the *Ayuuk* (Nisga'a traditional laws and practices);

WHEREAS the Parties intend their relationship to be based on a new approach to mutual recognition and sharing, and to achieve this mutual recognition and sharing by agreeing on rights, rather than by the extinguishment of rights; and

WHEREAS the Parties intend that this Agreement will provide certainty with respect to Nisga'a ownership and use of lands and resources, and the relationship of federal, provincial and Nisga'a laws, within the Nass Area.

Chapter 2 of the Agreement, outlining the general provisions, begins:

This Agreement is a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.

Campbell v AG BC/AG Cda & Nisga'a Nation, 2000 BCSC 1123, which dealt with a challenge to the constitutionality of the *Nisga'a Final Agreement* and is excerpted below, summarizes the Nisga'a governmental powers under the Final Agreement:

[45] The Nisga'a Government has power to make laws in a number of different areas which can be divided generally into two groupings. In the first category, when Nisga'a law

conflicts with federal or provincial law, the Nisga'a law will prevail, although in many cases only if it is consistent with comparable standards established by Parliament, the Legislative Assembly, or relevant administrative tribunals.

[46] Generally speaking, the subjects in this category are matters which concern the identity of the Nisga'a people, their education, the preservation of their culture, the use of their land and resources, and the means by which they will make decisions in these areas. As noted, however, some of these areas remain subject to comparable provincial standards. For example, adoption laws must provide for the best interests of the child, just as does the *Adoption Act*, R.S.B.C. 1996, c. 5. The provision for Nisga'a control of education is subject to various comparable provincial educational standards.

[47] Other jurisdictions of the Nisga'a government in this category have specific matters carved out and reserved to the Crown, or to laws generally applicable in the subject area. For example, the right to regulate the use and development of Nisga'a Lands rests with the Nisga'a, but rights of way held or required by the Crown are subject to special provisions. The right to regulate businesses, professions and trades on Nisga'a lands rests with the Nisga'a, but it is subject to provincial laws concerning accreditation, certification and regulation of the conduct of professions and trades.

[48] In the second classification of jurisdiction, when a Nisga'a law conflicts with federal or provincial law, the federal or provincial law will prevail.

[49] The Treaty permits the Nisga'a to establish police services and a police board. Any regimes established pursuant to these provisions require the approval of the provincial cabinet. If the Attorney General of the province is of the opinion that "effective policing in accordance with standards prevailing elsewhere in British Columbia" is not in place, she or he may provide or reorganize policing on the Nisga'a lands, appointing constables or using the provincial police (the R.C.M.P.) as a police force.

[50] The Treaty also provides that the Nisga'a Lisims Government may decide to establish a Nisga'a Court. But again, if that course is followed, its structure and procedures, and the method of selecting judges, must be approved by the provincial cabinet. Further, an appeal from a final decision of the Nisga'a Court lies to the Supreme Court of British Columbia. The Court section of the Treaty includes a number of references to the requirement that any Nisga'a court system must operate in accordance with generally accepted principles. For example, a Nisga'a Court and its judges must comply with "generally recognized principles in respect of judicial fairness, independence and impartiality."

[51] The Nisga'a Government has no authority to make criminal law (that power remains with Parliament). Importantly, a person accused of any offence for which he or she may be imprisoned under Nisga'a law has the right to elect to be tried in the Provincial Court of British Columbia rather than a Nisga'a Court. Any provincial court proceedings would be subject to rights of appeal to the Supreme Court of British Columbia or the Court of Appeal.

[52] Labour relations law, or what in the Agreement is called industrial relations, is governed by federal and provincial laws. However, the Nisga'a Lisims Government has a right in some instances to make representations concerning the effect of a particular aspect of labour relations law upon Nisga'a culture.

[53] While the Treaty defines the right of the Nisga'a to harvest fish and aquatic plants in Nisga'a fisheries areas, all the fisheries rights of the Nisga'a are expressly subject to measures that are necessary for conservation and to legislation enacted for the purposes of public health or safety. Nisga'a peoples' harvest of fish is subject to limits set by the federal Minister of Fisheries. Any laws made by the Nisga'a government concerning fish or aquatic plants harvested by the Nisga'a are subject to relevant federal or provincial laws.

[54] The Nisga'a government may make laws concerning assets the Nisga'a Nation, a Nisga'a village or Nisga'a corporation may hold off Nisga'a lands, but in the event of a conflict between such laws and federal or provincial laws of general application, the latter prevail.

[55] Similarly, while the Nisga'a may make laws concerning the sale and consumption of alcohol (intoxicants) on Nisga'a lands, they are subject to federal and provincial laws in the area in the event of conflict.

[56] British Columbia retains the right to licence or approve gambling or gaming facilities on Nisga'a lands, but the Agreement provides that the province will not do so except in accordance with terms established by the Nisga'a government. Such terms, however, must not be inconsistent with federal and provincial laws.

Campbell involved a constitutional challenge to the *Nisga'a Final Agreement* on the basis that it was inconsistent with the division of powers granted to Parliament and the legislative assemblies of the provinces by ss 91 and 92 of the *Constitution Act, 1867*. The position taken by the challengers was that the Agreement was of no force or effect to the extent that it purported to provide the Nisga'a government with legislative jurisdiction or provided that the Nisga'a government could make laws that would prevail over federal and provincial laws. Justice Williamson of the BC Supreme Court ruled against the challenge, finding that the Agreement recognized a right to self-government constitutionally protected under s 35 of the *Constitution Act, 1982*. His summary reasons for the decision at the end of the judgment are excerpted below:

[179] ... I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly.

[180] I have also concluded that the *Constitution Act, 1867* did not distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92 (subject until 1931 to the Imperial Parliament). But the *Constitution Act, 1867* did not purport to, and does not end, what remains of the royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982.

[181] Section 35 of the *Constitution Act, 1982*, then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty. The Nisga'a Final Agreement and the settlement legislation give that limited right definition and content. Any decision or action which results from the exercise of this now-entrenched treaty right is subject to being infringed upon by Parliament and the legislative assembly. This is because the Supreme Court of Canada has determined that both aboriginal and treaty rights guaranteed by s. 35 may be impaired if such interference can be justified and is consistent with the honour of the Crown.

[182] The Nisga'a Final Agreement, negotiated in full knowledge of the limited effect (a fact accepted by the Nisga'a Nation in these proceedings) of the constitutional promise of s. 35, itself limits the new Nisga'a governments' rights to legislate. In addition, it specifies that in a number of areas, should there be any conflict between Nisga'a laws and federal or provincial laws, federal or provincial laws will prevail.

[183] Thus, the Nisga'a government, subject as it is to both the limitations set out in the treaty itself and to the limited guarantee of s. 35 of the *Constitution Act, 1982*, does not have absolute or sovereign powers.

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[185] In the result, I find the Nisga'a Final Agreement, and the settlement legislation passed by Parliament and the Legislative Assembly of the Province of British Columbia, establish a treaty as contemplated by Section 35 of the *Constitution Act, 1982*. The legislation and

the Treaty are constitutionally valid. The application for a declaration that the settlement legislation and the Treaty are in part void and of no effect is dismissed.

In another unsuccessful challenge to the *Nisga'a Final Agreement*, the BC Court of Appeal upheld a different standard for the existence of Indigenous governance in treaties: see *Sga'nisim Sim'augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49. It ruled that Canada and the provinces can delegate elements of their constitutional powers to a First Nation through treaty as long as the governments oversee how these powers are used. At the same time, the Court was quick to hold that “[i]t is unnecessary to decide whether some or all of the self-government powers derive from an inherent Aboriginal right” (at para 8). Thus the *Sga'nisim* case does not address the central question of whether treaties incorporate inherent rights to self-government. For critical commentary, see Joshua Nichols, “Claims of Sovereignty—Burdens of Occupation: William and the Future of Reconciliation” (2015) 48:1 UBC L Rev 221.

As of April 2020, the Government of Canada has entered into 25 self-government agreements across Canada involving 43 Indigenous communities. There are also two education agreements involving 35 Indigenous communities. [“Self-Government, Self-Government Agreements” (last modified 25 August 2020), online: *Government of Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>.]

D. SELF-GOVERNMENT AS A DIRECTLY ENFORCEABLE RIGHT

Mitchell v MNR

[2001 SCC 33](#)

[In this case, Grand Chief Mitchell, a Mohawk of Akwesasne, claimed an Aboriginal right to cross the border into Canada from the United States without paying customs and excise taxes. His claim was not successful, with the majority concluding that there was insufficient evidence of an ancestral Mohawk practice of trading north of the St Lawrence river to establish the right. The case is included here for two reasons. The first is the explicit recognition by McLachlin CJ that Indigenous customary laws were not extinguished by the assertion of British sovereignty. The second is the discussion, in Binnie J’s minority concurring judgment, of the sovereignty claims entailed by the Aboriginal right, claimed in this case, and his contentious incorporation of the doctrine of “sovereign incompatibility” into s 35.]

McLACHLIN CJ (Gonthier, Iacobucci, Arbour, and LeBel JJ concurring):

A. What Is the Nature of Aboriginal Rights?

[9] Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown:

Sparrow, supra. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

[10] Accordingly, ... aboriginal interests and customary laws were presumed to survive the assertion of [Crown] sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada

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D. Is the Claimed Right Barred from Recognition as Inconsistent with Crown Sovereignty?

[61] The conclusion that the right claimed is not established on the evidence suffices to dispose of this appeal. I add a note, however, on the government's contention that s. 35(1) of the *Constitution Act, 1982* extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty. Pursuant to this argument, any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under s. 35(1) as incompatible with the Crown's sovereign interest in regulating its borders.

[62] This argument finds its source in the doctrine of continuity, which governed the absorption of aboriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region. As discussed above, this incorporation of local laws and customs into the common law was subject to an exception for those interests that were inconsistent with the sovereignty of the new regime

[63] This Court has not expressly invoked the doctrine of "sovereign incompatibility" in defining the rights protected under s. 35(1). In the *Van der Peet* trilogy [*R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216; *R v NTC Smokehouse Ltd.*, [1996] 2 SCR 672, 1996 CanLII 159; *R v Gladstone*, [1996] 2 SCR 723, 1996 CanLII 160], this Court identified the aboriginal rights protected under s. 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies Subsequent cases affirmed this approach to identifying aboriginal rights falling within the aegis of s. 35(1) ... and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.

[64] The Crown now contends that "sovereign incompatibility" is an implicit element of the *Van der Peet* test ... , or at least a necessary addition. In view of my conclusion that Chief Mitchell ... has not proven his claim to an aboriginal right, I need not consider the merits of this submission. Rather, I would prefer to refrain from comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue.

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BINNIE J (Major J concurring):

[66] I have read the reasons of the Chief Justice and I concur in the result and with her conclusion that even if Mohawks did occasionally trade goods across the St. Lawrence River with First Nations to the north, this practice was not on the

evidence a "defining feature of the Mohawk culture" ... or "vital to the Mohawk's collective identity" ... in pre-contact times. There are, however, some additional considerations that have led me to conclude that the appeal must be allowed.

[67] It has been almost 30 years since this Court emphatically rejected the argument that the mere assertion of sovereignty by the European powers in North America was necessarily incompatible with the survival and continuation of aboriginal rights: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. Because not all customs and traditions of aboriginal First Nations are incompatible with Canadian sovereignty, however, does not mean that *none* of them can be in such conflict. The Chief Justice refrains from addressing the sovereignty issue ... but she holds, correctly in my view, that "any finding of a *trading* right would also confirm a *mobility* right" (emphasis added). ...

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[69] ... [W]e are [thus] left with [the] legitimate concern about the sovereignty implications of the international trading/mobility right claimed by the respondent ... I therefore think it desirable to address at least some aspects of the sovereignty controversy.

[70] Counsel for the respondent does not challenge the reality of Canadian sovereignty, but he seeks for the Mohawk people of the Iroquois Confederacy the maximum degree of legal autonomy to which he believes they are entitled because of their long history at Akwesasne and elsewhere in eastern North America. This asserted autonomy, to be sure, does not presently flow from the ancient Iroquois legal order that is said to have created it, but from the *Constitution Act, 1982*. ... If the respondent's claimed aboriginal right is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result.

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[73] In terms of traditional aboriginal law, the issue, as I see it, is whether trading/mobility activities asserted by the respondent not as a Canadian citizen but as an heir of the Mohawk regime that existed prior to the arrival of the Europeans, created a *legal right* to cross international boundaries under succeeding sovereigns. This aspect of the debate, to be clear, is not at the level of *fact* about the effectiveness of border controls in the 18th century. (Nor is it about the compatibility of internal aboriginal self-government with Canadian sovereignty.) The issue is at the level of *law* about the alleged incompatibility between European (now Canadian) sovereignty and mobility rights across non-aboriginal borders said by the trial judge to have been acquired by the Mohawks of Akwesasne by reason of their conduct prior to 1609.

[74] In terms of post-1982 aboriginal law, consideration should be given to whether the international trading/mobility right asserted by the respondent would advance the objective of reconciliation of aboriginal peoples with Canadian sovereignty which, as established by the *Van der Peet* trilogy, is the purpose that lies at the heart of s. 35(1).

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[125] ... [T]he respondent's claim ... is not just about physical movement of people or goods in and about Akwesasne. It is about pushing the envelope of Mohawk autonomy within the Canadian Constitution. It is about the Mohawks' aspiration to live as if the international boundary did not exist. Whatever financial benefit accrues from the ability to move goods across the border without payment of duty is clearly incidental to this larger vision.

[126] It is true that in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, the Court warned ... against casting the Court's aboriginal rights inquiry "at a level of excessive generality."

Yet when the claim, as here, can only properly be construed as an international trading and mobility right, it has to be addressed at that level.

[127] In the constitutional framework envisaged by the respondent, the claimed aboriginal right is simply a manifestation of the more fundamental relationship between the aboriginal and non-aboriginal people. In the Mohawk tradition this relationship is memorialized by the "two-row" wampum, referred to by the respondent in Exhibit D-13, at pp. 109-110, and in his trial evidence (trans., vol. 2, at pp. 191-92), and described in the Haudenosaunee presentation to the Parliamentary Special Committee on Indian Self-Government in 1983 as follows:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.

These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

(Indian Self-Government in Canada: Report of the Special Committee (1983), back cover)

[128] Thus, in the "two-row" wampum there are two parallel paths. In one path travels the aboriginal canoe. In the other path travels the European ship. The two vessels co-exist but they never touch. Each is the sovereign of its own destiny.

[129] The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship* (1996)), at p. 214, says that "Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil." This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s. 35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

[130] The final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, goes on to describe "shared" sovereignty at pp. 240-41 as follows:

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

On this view, to return to the nautical metaphor of the "two-row" wampum, "merged" sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel's components pull together as a harmonious whole, but the wood remains wood, the iron remains iron and the canvas remains canvas. Non-aboriginal leaders, including Sir Wilfrid Laurier, have used similar metaphors. It represents, in a phrase, partnership without assimilation.

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[133] In the earlier years of the century the federal government occasionally argued that Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians") was plenary. Indians were said to be federal people whose lives were wholly subject to federal "regulation." This was rejected by the courts, which ruled that while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. For other purposes he or she must be recognized and treated as an ordinary member of Canadian society. ... The constitutional objective is reconciliation not mutual isolation.

[134] The Royal Commission does not explain precisely how "shared sovereignty" is expected to work in practice, although it recognized as a critical issue how "60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities" would "interact with the jurisdictions of the federal and provincial governments" in cases of operational conflict (final report, vol. 2, *supra*, at pp. 166 and 216). It also recognized the challenge aboriginal self-government poses to the orthodox view that constitutional powers in Canada are wholly and exhaustively distributed between the federal and provincial governments . . . There are significant economic and funding issues. Some aboriginal people who live off reserves, particularly in urban areas, have serious concerns about how self-government would affect them . . . With these difficulties in mind perhaps, the Royal Commission considered it to be "essential that any steps toward self-government be initiated by the aboriginal group in question and "respond to needs identified by its members" (*Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (1993), at p. 41). It rejected the "one size fits all" approach to First Nations' self-governing institutions in favour of a negotiated treaty model. The objective, succinctly put, is to create sufficient "constitutional space for aboriginal peoples to be aboriginal" . . . The Royal Commission Final Report, vol. 2, states at p. 214 that:

Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty . . . As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

[135] It is unnecessary, for present purposes, to come to any conclusion about these assertions. What is significant is that the Royal Commission itself sees aboriginal peoples as full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.

[136] With this background I return to the point that the respondent does not base his mobility rights in this test case as a Canadian citizen. . .

[137] The respondent . . . asserts a trading and mobility right across the international boundary and he attaches this right to his current citizenship not of Canada but of the Haudenosaunee Confederacy with its capital in Onondaga, New York State.

8. The Legal Basis of the Respondent's Claim

[138] The respondent initially asserted both a treaty right and an aboriginal right but the conceptual distinction between these two sources of entitlement is important. A treaty right is an affirmative promise by the Crown which will be interpreted generously and enforced in a way that upholds the honour of the Crown

[139] The trial court acknowledged that if duty-free provisions had been incorporated into a treaty with the Mohawks, the promise would be enforceable as a s. 35 treaty right. A treaty right is itself an expression of Crown sovereignty.

[140] In the case of aboriginal rights, there is no historical event comparable to the treaty-making process in which the Crown negotiated the right or obligation sought to be enforced. The respondent's claim is rooted in practices which he says long preceded the Mohawks' first contact with Europeans in 1609.

[141] I return to the comment of McLachlin J, dissenting in the result, in *Van der Peet, supra*, at para. 227 that "[t]he issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights." There was a presumption under British colonial law that the Crown intended to respect the pre-existing customs of the inhabitants that were not deemed to be unconscionable

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[143] Since *Calder, supra*, the courts have extended recognition beyond pre-existing "rights" to practices, customs or traditions integral to the aboriginal community's distinctive culture (*Van der Peet, supra*, at para. 53). The aboriginal rights question, as McLachlin J put it, dissenting in the result, in *Van der Peet*, at para. 248, is traditionally "what laws and customs held sway before superimposition of European laws and customs[?]"

[144] ... [O]ne of several sources of the concept of aboriginal rights ... is traditional British colonial law. Many of the cases decided by the Judicial Committee of the Privy Council were concerned with rights of property created under a former regime. In *Amudu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399, at p. 407, it was confirmed that "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners" (emphasis added). More recently, Lord Denning, speaking for the Privy Council in *Oyekan v. Adele*, [1957] 2 All E.R. 785, at p. 788, said: "In inquiring ... what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected" (emphasis added). As with the modern law of aboriginal rights, the law of sovereign succession was intended to reconcile the interests of the local inhabitants across the empire to a change in sovereignty.

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[148] I am far from suggesting that the key to s. 35(1) reconciliation is to be found in the legal archives of the British Empire. The root of the respondent's argument nevertheless is that the Mohawks of Akwesasne acquired under the legal regimes of 18th century North America, a positive *legal right* as a group to continue to come and go across any subsequent international border ... with whatever goods they wished, just as they had in pre-contact times. In other words, Mohawk autonomy in this respect was continued but not as a mere custom or practice. It emerged in the new European-based constitutional order as a *legal trading and mobility right*. By s. 35(1) of the *Constitution Act, 1982*, it became a constitutionally protected right. That is the respondent's argument.

9. The Limitation of "Sovereign Incompatibility"

[149] Care must be taken not to carry forward doctrines of British colonial law into the interpretation of s. 35(1) without careful reflection. ...

[150] Yet the language of s. 35(1) cannot be construed as a wholesale repudiation of the common law. The subject matter of the constitutional provision is "existing" aboriginal and treaty rights and they are said to be "recognized and affirmed" not wholly cut loose from either their legal or historical origins. One of the defining characteristics of sovereign succession ... was the notion of incompatibility with the new sovereignty. Such incompatibility seems to have been accepted, for example, as a limitation on the powers of aboriginal self-government in the 1993 working report of the Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, *supra*, at p. 23:

... Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. Rather, they retained their ancient constitutions so far as these were not inconsistent with the new relationship. [Emphasis added.]

[151] Prior to *Calder, supra*, "sovereign incompatibility" was given excessive scope. The assertion of sovereign authority was confused with doctrines of feudal title to deny aboriginal peoples any interest at all in their traditional lands or even in activities related to the use of those lands. To acknowledge that the doctrine of sovereign incompatibility was sometimes given excessive scope in the past is not to deny that it has any scope at all, but it is a doctrine that must be applied with caution.

[152] I take an illustration from the evidence in this case. The trial judge showed that pre-contact the Mohawks, as a military force, moved under their own command through what is now parts of southern Ontario and southern Quebec. The evidence, taken as a whole, suggests that military values were "a defining feature of the Mohawk [or Iroquois] culture"

[153] However, important as they may have been to the Mohawk identity as a people, it could not be said, in my view, that pre-contact warrior activities gave rise under successor regimes to a *legal right* under s. 35(1) to engage in military adventures on Canadian territory. Canadian sovereign authority has, as one of its inherent characteristics, a monopoly on the *lawful* use of military force within its territory. I do not accept that the Mohawks *could* acquire under s. 35(1) a legal right to deploy a military force , even if the warrior tradition was to be considered a defining feature of pre-contact Mohawk society. Section 35(1) should not be interpreted to throw on the Crown the burden of demonstrating subsequent extinguishment by "clear and plain" measures (*Gladstone, supra*, at para. 31) of a "right" to organize a private army, or a requirement to justify such a limitation after 1982 under the *Sparrow* standard. This example, remote as it is from the particular claim advanced in this case, usefully illustrates the principled limitation flowing from sovereign incompatibility in the s. 35(1) analysis.

[154] In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada does not raise legitimate sovereignty issues at the definitional stage.

10. The Alleged Incompatibility Between the Aboriginal Right Disclosed by the Evidence and Canadian Sovereignty

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[158] The question is whether the asserted legal right to the autonomous exercise of international trade and mobility was compatible with the new European (now Canadian) sovereignty and the reciprocal loss (or impairment) of Mohawk sovereignty.

[159] ... [A]s stated, we are addressing *legal* incompatibility as opposed to *factual* incompatibility. The latter emerged more slowly as assertions of sovereignty gave way to colonisation and progressive occupation of land. ...

[160] Control over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty. ... In other words, not only does authority over the border exist as an incident of sovereignty, the state is expected to exercise it in the public interest. The duty cannot be abdicated to the vagaries of an earlier regime whose sovereignty has been eclipsed.

[161] The legal situation is further complicated by the fact ... that the respondent attributes his international trading and mobility right not to his status as a Canadian citizen but as a citizen of the Haudenosaunee (Iroquois Confederacy) based at Onondaga, New York. Border conditions in the modern era are vastly different from those in the 18th century. Nevertheless, as stated, borders existed among nations, including First Nations. They were expressions of sovereign autonomy and then, as now, compelled observance.

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[163] ... In my view, therefore, the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty.

[164] The question that then arises is whether this conclusion is at odds with the purpose of s. 35(1), i.e. the reconciliation of the interests of aboriginal peoples with Crown sovereignty? In addressing this question it must be remembered that aboriginal people are themselves part of Canadian sovereignty as discussed above. I agree with Borrows [J Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001) 80:1/2 Can Bar Rev 15], at p. 40, that accommodation of aboriginal rights should not be seen as "a zero-sum relationship between minority rights and citizenship; as if every gain in the direction of accommodating diversity comes at the expense of promoting citizenship" (quoting W. Kymlicka and W. Norman, eds., *Citizenship in Diverse Societies* (2000), at p. 39). On the other hand, the reverse is also true. Affirmation of the sovereign interest of Canadians as a whole, including aboriginal peoples, should not necessarily be seen as a loss of sufficient "constitutional space for aboriginal peoples to be aboriginal" ([Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" (1992) 26 UBC L Rev (Special ed on Aboriginal Justice) 338], at p. 342). A finding of distinctiveness is a judgment that to fulfill the purpose of s. 35, a measure of constitutional space is required to accommodate particular activities (traditions, customs or practices) rooted in the aboriginal peoples' prior occupation of the land. In this case, a finding against "distinctiveness" is a conclusion that the respondent's claim does not relate to a "defining feature" that makes Mohawk "culture what it is" (Van der Peet, at paras. 59 and 71 (emphasis in original deleted)); it is a conclusion that to extend constitutional protection to the respondent's claim finds no support in the pre-1982 jurisprudence and would overshoot the purpose of s. 35(1). In terms of sovereign incompatibility, it is a conclusion that the respondent's claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal

community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.

11. Implications for Internal Aboriginal Self-Government

[165] In reaching that conclusion, however, I do not wish to be taken as either foreclosing or endorsing any position on the compatibility or incompatibility of *internal* self-governing institutions of First Nations with Crown sovereignty, either past or present. I point out in this connection that the sovereign incompatibility principle has not prevented the United States (albeit with its very different constitutional framework) from continuing to recognize forms of *internal* aboriginal self-government which it considers to be expressions of residual aboriginal sovereignty. The concept of a "domestic dependent nation" was introduced by Marshall C.J. in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), at p. 17, as follows:

... it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.

[166] More recently, in *United States v. Wheeler*, 435 U.S. 313 (1978), the United States Supreme Court, per Stewart J., described the applicable U.S. doctrine at pp. 322, 323 and 326:

The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished*" ...

Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." *United States v. Kagama*, *supra*, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

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In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

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The areas in which such *implicit divestiture* of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. ... They cannot enter into direct commercial or governmental relations with foreign nations. ... And, as we have recently held, they cannot try nonmembers in tribal courts. ...

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. [Emphasis added.]

[167] The U.S. doctrine of domestic dependent nation differs in material respects from the proposals of our Royal Commission on Aboriginal Peoples. The concepts of merged sovereignty and shared sovereignty ... are not reflected in the American jurisprudence. Under US law the powers of a tribal government (whatever its theoretical sovereignty) can be overridden by an ordinary law of Congress. Further, there is nothing that I am aware of in the U.S. doctrine that extends the concept of self-government to claims to an independent self-sustaining economic base, as contemplated by the Royal Commission on Aboriginal Peoples (final report, vol. 2, *supra*, at p. 2). In any event, whatever be the differences and similarities, an international

trading and mobility right, which necessarily involves "external relations," would appear *not* to be included in the attributes of a US-style "domestic dependent nation."

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[169] I refer to the U.S. law only to alleviate any concern that addressing aspects of the sovereignty issue in the context of a claim to an international trading and mobility right would prejudice one way or the other a resolution of the much larger and more complex claim of First Nations in Canada to *internal* self-governing institutions. The United States has lived with internal tribal self-government ... without doctrinal difficulties since *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), was decided almost 170 years ago.

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[171] The question under consideration here is ... not about post-1982 extinguishment. It is about the *prior* question of whether the claimed international trading and mobility right could, as a matter of law, have arisen in the first place.

[172] It was, of course, an expression of sovereignty in 1982 to recognize existing aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. However, if the claimed aboriginal right did not survive the transition to non-Mohawk sovereignty, there was nothing in existence in 1982 to which s. 35(1) protection of *existing* aboriginal rights could attach. It would have been, of course, quite within the sovereign's power to confer specific border privileges by treaty, but the respondent's claim to a treaty right was dismissed.

[173] In my respectful view the claimed aboriginal right never came into existence and it is unnecessary to consider the Crown's argument that whatever aboriginal rights in this respect may have existed were extinguished by border controls enforced by Canada prior to April 17, 1982.

Appeal allowed.

In addition to the doctrine of continuity outlined in *Mitchell*, the UNDRIP, excerpted below, also contains significant potential to facilitate the direct recognition of Indigenous self-determination.

United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly, GA res 61/295
(2 October 2007)

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

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Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

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Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Truth and Reconciliation Commission, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada

(Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 187–91, 202–6 (footnotes omitted)

The United Nations Declaration on the Rights of Indigenous Peoples as a Framework for Reconciliation

Aboriginal peoples in Canada were not alone in the world when it came to being treated harshly by colonial authorities and settler governments. Historical abuses of Aboriginal peoples and the taking of Indigenous lands and resources throughout the world have been the subject of United Nations' attention for many years. On September 13, 2007, after almost twenty-five years of debate and study, the United Nations adopted the *Declaration on the Rights of Indigenous Peoples*. As a declaration, it calls upon member states to adopt and maintain its provisions as a set of "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

The Commission concurs with the view of S. James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples, who observed,

It is perhaps best to understand the Declaration and the right of self-determination it affirms as instruments of reconciliation. Properly understood, self-determination is an animating force for efforts toward reconciliation—or, perhaps, more accurately, conciliation—with peoples that have suffered oppression at the hands of others. Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suppression and relocation. It does not do so to condone vengefulness or

spite for past evils, or to foster divisiveness but rather to build a social and political order based on relations of mutual understanding and respect. That is what the right of self-determination of indigenous peoples, and all other peoples, is about.

Canada, as a member of the United Nations, initially refused to adopt the *Declaration*. It joined the United States, Australia, and New Zealand in doing so. It is not coincidence that all these nations have a common history as part of the British Empire. The historical treatment of Aboriginal peoples in these other countries has strong parallels to what happened to Aboriginal peoples in Canada. Specifically, Canada objected to the *Declaration's*

provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, member States and third parties.

Although these four countries eventually endorsed the *Declaration*, they have all done so conditionally. In 2010, Canada endorsed the *Declaration* as a "non-legally binding aspirational document" ...

... On September 22, 2014, at the World Conference on Indigenous Peoples (WCIP) in New York, the United Nations General Assembly adopted an action-oriented "Outcome Document" to guide the implementation of the *Declaration*. Member states from around the world committed, among other things, to the following:

Taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy, and administrative measures, to achieve the ends of the *Declaration*, and to promote awareness of it among all sectors of society, including members of legislatures, the judiciary and the civil service. ... [para. 7] We commit ourselves to cooperating with indigenous peoples, through their own representative institutions, to develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the *Declaration* [para. 8] ... [and also] encourage the private sector, civil society and academic institutions to take an active role in promoting and protecting the rights of indigenous peoples. [para. 30]

The "Outcome Document" represented an important step forward with regard to implementing the *Declaration* in practical terms. The development of national action plans, strategies, and other concrete measures will provide the necessary structural and institutional frameworks for ensuring that Indigenous peoples' right to self-determination is realized across the globe.

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The TRC considers "reconciliation" to be an ongoing process of establishing and maintaining respectful relationships at all levels of Canadian society. The Commission therefore believes that the *United Nations Declaration on the Rights of Indigenous Peoples* is the appropriate framework for reconciliation in twenty-first-century Canada. ...

Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and civic institutions, in a manner consistent with the principles, norms, and standards of the *Declaration*. Aboriginal peoples in Canada have Aboriginal and Treaty rights. They have the right to access and revitalize their own laws and governance systems within their own communities and in their dealings with governments. They have a right to protect and revitalize their cultures, languages, and ways of life. They have the right to reparations for historical harms.

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... [I]n our view, it is essential that all levels of government endorse and implement the *Declaration*. The Commission urges the federal government to ... fully endorse the "Outcome Document." ...

In 2019, the province of British Columbia adopted the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [hereinafter DRIPA]. DRIPA is a short bill and has ten sections. Section 2 outlines DRIPA's purposes, which are:

- (a) to affirm the application of the Declaration to the laws of British Columbia;
- (b) to contribute to the implementation of the Declaration;
- (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

Section 3 states:

In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

The government is committed to preparing and implementing an Action Plan to implement the Declaration's objectives, along with an Annual Report. Section 6 provides that the "Executive Council, on behalf of the government, may enter into an agreement with an Indigenous governing body." Section 7 allows the government to make agreements with Indigenous governing bodies for the exercise of a statutory power of decision-making jointly by the Indigenous governing body, and the government or another decision-maker, or to acquire the consent of an Indigenous governing body before the exercise of a statutory power of decision.

In 2021, the Canadian Parliament also passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, 2021, c 14. The legislation differs from British Columbia's legislation as it does not make provision for agreements nor does it provide for Indigenous governing bodies exercising statutory powers of decision-making. The federal Act also has no provisions for creating "consent regimes" with Indigenous governing bodies which could be activated by the exercise of statutory decision-making powers. While the legislation does require an action plan and annual report regarding the Declaration's implementation, its main clause in s 5 states the "Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."

Professor John Borrows has suggested that this legislation that implements UNDRIP needs to go hand-in-hand with the resurgence of Indigenous law and governance. He writes about these developments in John Borrows, "Foreword" (2021) Special Issue UBC L Rev (forthcoming), as follows:

My view is that the *Declaration on the Rights of Indigenous Peoples Act* is a necessary step in facilitating the recognition of Indigenous law, implementing constitutional rights related to Indigenous peoples, and applying international law principles relative to Indigenous peoples. Such laws are necessary because Canada largely places legislative power, sometimes called positivism, at the heart of political action. The Supreme Court of Canada made this clear when it wrote that "Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority" [*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 36]. Parliamentary sovereignty

is exercised legislatively to set standards which allows courts to hold governments accountable for the principles and processes they have adopted.

At the same time, DRIPA is not necessarily not sufficient because law does not equal legislation when it comes to Indigenous peoples. Indigenous peoples have their own laws. Indigenous sovereignty has legal implications for how the Crown exercises its powers, even if no legislation is present. Constitutionally, if Aboriginal or treaty rights are affected, laws must recognize and affirm their existence. Furthermore, law is something that is interpreted and practiced by citizens as they operationalize, internalize and resist constitutional, legislative and customary law's obligations. Law must be lived, not just legislated, and its effectiveness can only be measured by its effects on people and places it purports to address.

In other spaces I have argued that Indigenous peoples must also take steps to implement UNDRIP in accordance with their own Indigenous legal traditions. In addition to necessary state action, rights embedded within the Declaration will not be realized if Indigenous governments disregard or reject its provisions. Indigenous governments could facilitate the application and enhancement of protections found in the Declaration or they could frustrate them. Law will fail to be meaningful for Indigenous communities and individuals if they cannot exercise the Declaration's following rights and freedoms within their communities, as well as in relation to the state: religion, spiritual beliefs and practices, speech and expression, association, life, liberty and security, property, family togetherness, a right not to be discriminated against by their governments, the privileges and immunities of citizenship, language, education, labour fairness, administrative law (notice, fairness, hearing), health care, gender equality, in accordance with limitations imposed by law and in accordance with international law.

If nation states began to more seriously protect the rights of indigenous individuals, if Indigenous governments did not, this could lead to charges of hypocrisy. We remember that while the Declaration was drafted with the intent of affirming rights as against nation states, it can also be construed as recognizing the human rights of Indigenous individuals in their relations with their own governments. The Preamble reads: "Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law . . ." Article 1 of the Declaration also affirms that Indigenous individuals possess human rights. It proclaims, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." Thus, the Declaration must be read in ways that affirm Indigenous government's obligations in relation to individuals within their jurisdiction.

In this light UNDRIP's implementation by Canadian governments does not complete its implementation. Agreements with the province or nation state to implement the Declaration, accompanied by action plans and annual reviews (as contemplated in DRIPRA) do not cover a broad enough field. First Nations, Metis and Inuit legal communities must use their own values, norms, ethics and laws to translate UNDRIP into their own self-determining decisions. The Declaration on the Rights of Indigenous Peoples (UNDRIP) proclaims that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." My strongest hope is that UNDRIP gains its greatest meaning through how Indigenous law guide self-determination—not just with provinces or the federal government—but within each legal tradition.

The country and world would be a richer place if rights to: religion, spirituality, speech and expression, association, life, liberty and security, property, family togetherness, the privileges and immunities of citizenship, language, education, labour fairness, administrative law (notice, fairness, hearing), health care, gender equality, and others (in accordance with limitations imposed by law and in accordance with international law) were made more meaningful as they were transformed into laws which were Salish, Haida, Nisga'a, Tsimshian, Secwepmec, Sylix, Cree, Gitksan, Wet'suwet'en, Taltan, Tlingit, Ktunaxa, Nuu-chah-nulth, Kwakwaka'wakw, Nlaka'pamux, Tsilhqot'in, etc.

As Indigenous peoples interpret and apply International law, Indigenous law holds the potential to enrich international law. International law is currently state centric. Its translation and transformation through Indigenous normative commitments could help reshape the field. The jurisgenerative potential of Indigenous International law could also assist in decolonizing state law by giving us new ways of reconceiving rights, relationships and lifeways.

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Revitalizing Indigenous Law: Truth, Reconciliation, and Access to Justice

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... Many Indigenous people have a deep and abiding distrust of Canada's political and legal systems because of the damage they have caused. They often see Canada's legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests. Not only has Canadian law generally not protected Indigenous land rights, resources, and governmental authority, despite court judgments, but it has also allowed, and continues to allow, the removal of Indigenous children through a child-welfare system that cuts them off from their culture. As a result, law has been, and continues to be, a significant obstacle to reconciliation. This is the case despite the recognition that courts have begun to show that justice has historically been denied and that such denial should not continue. Given these circumstances, it should come as no surprise that formal Canadian law and Canada's legal institutions are still viewed with suspicion within many Indigenous communities.

Yet, that is changing. Court decisions since the repatriation of Canada's Constitution in 1982 have given hope to Indigenous people that the recognition and affirmation of their existing Treaty and Aboriginal rights in Section 35 of the *Constitution Act, 1982* may be an important vehicle for change. However, the view of many Indigenous people is that the utilization of the Government of Canada's court is fraught with danger. Indigenous leaders and communities turn to Canada's courts literally because there is no other legal mechanism. When they do so, it is with the knowledge that the courts still are reluctant to recognize their own traditional means of dispute resolution and law.

Reconciliation will be difficult to achieve until Indigenous peoples' own traditions for uncovering truth and enhancing reconciliation are embraced as an essential part of the ongoing process of truth determination, dispute resolution, and reconciliation. ...

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As noted, the *United Nations Declaration on the Rights of Indigenous Peoples* and the UN "Outcome Document" provide a framework and a mechanism to support and improve access to justice for Indigenous peoples in Canada. Under Article 40 of the *Declaration*,

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

In 2013, the UN Expert Mechanism on the Rights of Indigenous Peoples issued a study, "Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples." It made several key findings that are relevant to Canada. The international study noted that states and Indigenous peoples themselves have a critical role to play in implementing Indigenous peoples' access to justice. Substantive changes are required within the criminal legal system and in relation to Indigenous peoples' rights to their lands, territories, and natural resources; political self-determination; and community well-being. The study made several key findings and recommendations, including the following:

- The right to self-determination is a central right for indigenous peoples from which all other rights flow. In relation to access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws.
 - The cultural rights of indigenous peoples include recognition and practice of their justice systems ... as well as recognition of their traditional customs, values and languages by courts and legal procedures.
 - Consistent with indigenous peoples' right to self-determination and self-government, States should recognize and provide support for indigenous peoples' own justice systems and should consult with indigenous peoples on the best means for dialogue and cooperation between indigenous and State systems.
 - States should recognize indigenous peoples' rights to their lands, territories and resources in laws and should harmonize laws in accordance with indigenous peoples' customs on possession and use of lands. Where indigenous peoples have won land rights and other cases in courts, States must implement these decisions. The private sector and government must not collude to deprive indigenous peoples of access to justice.
 - Indigenous peoples should strengthen advocacy for the recognition of their justice systems.
 - Indigenous peoples' justice systems should ensure that indigenous women and children are free from all forms of discrimination and should ensure accessibility to indigenous persons with disabilities.
 - Indigenous peoples should explore the organization and running of their own truth-seeking processes.
- • •

In Canada, law must cease to be a tool for the dispossession and dismantling of Aboriginal societies. It must dramatically change if it is going to have any legitimacy within First Nations, Inuit, and Métis communities. Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force. A commitment to truth and reconciliation demands that Canada's legal system be transformed. It must ensure that Aboriginal peoples have greater ownership of, participation in, and access to its central driving forces. ...

At the same time, First Nations, Inuit, and Métis peoples need greater control of their own regulatory laws and dispute-resolution mechanisms. Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to

address their disagreements by making laws within their communities. This is necessary to facilitating truth and reconciliation within Aboriginal societies.

Law is necessary to protect communities and individuals from the harmful actions of others. When such harm occurs within Aboriginal communities, Indigenous law is needed to censure and correct citizens when they depart from what the community defines as being acceptable. Any failure to recognize First Nations, Inuit, and Métis law would be a failure to affirm that Aboriginal peoples, like all other peoples, need the power of law to effectively deal with the challenges they face.

The Commission believes that the revitalization and application of Indigenous law will benefit First Nations, Inuit, and Métis communities, Aboriginal–Crown relations, and the nation as a whole. For this to happen, Aboriginal peoples must be able to recover, learn, and practise their own, distinct, legal traditions. That is not to say that the development of self-government institutions and laws must occur at the band or village level. In its report, the Royal Commission on Aboriginal Peoples spoke about the development of self-government by Aboriginal nations:

We have concluded that the right of self-government cannot reasonably be exercised by small, separate communities, whether First Nations, Inuit or Métis. It should be exercised by groups of a certain size—groups with a claim to the term “nation.”

The problem is that the historical Aboriginal nations were undermined by disease, relocations and the full array of assimilationist government policies. They were fragmented into bands, reserves and small settlements. Only some operate as collectivities now. They will have to reconstruct themselves as nations.

We endorse the approach recommended by the Royal Commission.

Indigenous law, like so many other aspects of Aboriginal peoples' lives, has been impacted by colonization. At the TRC's Knowledge Keepers Forum in 2014, Mi'kmaq Elder Stephen Augustine spoke about the Mi'kmaq concept for "making things right." He shared a metaphor about an overturned canoe in the river. He said, "We'll make the canoe right and ... keep it in water so it does not bump on rocks or hit the shore. ... [When we tip a canoe] we may lose some of our possessions. ... Eventually we will regain our possessions [but] they will not be the same as the old ones."

When we consider this concept in relation to residential schools, we have repeatedly heard that they caused great and obvious loss. The Mi'kmaq idea for "making things right" implies that sometimes, in certain contexts, things can be made right—but the remedy might not allow us to recapture what was lost. Making things right might involve creating something new as we journey forward. Just as the Canadian legal system has evolved over time, Indigenous law is not frozen in time. Indigenous legal orders adapt with changing circumstances. The development and application of Indigenous law should be regarded as one element of a broader holistic strategy to deal with the residential schools' negative effects.

There are diverse sources of Indigenous law that hold great insight for pursuing reconciliation. In 2012, the TRC partnered with the University of Victoria Faculty of Law's Indigenous Law Clinic, and the Indigenous Bar Association, to develop a national research initiative, the "Accessing Justice and Reconciliation (AJR) Project." Working with seven community partners, the AJR project examined six different legal traditions across the country

The AJR report concluded that many more Aboriginal communities across the country would benefit from recovering and revitalizing their laws. Doing so would enable First Nations, Inuit, and Métis communities to remedy community harms and resolve internal conflicts as well as external conflicts with governments more effectively.

NOTE

The Government of Canada now recognizes the inherent right to self-government and is prepared to negotiate self-government agreements on the basis of its understanding of what the right entails, as described below:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under s 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Indigenous peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities and integral to their unique cultures, identities, traditions, languages, and institutions, and with respect to their special relationship to their land and their resources.

The government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope, and content of the inherent right. However, litigation over the inherent right would be lengthy and costly, and it would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements.

For these reasons, the government is convinced that litigation should be a last resort. Negotiations among governments and Indigenous peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government. See "Revitalizing Indigenous Law: Truth, Reconciliation, and Access to Justice" in *Honouring the Truth, Reconciling for the Future* (last visited 20 October 2021) at 255-60, online: *The Truth and Reconciliation Commission of Canada* <<https://web-trc.ca>>.

PART FIVE

RIGHTS

CHAPTER FIFTEEN

ANTECEDENTS OF THE CHARTER

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I. INTRODUCTION

While the discussion of rights in this book is focused on the *Canadian Charter of Rights and Freedoms* (Charter), rights did not suddenly appear in Canada on April 17, 1982. In fact, rights were protected in a range of ways prior to the enactment of the Charter, including by statutes, the common law, and through the operation of federalism. This chapter is designed to introduce you to each of these important antecedents of the Charter, beginning with the idea of the “common law constitution.”

II. THE COMMON LAW CONSTITUTION

The common law has long served as a basis for protecting individual rights. These rights are usually divided into two categories: political rights, which include rights of participation, representation, and voting, and civil rights, which include freedoms of the person, speech, religion, and property.

The rule of law has also emerged as a source of protection of individual rights. The rule of law has different meanings, but at its core are three tenets: that there must be a positive order of laws, that individuals and the state are bound equally by the law, and that civil and political rights are protected by common law courts rather than by a written constitution. It was expressed in its classic form by Albert V Dicey in 1885 in his text *Introduction to the Study of the Law of the Constitution*.

Albert V Dicey, *Introduction to the Study of the Law of the Constitution*

(London: Macmillan, 1885) at 167

Two features have at all times since the Norman Conquest characterised the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. ... This royal supremacy has now passed into [the] sovereignty of Parliament. ...

The second of these features, which is closely connected with the first, is the rule or supremacy of law. ...

When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. ...

We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. ...

There remains yet a third and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

For Dicey and late 19th-century lawyers generally, individual rights were essentially common law rights—that is, rights that had emerged through decisions in individual cases. Moreover, according to Dicey's third prong of the rule of law, the courts were the means of enforcement of those common law rights.

This common law constitution continues to be a part of our constitutional beliefs, but as a modern lawyer or law student reads Dicey, they may well wonder how common law rights and parliamentary sovereignty can be reconciled. How can rights be protected when they can be taken away by a simple statute?

There are at least two possible answers to this question. First, rights can be understood as a set of ideals that Parliament is constitutionally obligated to respect, even if parliamentary sovereignty precludes enforcement of these rights by courts. Here, the security of rights depends greatly on good faith and effective representation. The question is how effective this form of rights protection is.

A second way of thinking about common law rights is as a set of interpretative presumptions. Sometimes the words of a statute do not have one clear meaning; instead, they may have a range of possible meanings, some of which may intrude on an individual rights and some of which do not. In these situations, the courts will choose the latter, benign interpretation, while

acknowledging that rights can be abrogated where the statutory intent to do so is clear. This approach is often expressed by way of presumptions—for example, presumptions about respecting established property interests. In *Roncarelli v Duplessis*, the case that appears shortly, interpretation is the central issue—did the *Alcoholic Liquor Act*, RSQ 1941, c.255 give the head of the Quebec Liquor Commission authority to revoke Roncarelli's licence at the behest of Attorney General and Premier Maurice Duplessis for reasons unconnected to the Act's purpose? In reaching the conclusion that it did not give him the authority, Rand J invoked both the rule of law and common law rights.

In reading *Roncarelli v Duplessis*, it is important to understand the limits, even deficiencies, of common law rights. The right to liberty has often been deployed to benefit those who are most advantaged: to shield established interests from regulation and redistribution, to permit exploitation of individuals by private power, and to protect the prestige and power of courts against encroachment by administrative agencies.

Roncarelli v Duplessis

[1959] SCR 121, 1959 CanLII 50

[Roncarelli brought an action for damages against Duplessis, the Premier of Quebec, for wrongful revocation of a licence to sell liquor. He succeeded at trial; the Quebec Court of Appeal reversed, and Roncarelli's appeal to the Supreme Court was allowed by a majority of six to three.]

RAND J (Judson J concurring):

The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December 4 of that year, while his application for annual renewal was before the Liquor Commission, the existing licence was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future licence would ever issue to him. These primary facts took place in the following circumstances.

For some years the appellant had been an adherent of a rather militant Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake" sold at a small price.

In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to ... the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of \$40, and as the Witnesses disputed liability, bail was in all cases resorted to.

The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had [provided] security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from \$100 to \$300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the [head] of the Liquor Commission, and the chief [prosecutor] in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate," was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings were taken against one Boucher charging him with publication of a seditious libel.

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever," and to warn others that they similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his decision became automatically that of Mr. Archambault and the Commission. ...

In these circumstances, when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? ...

[An account of the legislation about liquor follows. Briefly, it created a commission, which had power to grant licences and to revoke them "at its discretion."]

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The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony," and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity to a superior class restaurant but also its identification with the business carried on. The provisions for assignment of the permit ... were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammeled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not

be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever." This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and a *fortiori* to the government or the respondent There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; ... what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

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The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of \$25,000 plus that allowed by the trial court.

I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of \$33,123.53.

[Justice Martland, with whom Kerwin CJ and Locke J concurred, and Abbot J gave judgments allowing the appeal for reasons similar to those of Rand J. Both Taschereau J and Fauteux J dissented, on the ground that the notice required by the *Code of the Civil Procedure*, CQLR c C 25 was not given. Justice Cartwright, dissenting, held that because of the extensive discretion given to the Commission, the courts could not inquire into the reasons for revocation.]

Appeal allowed.

Writing on the 50th anniversary of *Roncarelli v Duplessis*, Mark Walters explained that

[Justice Rand's] reasons in *Roncarelli* were an integral part of a larger contribution to a common law discourse on constitutionalism that had been unfolding in Canada during the previous decade. *Roncarelli* was seen at the time as part of a package of cases that, as Bora Laskin observed, affirmed a "judicial Bill of Rights" or the potential for a "basically common law ... protection of civil liberties." In fact, *Roncarelli* was the last case in this chapter of Rand's narrative: Rand would soon retire from the bench, and within just a few years it would become apparent that a distinct moment in Canadian constitutional history had passed. By the mid-1970s, there was already a sense of "[n]ostalgia" and even "reverence" for the cases from *Roncarelli*'s time.

See Mark D Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55:3 McGill LJ 563 at 575-76 (footnotes omitted).

We explore another case from this period, *Switzman v Elbling*, [1957] SCR 285, 1957 CanLII 2 in Section III.B, "The Implied Bill of Rights," below.

III. RIGHTS AND FEDERALISM

Another antecedent of the Charter lies in the distinctively Canadian tangle of rights and federalism, and in the ways that rights are protected (or not protected) in both the structure of federalism itself and in division of powers cases.

Structurally, federalism provides one way of protecting rights by separating groups that might otherwise clash if combined in the same state. A group that shares a culture or tradition may also share understandings of rights and the kinds of limitations on rights that are appropriate, and therefore resolve differences about rights through public discourse.

Recall from the readings in Chapter 3, From Contact to Confederation, that one of the purposes of Confederation was to avoid conflict between the English-speaking Protestants in Ontario and the French-speaking Roman Catholics in Quebec. Under the *Constitution Act, 1867*, each was given substantial power to govern its affairs in its own province, especially by virtue of ss 92(13) and 92(16), and in s 93, which gave the power to each province "exclusively" to legislate "in relation to education." Yet in each province, a discrete minority feared oppression on the basis of language and religion. At Confederation and later, much of the fear centred on schools. Section 93 included two limitations designed to protect denominational, dissentient and separate schools. These limitations are complex and overlapping, but their general nature can be suggested in these two propositions: (1) provincial legislation could not prejudicially affect religious schools established before Confederation, and (2) an appeal could be made to the federal Cabinet against legislation prejudicially affecting schools established after Confederation. Similar, but not identical, limitations were imposed when other provinces joined Canada. Some of the issues relating to s 93 and minority schools are discussed in Chapter 4, The Late Nineteenth Century: The Courts Set an Initial Course, and Chapter 19, Freedom of Religion.

In the next two sections, we consider how rights and federalism intersect in division of powers cases. As you read these, consider the Supreme Court of Canada's statement in the *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 at para 81 that "[a]lthough Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes." Do you agree with this statement?

A. FEDERALISM AND RACE

This section includes notes and cases from the long history of racial discrimination against Chinese and Japanese people in Canada. The Chinese began to come to Canada in the 1850s, usually arriving from the Western United States as part of a northward shift in the search for gold. During the next decade, immigration from China itself began, and the Japanese began to arrive in the 1880s. From the 1870s onward, the numbers of both groups were significant, although during the 19th century and well into the 20th, they settled almost exclusively in the West, and mainly in British Columbia. At first, most were males who worked in construction (especially of the transcontinental railway), mines, fishing, agriculture, and in domestic establishments.

From the 1870s until well into the 20th century, Chinese and Japanese immigrants were targets of discriminatory legislation, most of it enacted by the Western provinces, especially British Columbia. The legislation used a wide range of techniques: restricting immigration—for example, by prohibitions, taxes, and language tests; imposing taxes—for example, head taxes; denying the franchise and restricting eligibility for public offices; and limiting economic competition by imposing discriminatory licence requirements on businesses and prohibitions against employment.

The nature of this discrimination is described in the following passage about the 1890s from Patricia E Roy, *A White Man's Province* (Vancouver: University of British Columbia Press, 1989) at 65–66 (footnotes omitted):

During much of the decade Asian immigration was not a major issue; the restriction of Asian labour already in the province, however, remained a lively subject. The Chinese head tax and sometimes unfavourable economic conditions contributed to a decline in the Chinese population; Japanese immigrants were not yet conspicuous except along the lower Fraser River. Occasionally, dramatic outbursts of opposition occurred. When Chinese were hired to clear land in Vancouver, a riot ensued; when Japanese fishermen helped break a strike, white fishermen pressed for laws to keep the Japanese out of the fisheries; when explosions killed 216 white and Chinese coal miners, the white miners claimed Chinese were a danger and pressed for their removal from the mines.

Most agitation against Asian competition took place in the political arena. The question of restricting Asian competition was complicated by a fundamental division within British Columbia between capital and labour, that is, in this context, between those who believed "cheap" labour was essential for the development of the province and those who regarded "cheap" labour as a threat to their livelihoods. The presence of high-profile representatives of both camps in the legislature exacerbated the conflict. The dichotomy was especially clear in coal-mining and salmon-canning, industries in which Chinese and Japanese were extensively employed. The contest was also evident in the perennial discussion of whether or not jobs created by new industries, especially railways and mines, should be reserved for men of "our own race" . . . Nevertheless, the lines . . . were not always firmly drawn. On occasion, even sinophobes would set aside principles if they wanted a cheap labour supply quickly for a particular project. References to preserving British Columbia for "our own race" seem not so much to have reflected racist ideas as they did an attempt to broaden support for particular economic interests. Political expediency also influenced legislation. The legislature was more likely to pass anti-Asian measures just before an election than at any other time.

Union Colliery Co v Bryden

[1889] UKPC 58, [1899] AC 580 (PC)

[The tensions described by Roy in the preceding passage became intense in the early 1880s. Proposals were made in the BC legislature to exclude Chinese workers from mines, on the pretext that being unable to speak English was dangerous, especially below ground. In 1890, s 4 of the *Coal Mines Regulation Act* was amended in response to this pressure. The prohibition proved to be difficult to enforce; its constitutionality was questioned; and proposals were made throughout the 1890s to repeal it. Late in the decade, a shareholder of Union Colliery brought an action for a declaration that the mine was violating the prohibition, probably hoping that the prohibition would be declared *ultra vires*. The company appealed to the Privy Council from the BC Court of Appeal.]

LORD WATSON:

[T]he question raised directly concerns the legislative authority of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the *British North America Act, 1867*. ... In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not.

• • •

There can be no doubt that, if s. 92 of the Act of 1867 had stood alone ..., the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the *Coal Mines Regulation Act*. The subject-matter of that enactment would clearly have been included in s. 92(10), which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92(13), which embraces "Property and Civil Rights in the Province."

But s. 91(25) extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Section 91 concludes with a proviso to the effect that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Section 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, *ipso facto*, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91(25) might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seems *prima facie* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in s. 91(25). But it seems clear that the expression "aliens" occurring in that clause refers to, and, at least includes, all aliens who have not yet been naturalized; and the

words "no Chinaman," as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized. . . .

The provisions [which have been] affirmed by the Courts below are capable of being viewed in two different aspects They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if [so], it would be difficult to dispute that they were within the competency of the provincial legislature But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish . . . that these aliens or naturalized subjects shall not work . . . in underground coal mines

Their Lordships see no reason to doubt that, by virtue of s. 91(25), the legislature of the Dominion is invested with exclusive authority in all matters which directly concern . . . the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of . . . s. 4 of the *Coal Mines Regulation Act* . . . consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. . . .

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from; to find and declare that the provisions of s. 4 of the British Columbia *Coal Mines Regulation Act*, 1890, which are now embodied in chapter 138 of the Revised Statutes of British Columbia, 1897, were, in so far as they relate to Chinamen, *ultra vires* of the provincial legislature, and therefore illegal.

Appeal allowed.

Cunningham v Tomey Homma

[1902] UKPC 60, [1903] AC 151 (PC)

THE LORD CHANCELLOR (LORD HALSBURY):

In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is [dis]qualified . . . ; but it is contended that ss. 91 and 92 of the *British North America Act* have deprived the province of the power of making any such provision It is maintained that s. 91(25), enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the *Naturalization Act of Canada* enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that, by s. 92(1), the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which

of these two views is the right one . . . [T]he policy or impolicy of such an enactment . . . is not a topic which their Lordships are entitled to consider.

The first observation which arises is that the enactment, supposed to be *ultra vires* . . . upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. . . .

In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of s. 91(25) would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co. v. Bryden*, [1899] AC 580 (PC). That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

For these reasons their Lordships will humbly advise His Majesty that the order of the Chief Justice in the country court and the order of the Supreme Court ought to be reversed.

Appeal allowed.

Bruce Ryder, "Racism and the Constitution: British Columbia Anti-Asian Legislation, 1872-1923"

(1990) [unpublished] (footnotes omitted)

Beginning with the Privy Council's decision in *Cunningham v. Tomey Homma*, a revisionist understanding of the *Bryden* case emerged that removed any constitutional challenge to the racial status quo. The Privy Council in *Tomey Homma* abandoned the view expressed by Lord Watson in *Bryden* that s. 91(25) gave the Dominion government jurisdiction over all of the consequences of either alien or naturalized status. Rather, the Privy Council in *Tomey Homma* stated that s. 91(25) gave the Dominion jurisdiction only over the "ordinary rights" of the inhabitants of

a province to reside and earn a living in the province. Post-*Bryden*, s. 91(25) was interpreted as prohibiting the provinces from passing laws that were intended to deprive a racial group of the right to reside and take up employment in wage labour in the province. Otherwise, provincial legislation imposing racial disabilities did not interfere with exclusive federal jurisdiction over aliens and naturalization. In this way the courts were able to follow Lord Watson's fusion of race with the s. 91(25) categories of federal jurisdiction while removing any potential that the *Bryden* principle had to disrupt the racial status quo.

This peculiar refashioning of judicial interpretation of s. 91(25) can be understood only in light of the network of racist assumptions and beliefs that sustained and justified a social order premised on racial hierarchy. Provincial laws imposing racial disabilities were held to be valid when they were believed to rest on accurate assumptions about racial difference. When it came to the right to reside and work in a province, provincial legislative disabilities were *ultra vires* because Chinese and Japanese workers were no different than European workers. Drake J, in dismissing a charge against a mine for employing Chinese underground, stated that a provincial legislature does not have the power "to exclude a large number of persons from earning a living in the manner they were brought up to do." (*R v. Priest*, (1904) 10 BCR 436, 437.) However, when it came to other rights, for example, rights as voters or employers rather than as labourers, racial differences provided a bona fide provincial legislative purpose that justified the imposition of disabilities on Chinese and Japanese by the provincial legislature. The acceptance of a racial difference grounded provincial laws in a provincial head of power, and removed the objection that the provincial law was in pith and substance imposing a disability on a racial group. ...

In this way, the post-*Bryden* jurisprudential accommodation used racial similarity and difference to ratify a social order premised on racial hierarchy.

In the 1870s and 1880s, before the Privy Council imposed its authority in *Bryden* and *Cunningham*, judges in British Columbia struck down some of the discriminatory legislation, openly protesting against the attitudes it expressed. These cases are discussed in John PS McLaren, "The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law" (1991) 20 Man LJ 107. For a more in-depth discussion of this historical period, see Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29 Osgoode Hall LJ 619.

R v Quong Wing

[1914] SCR 440, 1914 CanLII 608

[In 1912, Saskatchewan enacted the *Female Employment Act*, which, in its entirety, read:

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bona fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person.
2. Any employer guilty of any contravention or violation of this Act shall upon summary conviction be liable to a penalty not exceeding \$100 and in default of payment to imprisonment for a term not exceeding two months.

The term "Chinaman" was not defined. The Dominion's *Naturalization Act*, RSC 1906, c 77, s 24, which was crucial to Idington J's dissent, provided:

An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject within Canada.

Quong Wing owned a restaurant and employed two white women as servers. When he was charged under the Act, he argued that the prohibition was *ultra vires*. He was convicted and appealed to the Supreme Court.]

DAVIES J:

The question on this appeal is not one as to the policy or justice of the Act in question, but solely as to the power of the provincial legislature to pass it. There is no doubt that, as enacted, it seriously affects the civil rights of the Chinamen in Saskatchewan . . . If the language of Lord Watson, in ... *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580, was to be accepted as [correct] . . . , I would feel some difficulty in upholding the legislation now under review. . . .

If the "exclusive authority on all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada" is vested in the Dominion Parliament . . . , it would, to my mind, afford a strong argument that the legislation now in question should be held *ultra vires*.

But in the later case of *Cunningham v. Tomey Homma*, [1903] A.C. 151, the Judicial Committee modified the views of the construction of s. 91(25) stated in the *Union Colliery* decision. . . .

Reading the *Union Colliery* case, therefore, . . . and accepting their Lordships' interpretation of s. 91(25) that "its language does not purport to deal with the consequences of either alienage or naturalization," and that, while it exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, . . . it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires*, however harshly it may bear upon Chinamen There is no inherent right in any class of the community to employ women and children which the legislature may not modify or take away altogether. There is nothing in the *British North America Act* which says that such legislation may not be class legislation. Once it is decided that the subject-matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe upon any of the enumerated subject-matters assigned to the Dominion, then such provincial powers are plenary.

What objects or motives may have controlled or induced the passage of the legislation in question I do not know. Once I find its subject-matter is not within the powers of the Dominion Parliament and is within that of the provincial legislature, I cannot inquire into its policy or justice or into the motives which prompted its passage.

But, in the present case, I have no reason to conclude that the legislation is not such as may be defended upon the highest grounds.

The regulations impeached in the *Union Colliery* case . . . were, as stated by the Judicial Committee, in the later case of *Tomey Homma* [at p. 157],

not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of

British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* ... [in] *The Union Collieries v. Bryden*

The right to employ white women in any capacity ... is clearly within the powers of the provincial legislatures. The right to guarantee and ensure their protection from a moral standpoint is, in my opinion, within such provincial powers and, if the legislation is *bona fide* for that purpose, it will be upheld even though it may operate prejudicially to one class or race of people.

There is no doubt in my mind that the prohibition is a racial one It extends and was intended to extend to all Chinamen as such, naturalized or aliens. Questions which might arise in cases of mixed blood do not arise here.

The Chinaman prosecuted in this was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British subject, and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. This would accord with the interpretation of the word "Chinaman" adopted by the judicial committee in the case of *The Union Colliery Company v. Bryden*

The prohibition against the employment of white women was not aimed at alien Chinamen simply or at Chinamen having any political affiliation. It was against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

For these reasons I would dismiss the appeal with costs.

IDINGTON J (dissenting):

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It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid.

For example, is it competent for a legislature to create a system of slavery and, above all, such a system as applied to naturalized British subjects? This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.

Again, it may also be well argued that, within the exclusive powers given to the Dominion Parliament over the subject of naturalization and aliens, there is implied the power to guarantee to all naturalized subjects that equality of freedom and opportunity to which I have adverted. And I ask, has it not done so by the foregoing provision of the *Naturalization Act*?

• • •

Canada, for example, is deeply interested ... in the colonization of its waste lands by aliens expecting to become British subjects and surely the power over naturalization must involve ... many considerations relative to the future status of such people as

invited to go there and accept the guarantees and inducements offered them. To define and forever determine beyond the power of any legislature to alter the status of such people and measure out their rights by that enjoyed by the native-born seems to me a power implied in the power over "naturalization and aliens." ...

• • •

The appellant having, under the *Naturalization Act* (as I think fair to infer), become a British subject, he has presumably been certified to as a man of good character and enjoying the assurance ... of equal treatment with other British subjects, I shall not willingly impute an intention to the legislature to violate that assurance by this legislation specially aimed at his fellow-countrymen in origin. Indeed, in a piece of legislation alleged to have been promoted in the interests of morality, it would seem a strange thing to find it founded upon a breach of good faith which lies at the root of nearly all morality worth bothering one's head about.

• • •

Looked at from this point of view I am constrained to think that this Act must be construed as applicable only to those Chinamen who have not become naturalized British subjects, and is not applicable to the appellant who has become such.

Whether it is *ultra vires* or *intra vires* the alien Chinamen is a question with which, in this view, I have nothing to do.

• • •

DUFF J:

• • •

The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to ... "aliens and naturalization," and to which, therefore, the jurisdiction of the province does not extend. This is said to be shewn by the decision of the Privy Council in *The Union Colliery Co. v. Bryden*

I think that, on the proper construction of this Act (and this appears to me to be the decisive point), it applies to persons of the races mentioned without regard to nationality. ... The terms Chinaman and Chinese, as generally used in Canadian legislation, point to a classification based upon origin, upon racial or personal characteristics and habits, rather than upon nationality or allegiance. ... Indeed, the presence of the phrase "other Oriental persons" seems to make it clear, even if there could otherwise have been any doubt upon the point, that the legislature is not dealing with these classes of persons according to nationality, but as persons of a certain origin or persons having certain common characteristics and habits sufficiently indicated by the language used.

Prima facie, therefore, the Act is not an Act dealing with aliens or with naturalized subjects as such. It seems also impossible to say that the Act is, in its practical operation, limited to aliens and naturalized subjects. ...

• • •

There is nothing in the Act itself to indicate that the legislature is doing anything more than attempting to deal according to its lights (as it is its duty to do) with a strictly local situation. In the sparsely inhabited Western provinces of this country the presence of Orientals in comparatively considerable numbers not infrequently raises questions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances ... ; considerations, for example, touching the interests of immigrant European women, and considerations touching

the effect of such a practice upon the local relations between Europeans and Orientals; to say nothing of considerations affecting the administration of the law. . . .

[Chief Justice Fitzpatrick gave a judgment essentially similar to the judgments of Davies and Duff JJ.]

Appeal dismissed.

Shortly after the outbreak of hostilities in the Pacific during the Second World War, the government began to impose controls on Japanese persons living in Canada, especially those living in British Columbia. At first, curfews were imposed and fishing boats were impounded. In 1942, a comprehensive program of evacuation began. Japanese persons living in specified areas were moved to camps, most of which were in the interior of British Columbia, and the remainder on the prairies and in Ontario. Here, they worked on highway construction and sugar beet farms, often separated from their families, and much of their property was impounded.

These controls were imposed under the *War Measures Act*, 5 George V Chap 2, which gave the federal government power to do whatever it considered "necessary or advisable for the security, defense, peace, order and welfare of Canada." This power was limited to the existence of "real or apprehended war, invasion, insurrection," and a proclamation by the government was to be conclusive evidence that these conditions existed. This general grant of power was followed by some particulars, which included, "arrest, detention, exclusion, and deportation." In 1945, the Dominion enacted the *National Emergency Transitional Powers Act*, 1945, 9-10 George VI Chap 25, which was designed to provide for the difficult transition following the war. It gave the government powers, like the *War Measures Act*, to do whatever it considered necessary during the continuing emergency. It included a power to continue orders made under the *War Measures Act*, and an order continuing the internment of Japanese Canadians was made a few weeks later.

At the same time, the government made plans to deport specified groups of Japanese people who were British subjects either through birth or naturalization. This power was challenged, unsuccessfully, in *Co-Operative Committee on Japanese Canadians v AG Canada*, 1946 CanLII 361, [1947] AC 87 (UKJCPC). The first part of the challenge was to the *War Measures Act* itself, and it prompted Lord Wright, who wrote the judgment of the Privy Council, to make a general comment about emergencies at 101-2:

Under the *British North America Act* property and civil rights in the several Provinces are committed to the Provincial legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge.

Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

Several other arguments against deportation were made, and rejected, including one that the term "deportation" was limited to aliens. Lord Wright said at 104-5:

Upon this argument it may be conceded that commonly it is only aliens who are made liable to deportation, and that in consequence, where reference is made to deportation, there is often imported the suggestion that aliens are under immediate consideration.

The dictionaries, as might be expected, do not altogether agree as to the meaning of deportation, but the Oxford English Dictionary gives as its definition "The action of carrying away: 'forcible removal, especially into exile: transportation.'

As a matter of language, their Lordships take the view that "deportation" is not a word which is misused when applied to persons not aliens. Whether or not the word "deportation" is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found.

In the present case the Act is directed to dealing with emergencies; throughout it is in sweeping terms, and the word is found in the combination "arrest, detention, 'exclusion and deportation.'" As regards the first three of these words, nationality is obviously not a relevant consideration. The general nature of the Act and the collocation in which the word is found, establish, in their Lordships' view, that in this statute the word "deportation" is used in a general sense ... applicable to all persons irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian nationals. Nationality per se is not a relevant consideration. An order relating to deportation would not be unauthorized by reason that it related to Canadian nationals or British subjects.

When the Charter was being debated by the Special Joint Committee on the Constitution in 1980 and 1981, one of the groups it heard from was the National Association of Japanese Canadians. Eric Adams describes the submissions of Gordon Kadota, the Association's President:

We requested this appearance," Kadota began, "because the Japanese Canadians have had a unique experience in Canada, an experience which more than ever must be told to contribute to the making of our future nation." "Our history in Canada is a legacy of racism made legitimate by our political institutions," he continued, "and we must somehow ensure that no group of Canadians will be subjected to the whims of political process as we were." "We feel that this can only be done," he argued, "by entrenching a Charter of Rights in our constitution, unconditionally entrenching, beyond the reach of Parliament and beyond the reach of provincial legislatures.

See Eric Adams & The Landscapes of Injustice Research Collective, "Constitutional Stories: Japanese Canadians and the Constitution of Canada" (2019) 35 Australasian Canadian Studies at 22-23 (footnotes omitted).

In what ways do the cases discussed above demonstrate the limits of relying on the division of powers to indirectly protect rights?

B. THE IMPLIED BILL OF RIGHTS

In the following cases, provincial laws that interfered with fundamental freedoms were held to be *ultra vires*. Known as the "implied bill of rights" cases, these decisions suggest that the Constitution itself, perhaps as a result of the preamble to the *British North America Act, 1867*, implies that there is a zone of liberty into which the state must not unjustifiably enter. This is the function that the Charter performs today, which is why the "implied bill of rights" is one of the Charter's antecedents.

As you read the cases, ask yourself whether they suggest that only Parliament, and not the provincial legislature in question, is authorized to enact a law that interferes with a fundamental freedom, such as freedom of expression or religion, or whether the Constitution prevents both levels of government from enacting laws that interfere with the exercise of such freedoms.

Reference re Alberta Statutes—The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act

[\[1938\] SCR 100, 1938 CanLII 1](#)

[One of the most dramatic political events of the 1930s was the election of the Social Credit government in Alberta in 1937. Its monetary policies, which horrified the eastern establishment, especially its bankers, were vague and muddled, but the essential belief was that the total of the payments to individuals from all economic transactions was less than the total value of goods produced, and this shortfall was the cause of unemployment and depression. The solution was to impose public control over the banks, and provide each individual a "social credit," which they must spend to maintain the balance between payments and production. The newspaper accounts of the election victory and this economic policy were extensive and almost all hostile, and the hostility continued as the government began to implement its policies in 1936 and 1937. The government's response to this hostility was the Publication of Accurate News and Information Bill, which gave power to the Social Credit Board (which had been created by statute to implement the general program) to require newspapers to publish statements that it considered necessary to correct public misapprehension. The Bill also gave power to require disclosure of sources and names of authors.

The lieutenant governor refused assent to this Bill and two others about economic policy. A reference was made to determine the extent of the powers of disallowance and reservation, which is of no interest here, and the powers of Alberta to enact the three reserved bills. The Supreme Court unanimously held that all three were *ultra vires*—and the statutes that had been enacted earlier were *ultra vires* as well.]

CANNON J:

The policy referred to in the preamble of the Press bill regarding which the people of the province are to be informed from the government standpoint, is undoubtedly the Social Credit policy of the government. The administration of the bill is in the hands of the Chairman of the Social Credit Board who is given complete and discretionary power by the bill. "Social Credit," according to sec. 2(b) of ... *The Alberta Social Credit Amendment Act* is

the power resulting from the belief inherent within society that its individual members in association can gain the objectives they desire;

and the objectives in which the people of Alberta must have a firm and unshaken belief are the monetization of credit and the creation of a provincial medium of exchange instead of money to be used for the purposes of distributing to Albertans loans without interest, per capita dividends and discount rates to purchase goods from retailers. This free distribution would be based on the unused capacity of the industries and people of the province of Alberta to produce goods and services, which capacity remains unused on account of the lack or absence of purchasing power in the consumers in the province. The purchasing power would equal or absorb this hitherto unused capacity to produce goods and services by the issue of Treasury Credit certificates against a Credit Fund or Provincial credit account established by the Commission each year representing the monetary value of this "unused capacity"—which is also called "Alberta credit."

It seems obvious that this kind of credit cannot succeed unless every one should be induced to believe in it and help it along. The word "credit" comes from the Latin: *credere*, to believe. It is, therefore, essential to control the sources of information of the people of Alberta, in order to keep them immune from any vacillation in their absolute faith in the plan of the government. The Social Credit doctrine must become, for the people of Alberta, a sort of religious dogma of which a free and uncontrolled discussion is not permissible. The bill aims to control any statement relating to any policy or activity of the government of the province and declares this object to be a matter of public interest. The bill does not regulate the relations of the newspapers' owners with private individual members of the public, but deals exclusively with expressions of opinion by the newspapers concerning government policies and activities. The pith and substance of the bill is to regulate the press of Alberta from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt.

I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries ... , but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity.

Do the provisions of this bill, as alleged by the Attorney-General for Canada, invade the domain of criminal law and trench upon the exclusive legislative jurisdiction of the Dominion in this regard?

The object of an amendment of the criminal law, as a rule, is to deprive the citizen of the right to do that, apart from the amendment, he could lawfully do. Sections 130 to 136 of the *Criminal Code* deal with seditious words and seditious publications; and sect. 133(a) reads as follows:

No one shall be deemed to have a seditious intention only because he intends in good faith

- (a) to show that His Majesty has been misled or mistaken in his measures; or
- (b) to point out errors or defects in the *government* or constitution of the United Kingdom, or of any part of it, or of Canada or *any province thereof* ... ; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter of state; or
- (c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

It appears that in England, at first, criticism of any government policy was regarded as a crime involving severe penalties and punishable as such; but since the passing of *Fox's Libel Act* in 1792, the considerations now found in the above article of our criminal code that it is not criminal to point out errors in the Government of the country and to urge their removal by lawful means have been admitted as a valid defence in a trial for libel.

Now, it seems to me that the Alberta legislature by this retrograde Bill is attempting to revive the old theory of the crime of seditious libel by enacting penalties, confiscation of space in newspapers and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous It is an attempt by the legislature to amend the *Criminal Code* in this respect and to deny the advantage of sect. 133(a) to the Alberta newspaper publishers.

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammeled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of the *British North America Act*, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammeled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, *ultra vires* of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the *Criminal Code*. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada. Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.

• • •

DUFF CJ:

[The first part of this judgment is omitted. It concluded that the Bill was *ultra vires* because it depended on the other bills, which were held to be invalid.]

• • •

This is sufficient for disposing of the question referred to us but, we think, there are some further observations upon the Bill which may properly be made.

Under the constitution established by the *British North America Act*, legislative power for Canada is vested in one Parliament consisting of the sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by [persons qualified to vote]. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion

is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*, "freedom governed by law."

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the *British North America Act* as a whole (*Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, ... as repugnant to the provisions of the *British North America Act*, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter[.] ...

... Some degree of regulation of newspapers everybody would concede to the provinces. ... [B]ut the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the *British North America Act* and the statutes of the Dominion of Canada.

[Davis J concurred with Duff CJ, Kerwin, Crocket, and Hudson JJ held that the Bill was invalid because it was dependent on the other bills and statutes, and expressly declined to discuss its validity on the grounds that Duff CJ and Cannon J adopted. An appeal was brought to the Privy Council about all three bills, but that body did not hear argument about this Bill, because the earlier statutes upon which it depended were repealed early in 1938: *AG Alberta v AG Canada*, [1938] AC 294 (PC).]

Switzman v Elbling

[1957] SCR 285, 1957 CanLII 2

[This action was essentially a challenge to the *Act to Protect the Province Against Communistic Propaganda* RSQ 1941, c 52 [Padlock Act], enacted in 1937 by the Quebec legislature to control communism. Section 3, which was crucial, provided:

It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

Switzman's landlord brought an action to evict him because he had used the leased premises for purposes prohibited by this section. His defence was that the section was *ultra vires* the provincial government, and it succeeded in the Supreme Court by a majority of eight to one.]

RAND J.:

The first ground on which the validity of s. 3 is supported is s. 92(13) of the *British North America Act*. "Property in the Province," and Mr. Beaulieu's contention goes in this manner: by that head the Province is vested with unlimited legislative power over property; it may, for instance, take land without compensation and generally may act as amply as if it were a sovereign state, untrammelled by constitutional limitation. The power being absolute can be used as an instrument or means to effect any purpose or object. Since the objective accomplishment under the statute here is an Act on property, its validity is self-evident and the question is concluded.

I am unable to agree that [such absolute power] resides in either legislature. The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action. Under s. 92(13) the purpose would, in general, be a "property" purpose either primary or subsidiary to another head of the same section. If such a purpose is foreign to powers vested in the Province by the Act, it will invade the field of the Dominion. For example, land could not be declared forfeited or descent destroyed by attainder on conviction of a crime, nor could the convicted person's right of access to provincial Courts be destroyed. These would trench upon both criminal law and citizenship status. The settled principle that calls for a determination of the "real character," the "pith and substance," of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power. That a power ostensibly as here under a specific head cannot be exercised as a means directly and immediately to accomplish a purpose not within that endowment is demonstrated by the following decisions of the Judicial Committee: ...

[Discussion of several cases, including *Union Colliery v Bryden* [1899] AC 580, is omitted.]

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That the scene of study, discussion or dissemination of views or opinions on any matter has ever been brought under legal sanction in terms of nuisance is not suggested. For the past century and a half in both the United Kingdom and Canada, there has been a steady removal of restraints on this freedom Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language, in the broadest sense, free.

The object of the legislation here, as expressed by the title, is admittedly to prevent the propagation of communism and bolshevism, but it could just as properly have

been the suppression of any other political, economic or social doctrine ... ; and the issue is whether that object is a matter "in relation to which" under s. 92 the Province may exclusively make laws. Two heads of the section are claimed to authorize it: s. 92(13), as a matter of "Civil Rights," and s. 92(16), "Local and Private Matters."

Mr. Tremblay in a lucid argument treated such a limitation of free discussion and the spread of ideas generally as in the same category as the ordinary civil restrictions of libel and slander. These obviously affect the matter and scope of discussion to the extent that it trenches upon the rights of individuals to reputation and standing in the community; and the line at which the restraint is drawn is that at which public concern for the discharge of legal or moral duties and government through rational persuasion, and that for private security, are found to be in rough balance.

But the analogy is not a true one. The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

It is then said that the ban is a local matter under s. 92(16); that the social situation in Quebec is such that safeguarding its intellectual and spiritual life against subversive doctrines becomes a special need in contrast with that for a general regulation by Parliament. ...

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Indicated by the opening words of the preamble in the Act of 1867, ... the political theory which the Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate, whatever the deficiencies in its workings. Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from s. 92(16) as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inheritance in the individual it is embodied in his status of citizenship. ...

Prohibition of any part of this activity as an evil would be within the scope of criminal law Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion, ... and that the body of discussion is [generally] indivisible, ... the degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.

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I would, therefore, allow the appeal, set aside the judgments below, dismiss the action and direct a declaration on the intervention that the statute in its entirety is *ultra vires* of the Province.

ABBOTT J:

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The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours

This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. It does not, in substance, deal with matters of property and civil rights or with a local or private matter within the Province and in my opinion is clearly *ultra vires*. Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

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TASCHEREAU J (dissenting) [TRANSLATION]:

The appellant contends that this legislation is exclusive within the domain of the criminal law, and that consequently it is without the legislative competency of the provincial authority. I would willingly agree with him, if the Legislature had enacted that Communism was a crime punishable by law But such is not the case that we have before us If the provincial Legislature has no power to create criminal offences, it has the right to legislate to prevent ... crimes under the *Criminal Code*, and to prevent conditions calculated to favour the development of crime. ... [I]t may validly legislate as to the possession and use of property, as this is exclusively within the domain of civil law, and is by virtue of s. 92(13) of the *BNA Act* within the provincial competency.

I am clearly of opinion that if a Province may validly legislate on all civil matters in relation to criminal law, *that it may enact laws calculated to suppress conditions favouring the development of crime*, and control properties in order to protect society against any illegal uses that may be made of them ... I cannot see why it could not also have the power to enact that all those who extol doctrines, calculated to incite to treason, to the violation of official secrets, to sedition, etc., should be deprived of the enjoyment of [those] properties from where are spread these theories, the object of which is to undermine and overthrow the established order.

... Canadians, less than 10 years ago, in violation of their oath of allegiance, did not hesitate for the sake of Communism, to reveal official secrets and thus imperil the security of the state. The suppression of the spreading of these subversive doctrines by civil sanctions is, to my mind, as important as the suppression of disorderly houses. I remain convinced that the domain of criminal law, exclusively of federal competency, has not been encroached upon by the impugned legislation, and that

the latter merely establishes civil sanctions for the prevention of crime and the security of the country.

It has also been contended that this legislation constituted an obstacle to the liberty of the press and the liberty of speech. I believe in those fundamental liberties; ... but these liberties would cease to be a right and become a privilege if it were permitted to certain individuals to misuse them in order to propagate dangerous doctrines that are necessarily conducive to violations of the established order. These liberties which citizens and the press enjoy of expressing their beliefs, their thoughts and their doctrines without previous authorization or censure, do not constitute absolute rights. They are necessarily limited and must be exercised within the bounds of legality. When these limits are overstepped, these liberties become abusive, and the law must then necessarily intervene to exercise a repressive control in order to protect the citizens and society.

The same reasoning must serve to meet the objection raised by the appellant, to the effect ... that the impugned law is an obstacle to the free expression of all individuals, candidates in an election. Destructive ideas of social order and of established authority by dictatorial methods do not have more rights in electoral periods than in any other times. In the minds of many, this law may appear rigid (it is not within my province to judge of its wisdom), but the severity of a law adopted by a competent power does not brand it with unconstitutionality.

For all these reasons, I am of opinion that this appeal must be dismissed. ...

[Chief Justice Kerwin and Cartwright, Fauteux, Locke, and Nolan JJ all held the Act *ultra vires* because it dealt, in substance, with criminal law. Kellock J concurred with Rand J.] [Emphasis in original.]

Appeal allowed.

Dupond v City of Montreal

[1978] 2 SCR 770, 1978 CanLII 201

[This case, also discussed in Chapter 11, Criminal Law and Procedure, involved a challenge to a municipal by-law imposing a 30-day prohibition on any public gatherings or assemblies. The by-law was challenged on two grounds: (1) as an invasion of the federal criminal law power; and (2) as an infringement of the fundamental freedoms of speech, assembly and association, the press, and religion. A majority of the Court, in a decision written by Beetz J, rejected both grounds of challenge and upheld the by-law. Only the portions of the judgment dealing with the implied bill of rights argument are reproduced here.]

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BEETZ J (Martland, Judson, Ritchie, and Pigeon JJ concurring) [TRANSLATION]:

IV

The second submission against the constitutionality of s. 5 and of the ordinance was that they are in relation to and in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion which were inherited from the United Kingdom and made part of the Constitution by the preamble of the *British North America Act, 1867*, or which come under federal jurisdiction and are protected by the *Canadian Bill of Rights*. ...

I find it exceedingly difficult to deal with a submission couched in such general terms. What is it that distinguishes a right from a freedom and a fundamental freedom from a freedom which is not fundamental? Is there a correlation between freedom of speech and freedom of assembly on the one hand and, on the other, the right, if any, to hold a public meeting on a highway or in a park as opposed to a meeting open to the public on private land? How like or unlike each other are an assembly, a parade, a gathering, a demonstration, a procession? Modern parlance has fostered loose language upon lawyers. As was said by Sir Ivor Jennings, the English at least have no written constitution and so they may divide their law logically. . . .

I am afraid I cannot avoid answering in kind the appellants' submission. I believe I can state my position in a relatively small number of propositions . . . :

1. None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.
2. None of those freedoms is a single matter coming within exclusive federal or provincial competence. Each of them is an aggregate of several matters which, depending on the aspect, come within federal or provincial competence. (This proposition is postulated in s. 5(3) of "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms," 1960 (Can.), c. 44, of which the *Canadian Bill of Rights* constitutes Part I.)
3. Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city. This is particularly so with respect to freedom of speech and freedom of the press as considered in the *Alberta Press Act* case Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.
4. The right to hold public meetings on a highway or in a park is unknown to English law. Far from being the object of a right, the holding of a public meeting on a street or in a park may constitute a trespass . . . even though no one is obstructed and no injury is done; it may also amount to a nuisance

Being unknown to English law, the right to hold public meetings on the public domain of a city did not become part of the Canadian Constitution under the preamble of the *British North America Act, 1867*.

5. The holding of assemblies, parades or gatherings on the public domain is a matter which, depending on the aspect, comes under federal or provincial competence and falls to be governed by federal and provincial legislation
6. The *Canadian Bill of Rights*, assuming it has anything to do with the holding of assemblies, parades or gatherings on the public domain, does not apply to provincial and municipal legislation.

Appellants' second submission must also fail.

I would therefore dismiss both appeals.

Appeal dismissed.

Almost ten years later, Beetz J returned to this topic in *Ontario (AG) v OPSEU*, [1987] 2 SCR 2, 1987 CanLII 71, discussed in Chapter 8, Interpreting the Division of Powers. The Ontario Public Service Employees' Union (OPSEU) challenged the Ontario *Public Service Act*, RSO 1970, c 386, particularly its provisions that prohibited employees in the public service from participating in specified political activities—for example, being a candidate in a provincial or federal election or soliciting funds for a provincial or federal party or candidate. The discussion in Chapter 8 was about interjurisdictional immunity. In addition to the federalism challenge, OPSEU also made an argument based on the implied bill of rights cases. Beetz J said:

[151] There is no doubt in my mind that the basic structure of our Constitution ... contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff CJC in *Reference re Alberta Statutes*, at p. 133, "such institutions derive their efficacy from the free public discussions of affairs ..." and, in those of Abbott J in *Switzman v. Elbling*, at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate." Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. On the whole, though, I am inclined to the view that the impugned legislation is in essence concerned with the constitution of the province and with regulating the provincial public service and affects federal and provincial elections only in an incidental way.

[152] I should perhaps add that [these] issues ... will in the future ordinarily arise ... under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them. The present legislation does not go so far as to infringe upon the essential structure of free parliamentary institutions.

Chief Justice Dickson and Lamer J, who also authored opinions, did not consider this argument.

IV. THE CANADIAN BILL OF RIGHTS

In 1960, Parliament enacted the Canadian *Bill of Rights*. The initiative came from Prime Minister John Diefenbaker, who had campaigned for constitutional protection for rights since becoming a member of Parliament in 1945 and had made it a principal platform promise during the 1958 election. Two external influences seem clear in the Bill's development. The first was international rights instruments, especially the *Universal Declaration of Human Rights* adopted by the United Nations in 1948. The second was the American *Bill of Rights* and the liberal interpretations of rights by the Supreme Court from the mid-1950s onward, especially in *Brown v Board of Education*, 347 US 483, 74 S Ct 686 (1954), a landmark decision about school desegregation. The influence of the American constitutional experience was probably heightened by the Cold War and the sense that, at its heart, it was a struggle for individual rights.

Within Canada, an important factor was probably the fears about regulation by legislatures and administrative agencies, which had expanded greatly during the war. For lawyers, this regulation threatened both legal values, especially the common law constitution, and political values, for most lawyers were hardly sympathetic to the politics of the regulatory state. Specific incidents also contributed. Both lawyers and the general public were troubled by denials of civil liberties in the treatment of the Japanese Canadians during the war, and by the conduct of an inquiry into espionage in 1946, which was widely criticized for curtailing the civil rights of individuals who were being investigated.

The Canadian Bill of Rights

RSC 1985, Appendix III

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Part I: Bill of Rights

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

The *Bill of Rights*, while simply a statute of Parliament, is considered to be quasi-constitutional in nature: see Vanessa MacDonnell, "A Theory of Quasi-Constitutional Legislation" (2016) 53:2 Osgoode Hall LJ 508.

However, the impact of the *Bill of Rights* is limited in two important ways. First, it governs only matters within the federal government's power. During the 1950s, the possibility of including the provinces was discussed, but they were determined to protect their autonomy. Second, it can be amended like any other statute.

In retrospect, the Bill presented two major problems for the courts. The first of these problems was its effect on other statutes. According to its own terms (s 2), the Bill had no effect on a statute that contained a declaration that it was to be effective regardless of the Bill, but what about other statutes—ones that violated rights, but did not contain an express declaration? Consider a statute made before the Bill was enacted. Did the Bill prevail, and make a violation of rights in the earlier statute ineffective? Alternatively, was it no more than a guide to interpretation? If it was no more than a guide to interpretation, then any violation of rights in the earlier statute would continue to be effective, as long as it was express or otherwise clear.

Now consider a statute made after the Bill, containing a provision that clearly denied some protected right. Because the Bill was simply a statute, did the later statute prevail, as a consequence of the general doctrine of parliamentary sovereignty? (A later statute is a repeal, express or implicit, of an earlier inconsistent one.) The second problem was more general—how should courts approach the Bill? Should its grants of rights be interpreted expansively or restrictively?

The decisions of the Supreme Court were generally disappointing to observers who had hoped that it would approach the Bill sympathetically and interpret it liberally. Here is a short and selective account of its decisions, which deals first with the decisions about the effect of the Bill, and second with the Court's approach.

The discussion of effect begins with *The Queen v Drybones*, [1970] SCR 282, 1969 CanLII 1. Section 94(b) of the *Indian Act*, RSC 1952, c 149, provided that an "Indian" who was "intoxicated ... off a reserve" was guilty of an offence, and liable to a fine of a minimum of 10 dollars (and a maximum of 50 dollars), or imprisonment for not more than three months. In contrast, the Liquor Ordinance of the Northwest Territories, which regulated liquor generally, provided in s 94(6) that it was an offence for anyone to be "intoxicated ... in a public place," and specified a penalty of a fine, without any minimum amount, or imprisonment for no more than 30 days. (The crucial contrasts between these two statutes were first, the differences in the punishments, and second, the specifications of the location of the accused when they were intoxicated. The *Indian Act* specified anywhere off a reserve, and the Liquor Ordinance specified a public place.) Drybones, an "Indian" according to the definition in the *Indian Act*, was charged under the Act with being intoxicated off a reserve. He challenged the section on the basis that it violated his right to equality before the law under s 1(b) of the Bill. The Supreme Court dismissed an appeal by the Crown from an acquittal in the lower courts by a majority of six to three.

Ritchie J, writing the principal majority judgment, rejected the argument that the Bill of Rights should be understood as simply a guide to interpretation, saying “[it] appears to me to strike at the very foundations of the *Bill of Rights*, and convert it from its apparent character as a statutory declaration of the fundamental rights and freedoms which it recognizes, into little more than a rule for the construction of federal statutes” (at 293). He rejected this approach, relying primarily on the opening words of s 2.

The Liquor Ordinance challenged in *Drybones* was enacted prior to the *Bill of Rights*. The outcome could therefore be understood as a simple consequence of the general doctrine of parliamentary sovereignty. At the same time, the Court’s statements about the fundamental nature of the rights contained in the *Bill of Rights* also suggested that “The fundamentality of the rights recognized [in the *Bill of Rights*] seemed to do some work of its own”: see MacDonnell, above at 513.

The problem of the effect of the Bill on statutes enacted after the Bill remained. For decades, scholars had debated whether an earlier legislature could bind a later one. The most pressing question in this debate was whether a requirement of a particular procedure for making legislation (a “manner and form” requirement) specified in a statute would obligate later legislatures. If it did, the requirement in the Bill of a declaration that a statute “shall operate notwithstanding” would be an effective requirement, and any future statute that did not include such a declaration would be ineffective to the extent that it violated the protected rights. During the 1970s and 1980s, several members of the Supreme Court announced that the *Bill of Rights*, or provincial bills of rights like it, prevailed over later statutes, although their reasoning was not extensive.

The Supreme Court’s decisions about the effect of the Bill therefore seem sympathetic, if not fully reasoned. It was the Court’s approach to the interpretation of the rights that was disappointing. One pervasive question was the significance of the words “there have existed and shall continue to exist,” in s 1, and the words “herein recognized and declared,” in s 2. Did these words limit the courts to the nature of the specified rights as they stood in 1960? In *R v Burnshire*, [1975] 1 SCR 693, 1974 CanLII 150, Martland J said that the Bill “declared and continued existing rights and freedoms. It was those existing rights and freedoms which were not to be infringed by any federal statute. Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights” (at 694). This approach, named the “frozen rights” approach, was the dominant approach, and it seems to have been a manifestation of a general denial of expansive interpretation. Two examples are the interpretations of the provisions about equality and about procedure.

In *Drybones*, the Crown argued that the prohibition against being intoxicated off a reserve treated all Indians equally. Ritchie J, writing the principal majority judgment, rejected the argument, saying (at 297) that it would permit

the most glaring discriminatory legislation against a racial group ... so long as all the other members are being discriminated against in the same way.

... [N]o individual or group of individuals is to be treated more harshly than another under the law, and ... an individual is denied equality before the law if it is made an offence ... for him to do something which his fellow Canadians are free to do without having committed any offence.

This formulation seemed generous (perhaps unreasonably so—did it really prohibit all distinctions between individuals and groups, including zoning by-laws and progressive taxes?), but the generosity seemed to be diminished three years later. In *AG of Canada v Lavell*, [1974] SCR 1349, 1973 CanLII 175, another part of the *Indian Act* was challenged under the equality provision of the *Bill of Rights*. Section 12(1)(b) provided that an Indian woman who married a non-Indian man lost her registration under the Act. There was no corresponding provision for an Indian man. By a majority of five to four, the Supreme Court rejected the challenge. Ritchie J declared that “the meaning to be given to the language employed in the *Bill of Rights*

is the meaning which it bore in Canada at the time when the Bill was enacted" (at 1365). For him, the phrase "equality before the law" did not express the "egalitarian" understandings espoused by the Supreme Court of the United States. Instead, it was illuminated by the "rule of law," which was affirmed in the preamble to the Bill. This reference took him to Dicey's classic statement in *Introduction to the Study of the Law of the Constitution*: equality means "equality before the law or the equal subjection of all classes to the ordinary law of the land" (see above at 1367). Ignoring the purpose and late 19th-century context of Dicey's text, and the possibility that the 20th century may have brought changes in understandings about equality that might have illuminated its meaning in 1960, Ritchie J asserted that the impugned section could be enforced without denying equality of treatment in the administration of the law.

Writing in dissent, Laskin J concluded that it was "impossible to distinguish *Drybones* from the two cases in appeal" (at 1375) and that the impugned provision violated the equality guarantee of the *Bill of Rights*.

Ritchie J considered equality again in *Bliss v AG of Canada*, [1979] 1 SCR 183, 1978 CanLII 25. The *Unemployment Insurance Act*, 1971, 1970-71-72 (Can), c. 48, established a program of benefits for women whose employment was interrupted because of pregnancy, but imposed a longer qualifying period for women claiming these benefits than it did for individuals claiming the regular benefits. As well, it excluded interruption of employment because of pregnancy from the categories of entitlement for the regular benefits. Bliss, whose employment was interrupted by pregnancy, claimed benefits, but she had not been employed for long enough to satisfy the qualifying period for the benefits specifically provided for women whose employment had been interrupted because of pregnancy. Writing for a unanimous court, Ritchie J held that the Act did not discriminate against her on the specified ground of sex, saying (at 184) that the sections creating the program of benefits were

a complete code dealing exclusively with the entitlement of women to unemployment insurance benefits during the specified part of the period of pregnancy and childbirth; these provisions form an integral part of a legislative scheme enacted for valid federal objectives and they are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation, but by nature.

He also held (at 191-93) that the discrimination could not be grounded in the more general term "equality before the law":

There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina v. Drybones* ... and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits

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... [T]here can ... be no doubt that [the longer qualifying period] is a relevant one for consideration in determining the conditions entitling pregnant women to benefits under a scheme of unemployment insurance enacted to achieve the valid federal objective imposed on Parliament by s. 91(2A) of the *British North America Act*.

Section 91(2A) gives the federal government power to legislate about "unemployment insurance." It was added in the late 1930s, in response to the *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act*, [1936] SCR 427, 1936 CanLII 30 [*Unemployment Insurance Reference*], one of the New Deal cases considered in Chapter 6, The 1930s: The Depression and the New Deal. Ritchie J did not, though, explain the references in these passages to the valid objective. True, the Act as a whole had a

valid purpose—to provide unemployment insurance—but this purpose could hardly justify denying Bliss any benefits at all. This case, more than any other, was a focus of protests by women during the debates about the Charter during the late 1970s and early 1980s.

The judgments about procedure and the phrases “due process” and “a fair hearing” were less dramatic, but just as narrow. The Supreme Court read these phrases as doing little more than incorporating the common law rules of procedural fairness. For further analysis of the *Bill of Rights* equality decisions, see Carissima Mathen, “Equality Before the Charter: Reflections on *Fraser v Canada*” (2021) SCLR (2d) (forthcoming).

The *Bill of Rights* is still in force. Some of its terms are occasionally discussed, especially two sections that are wider than the corresponding sections of the Charter—s 1(a), which specifically includes “property,” and s 2(e), which requires a “fair hearing” for determination of rights and obligations: see *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65; *Authorson v Canada (AG)*, 2003 SCC 39. Even though it has occasionally been used as a ground for decision, the *Bill of Rights* has been almost totally eclipsed by the *Charter of Rights and Freedoms*.

To some extent, the entrenchment of the Charter has rendered the ambiguities of common law constitutionalism less important. In what circumstances might the common law constitution continue to be relevant today?

CHAPTER SIXTEEN

THE ADVENT OF THE CHARTER

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I. INTRODUCTION

In the introduction to this book, we briefly described the constitutional renovation that Canada undertook in 1982. The 1982 amendments stand as the first major reconstruction of Canada's written constitution since 1867. One of the most important of these changes was the adoption of the *Canadian Charter of Rights and Freedoms* (the Charter), which we begin to study in this chapter and which occupies the rest of the book. This chapter is composed of two topics. The first is an introduction to the history of the Charter's adoption. This material situates the Charter in its historical and political context, both domestic and international. It also introduces the division of opinion over the substance of the Charter and the process of its adoption. The point of view of Quebec, the sole province not to have agreed to patriation, and the struggles of Indigenous peoples to have their voices heard, will also be examined. The second topic gives an overview of the ongoing debate about the legitimacy of judicial enforcement of constitutionally guaranteed rights and freedoms.

II. THE ADOPTION OF THE CHARTER

The Charter project formally began at a federal–provincial first ministers' conference in January of 1968. Then Justice Minister Pierre Trudeau, at the beginning of his political career, tabled a document entitled "A Canadian Charter of Human Rights," an excerpt from which follows. Among other things, it traced the historical origins and evolution of modern conceptions of human rights.

**The Honourable Pierre Elliott Trudeau, Minister of
Justice, A Canadian Charter of Human Rights,
January 1968**

in Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 51-53
(footnotes omitted)

Interest in human rights is as old as civilization itself. Once his primary requirements of security, shelter and nourishment have been satisfied, man has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity.

In ancient times, and for centuries thereafter, these rights were known as "natural" rights; rights to which all men were entitled because they are endowed with a moral and rational nature. The denial of such rights was regarded as an affront to "natural" law—those elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason. These natural rights were the origins of the western world's more modern concepts of individual freedom and equality.

Cicero said of natural law that it was "unchanging and everlasting," that it was "one eternal and unchangeable law ... valid for all nations and for all times."

In the Middle Ages, St. Thomas Aquinas emphasized that natural law was a law superior to man-made laws and that as a result all rulers were themselves subject to it.

The Reformation brought sharply to the fore the need for protection of freedom of religious belief.

As the concept of the social contract theory of government developed in the 18th century, still greater emphasis came to be given to the rights of the individual. Should a government fail to respect natural rights, wrote Locke and Rousseau, then disobedience and rebellion were justified. Thus was borne the modern notion of human rights. So responsive were men to this notion that the greatest social revolutions in the history of the western world took place—one in America and the other in France—in order to preserve for individuals the rights which they claimed belonged to them.

This deep-seated desire for recognition of human dignity is reflected in the memorable words of the American Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute new Government

The *Bill of Rights* in the United States, enacted as an amendment to the Constitution, serves to safeguard the individual from governmental intolerance of the "unalienable rights."

In France, the 1789 Declaration of the Rights of Man and the Citizen sought to achieve similar results. "Men are born and remain free and equal in respect of rights" it said. "The purpose of all civil associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property and resistance to oppression."

In both the United States and France, there was embodied the idea that men shall not be deprived of liberty or property except in accordance with the law. This is a manifestation of the belief that men should be ruled by laws, not men; that a government has no more power than the people have agreed to delegate to it.

Monarchies, as well as republics, are influenced by these principles; the authority of kings, as well as presidents, is limited. Many of the Commonwealth countries which inherited a tradition of parliamentary sovereignty have introduced constitutional restrictions, denying to the parliament as well as to the monarch the power to interfere with certain of the subjects' liberties. Constitutional checks on the exercise of governmental authority are a natural development in a democratic society.

The events of the Second World War were disturbing proof of the need to safeguard the rights of individuals. It is not by accident that an overwhelming number of newly independent states have included within their constitutions comprehensive

bills of rights. Since 1945 considerable discussion has taken place in Canada as well concerning similar constitutional measures. The topic has been considered by the Canadian Bar Association, by parliamentary committees, and by numerous commentators. While no constitutional step has been taken, some legislative enactments designed to protect human rights have been passed into law. Parliament in 1960 enacted the *Canadian Bill of Rights*—a step of considerable significance and one which prepares the way for a constitutional enactment. Several provinces have introduced human rights legislation, and a committee engaged in revision of the Quebec Civil Code has recently proposed that a declaration of civil rights be included in the revised code.

These measures are all evidence of the interest of the Canadian people in some form of safeguard of individual liberty. To date, however, there does not exist in Canada any form of guarantee (beyond those few contained in the *British North America Act*) which a provincial legislature or Parliament, as the case may be, cannot repeal as freely as any other statute it has enacted. In this sense, no Canadian has the benefit of a constitutional protection as exists in dozens of other countries.

An entrenched bill of rights would offer this constitutional protection, although at the price of some restriction on the theory of legislative supremacy. It is suggested that this is not too high a price to pay. In fact the theory of legislative supremacy is seldom pressed to its full extent. Indeed, even in England, the birthplace of parliamentary government, fundamental liberties have been protected not only through the common law but also by means of such historic documents as *Magna Carta* (1215), the *Petition of Right* (1628), and the *Bill of Rights* (1689). The purpose of an entrenched bill of rights is simple and straightforward. It has been described as serving "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech and a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

A constitutional bill of rights in Canada would guarantee the fundamental freedoms of the individual from interference, whether federal or provincial. It would as well establish that all Canadians, in every part of Canada, have equal rights. This would constitute a major first step towards basic constitutional reform.

Canada could not choose a more appropriate year than this one for the consideration of a constitutional bill of rights for Canadians. 1968 has been declared International Human Rights Year by the General Assembly of the United Nations. The General Assembly has done so as an acknowledgement that the centuries-old interest in human rights is now, in the mid-twentieth century, of universal scope. The preamble of the United Nations Charter declares that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." As a reflection of this determination, the United Nations in 1948 adopted the Universal Declaration of Human Rights. Since that date some 15 separate conventions or treaties have been sponsored by the UN dealing with particular rights of a more specialized character. Only last year, however, were those rights which are generally regarded as "fundamental" formulated into two Covenants, (The International Covenant on Economic, Social and Cultural Rights; The International Covenant on Civil and Political Rights) open for signature and ratification by all states.

It is the hopeful expectation of the General Assembly that in 1968 an aroused awareness by all peoples will result in government action everywhere. Canada has the opportunity to take a lead in this respect.

Alan Cairns, Charter Versus Federalism: The Dilemmas of Constitutional Reform

(Kingston: McGill-Queen's University Press, 1992) at 12-20 (footnotes omitted)

Interpretations of our recent constitutional discontents have focused overwhelmingly on domestic factors. Demands and responses, inputs and outputs, have been conceived in an insular fashion, almost as if Canadians inhabited a separate planet under their total control, and so minimal attention has been paid to our location in an international network of states and peoples. ...

In contrast, the pervasive international dimension to our struggles has received little concentrated attention.

The Erosion of Britishness

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For the Fathers of Confederation, parliamentary responsible government was a positive heritage that differentiated Canada from the United States and gratifyingly confirmed the evolutionary nature of Canadian constitutional development. ... In the post-1945 period, the status of parliamentary government in Canada was weakened by the relative decline of the country of its origin—as a world power, as a centre of empire, and as an economic leader. ...

British parliamentary supremacy no longer seemed so central to Canadian identity as the prestige and status associated with connection to the United Kingdom eroded. Although as late as the 1950s, opposition to a growing support for a Canadian Bill of Rights could still be justified in terms of defending our British heritage, and by tarring a Bill of Rights with the stigma of Americanism, by the 1970s such arguments appeared strained. By the time of the 1980-1 Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, dealing with the proposed constitutional resolution to be transmitted to Westminster, the remaining defenders of parliamentary supremacy were clearly in retreat. The dominant thrust of the interveners was to strengthen the Charter. ...

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Growing support for a Charter in Canada was facilitated by removal of specific impediments. In this connection, the abolition of appeals to the Judicial Committee of the Privy Council in 1949 made a little-noticed indirect contribution to the lessening of support for parliamentary supremacy and to the provision of a positive environment in which Charter support could more easily grow. ...

More generally, national support for a Bill of Rights in the 1950s was part of the historic colony-to-nation movement that had propelled successive steps in Canadian independence from Great Britain. In contrast to the overtly political purpose of constraining centrifugal pressures that drove the federal government's support for a Charter in the late 1960s and the 1970s, the earlier support had "less to do with leashing the provinces and more to do with the evolution of the symbolic basis of the Canadian Constitution from the authority of the British Parliament to that of the people of Canada." ...

The capacity of parliamentary government to sustain a sense of Canadian distinctiveness in North America was conditioned by time and circumstance. It appears in retrospect that the traditional, positive evaluation of parliamentary government, unconstrained by entrenched rights, was intimately linked to the status of the United Kingdom as a great power and to the related tendency for many English Canadians to define themselves as British as long as significant domestic prestige continued to

flow from the British connection. As that connection lost its instrumental value, Canadian support for the constitutional theory of parliamentary supremacy was weakened, along with a cluster of values, intellectual orientations, and practices that had previously given the Canadian constitution, and commentary on it, a distinctly British cast. ...

The weakened appreciation for this formerly potent symbol of Canadian constitutional identity created a gap in the constitutional symbolism of an almost completely autonomous nation. The Charter that emerged to fill that gap brought entrenched rights, judicial supremacy, and a greatly enhanced role for the written portion of the constitution—all of which further distanced Canadians from their British constitutional origins.

From the 1950s to the 1980s, the declining allegiance to the British parliamentary side of Canadian political life coincided with selective interest in and positive appraisal of American constitutional theory and practice.

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The International Rights Dimension

In 1968, Maxwell Cohen attributed the novel and dramatic Canadian interest in "human rights" to transformed international and domestic beliefs which had "altered totally beyond anything that could have been imagined two decades before." "Human rights," he continued, "became ... within the past twenty years, an important piece of 'debating' language ... part of the political dialogue, part of the debating experience of peoples in all parts of the world, even those in affluent societies."

The most influential catalyst of that transformed climate of Canadian and international opinion was the United Nations, one of whose purposes has been to foster respect for fundamental freedoms and human rights. Its 1945 Charter, followed by the Universal Declaration of Human Rights, adopted as a unanimous resolution of the General Assembly in 1948, and subsequent international covenants on Civil and Political Rights and on Economic, Social and Cultural Rights have been influential in channelling and stimulating a "rights" debate in Canada. ...

Initial Canadian responses to the inclusion of rights in the UN Charter, and to the subsequent Universal Declaration, were distinctly lukewarm. Canadian officials asserted the superior protection of rights under the British tradition, which they rather smugly contrasted with American experience, and also stressed the constitutional limitations of federalism in which some rights pertained to matters under provincial jurisdiction. Although the Special Joint Committee of the Senate and House of Commons of Canada on Human Rights and Fundamental Freedoms (1947-8) and the Special Committee of the Senate on Human Rights and Fundamental Freedoms (1950) were explicit responses to the requirement for an analysis of Canadian practice in the light of the Charter and the Universal Declaration, they did not result in a Canadian version of the Charter. Nevertheless, it was standard practice for advocates of a Canadian Bill of Rights from the late 1940s on to cite the UN Charter and the Universal Declaration in support of their position Thirty years later, nearly all the civil liberties and human rights organizations that appeared before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (1980-1) stressed Canadian obligations under UN international covenants. Human Rights Commissioner Gordon Fairweather, after citing various UN instruments, by means of which Canada has "increased her accountability to the world community" asserted that such obligations could not be met without an entrenched Charter binding on both orders of government.

Thus the direct and indirect proselytizing on behalf of rights by the United Nations challenged regimes practising federalism and employing parliamentary supremacy

to modify their constitutional arrangements, as a Bill of Rights became an almost essential attribute of contemporary statehood. Accordingly, it is not surprising that a Bill of Rights has become virtually an automatic component of new constitutions, or that Bills of Rights have become increasingly comprehensive, or that an established state such as Canada, that had long existed without an entrenched Charter, has recently introduced one.

Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms"

(1983) 61:1 Can Bar Rev 30 at 30-36 (footnotes omitted)

[This article explores two purposes of the Charter: (1) to contribute to national unity, and (2) to protect rights. The excerpt that follows is limited to the first purpose; it is included to give some understanding of the national political context of the making of the Charter.]

To understand the national unity rationale of the Charter, it is necessary to recall the context in which the federal government made a charter its number one priority for constitutional reform.

In the mid-1960's right up to the Confederation of Tomorrow Conference organized by the Premier of Ontario, John Robarts, in the fall of 1967, the Liberal Government in Ottawa was not interested in constitutional reform of any kind. Patriation with an amending formula [in what was known as the "Fulton-Favereau formula"] had been very nearly achieved in 1964. Since then only Quebec had been pushing for constitutional change. But Quebec had drastically raised the stakes. [Quebec politicians] insisted that the price of Quebec's support for patriation of the Canadian Constitution would be agreement on substantive constitutional reform giving Quebec more recognition and power as the French Canadian homeland. This demand of Quebec provincial leaders for major constitutional change reflected a wholly new phase in Quebec nationalism. Historically the constitutional position of Quebec leaders had been profoundly conservative. Their prime concern had been to preserve the rights they believed had been acquired for Quebec and French Canada in the constitution of 1867. But now, under the impetus of Quebec's "quiet revolution," the province's leading politicians had become constitutional radicals. So long as these Quebec demands for radical change were the central preoccupation of constitutional debate, it was not in the federal government's interest to encourage the process of constitutional reform. The proposals likely to dominate such a debate, if they went far enough to placate Quebec nationalism, would either go too far in weakening the involvement of the federal government in the life of Quebec or else give Quebec representatives in federal institutions such a privileged place as to alienate opinion in the rest of the country. So the Pearson government at first tried to respond to Quebec through pragmatic adjustments in fiscal and administrative arrangements and took a dim view of Premier Robarts' constitutional initiative.

However, the very success of the Confederation of Tomorrow Conference ... seemed to convince the Prime Minister and his Justice Minister, Pierre Trudeau, who was soon to succeed him, that a different strategy was needed. The constitutional issue could no longer be kept on the back burner. But if constitutional reform was to be seriously pursued, it was essential that Quebec's demands be countered by proposals designed to have a unifying effect on Canada. It was at this point that the federal government urged that a charter of rights be at the top of the constitutional reform agenda.

After the Confederation of Tomorrow Conference, Prime Minister Pearson suggested to the provincial governments "that first priority should be given to that part of the Constitution which should deal with the rights of the individual—both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen to live." This was the position his government took at the Constitutional Conference in February 1968. Prime Minister Trudeau took exactly the same position. His government's paper prepared for the February 1969 Constitutional Conference repeated the commitment to a charter of rights as the first priority in constitutional change. "To reach agreement on common values," Trudeau argued, was "an essential first step" in any process of constitutional renewal. From this point until the final enactment of the *Constitution Act, 1982*, giving constitutional expression to fundamental rights including language rights was the Trudeau government's first constitutional priority. And throughout, the fundamental basic rationale for this constitutional strategy was the perceived value of such a measure as a popular and unifying counter to decentralizing provincial demands in the Canadian constitutional debate.

The Charter's attractiveness to the leaders of the federal Liberal Party as the centrepiece of their constitutional strategy was decisive in improving the political fortunes of the project of entrenching rights and freedoms in the Canadian constitution. Since World War II there had been a great deal of discussion of the Bill of Rights idea both within and outside Parliament. The prime stimulus of this discussion was international—the concern for human rights arising from the war against fascism and Canada's obligations under the United Nations Declaration of Human Rights. Domestic events also stimulated interest in a Bill of Rights. At the federal level, there was regret concerning the treatment of Japanese Canadians during the war and the denial of traditional legal rights in the investigation of a spy ring following the Gouzenko disclosures in 1946. At the provincial level the persecution of Jehovah's Witnesses by the Duplessis administration in Quebec, the treatment of Doukhobors and other religious minorities in the west and the repression of trade unionism in Newfoundland were major causes célèbres. There was also a touch of the national unity theme in the submissions made on a number of occasions to parliamentary committees on the implications of post-war immigration. The addition of such large numbers of new Canadians with no education or experience in liberal democratic values, it was argued, meant that Canada could no longer rely on the British method of protecting civil liberties. For such a heterogeneous population a written code was needed. Liberal leaders were not moved by these arguments for a Canadian Bill of Rights. The CCF was the only national party to commit itself to establishing a Bill of Rights. And it was under a Progressive Conservative government led by John Diefenbaker that a statutory Bill of Rights affecting only the federal level of government was enacted in 1960.

Pierre Trudeau, before he entered politics and joined the Liberal Party, expressed interest in a constitutional Bill of Rights. In 1965, as a legal academic writing a background paper on how to deal with the Quebec agitation for constitutional change, he placed a Bill of Rights in first place on his list of constitutional reform proposals. But the main thrust of his paper was to dissuade Quebecers from relying on constitutional reform to solve their problems of political and social modernization. His constitutional reform proposals were for "some day" in the future. Whenever a Bill of Rights was added to the constitution, he saw the abolition of the federal power of reservation and disallowance over provincial legislation as a logical quid pro quo. This emphasis on the connection between a constitutional Bill of Rights and the federal powers of reservation and disallowance underlines a constitutional charter's capacity for imposing national standards on the provinces. This link appeared again

in the Trudeau government's 1978 constitutional initiative but was not part of the constitutional package which contained the new Charter. To have made a change in powers a quid pro quo for a charter of rights would not have fitted in very well with a political campaign in which the charter was being sold as part of a "people's package" and provincial premiers were being chastised for trying to swap rights for powers. In any event, by 1967 that distant day when constitutional reforms should be undertaken had suddenly arrived. Speaking to the Canadian Bar Association as Justice Minister in 1967 Trudeau announced his government's conclusion that a constitutional Bill of Rights proposal was "the best basis on which to begin a dialogue on constitution reform between the federal government and provincial governments," and he emphasized that in taking this approach: "Essentially we will be testing—and, hopefully, establishing—the unity of Canada."

After 1967 there were factors other than constitutional strategy which provided additional reasons for adopting a constitutional charter of rights. The application of the European Convention on Human Rights to the United Kingdom, Canada's accession to the International Covenant of Civil and Political Rights in 1976 and the enactment of human rights legislation by most of the Canadian provinces increased Canadian interest in a constitutional codification of basic rights. The invocation of the *War Measures Act* in 1970 and the excesses of the RCMP's Security Service stimulated civil libertarian interest in a constitutional Bill of Rights, as did the Supreme Court's generally narrow interpretation of the "Diefenbaker" Bill. But I doubt that any of these developments had much to do with the Trudeau government's commitment to the Charter—except insofar as they indicated greater public support for such a measure.

Aside from the political and strategic advantages of the Charter, it may also have had some purely intellectual or even aesthetic attractions for Mr. Trudeau and some of his colleagues. Federal government position papers put forward the view that the rational approach to the constitution was to begin with a statement of the fundamental values of the Canadian political community. This notion of constitutional rationality, of the constitution as a logical construct built on an explicit formulation of first principles, may be a manifestation of French rationalism and the civil law tradition with its penchant for deduction from codified principles in contrast with English empiricism and the inductive nature of common law. Even if there is some validity in this kind of ethnic stereotyping, it surely cannot account for the strength of the Trudeau government's political commitment to the Charter.

That commitment proved to be very strong indeed. A version of a constitutional Bill of Rights took pride of place in the Victoria Charter which Mr. Trudeau came so close to negotiating successfully with the provincial Premiers in 1971. Again in 1978 when, in response to the electoral victory of the separatists in Quebec, the federal government embarked on another serious programme of constitutional reform, a constitutional charter, albeit one which at first would not bind the provinces, was given a prominent position. But it was the inclusion of a constitutional Charter of Rights binding on the provinces in the package of constitutional change which Mr. Trudeau threatened to achieve, if necessary, unilaterally without provincial support that demonstrates how deeply he and his government believed in its benefits. At this point, when federal-provincial negotiations on the constitution were at an impasse, it would have been ever so much easier, from a political point of view, for the federal government to have proceeded simply with patriation and an amending formula. The insistence on coupling a constitutional charter with patriation shows how strongly the Trudeau government believed in the nation-building potential of a constitutional charter. They would risk dividing the country in order that it might become more united. This nation-building aspect of the Charter was the central thesis of Mr. Trudeau's final parliamentary speech on the Charter.

Lorraine Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution"

(1992) 42:2 UTLJ 207 (footnotes omitted)

The story [of the Charter] began in earnest in the early 1960s, when the project was simply patriation with an amending formula in order to remove the last remaining legal vestige of colonial status—the exclusive power of the British Parliament at Westminster to amend the *British North America Act*. ...

The Report of the Royal Commission on Bilingualism and Biculturalism in 1967 broadened the agenda beyond patriation with an amending formula to include language rights in the political process, in government services at every level, and in minority language education. ... [T]his report ... precipitat[ed] the genesis of our current Charter in the form of a discussion paper, prepared under the name of then Minister of Justice Pierre Trudeau, for a federal–provincial meeting held in February 1968, proposing *A Canadian Charter of Human Rights*. ...

This stage of discussions culminated in a text prepared for the June 1971 First Ministers' Conference, in Victoria, British Columbia: the *Canadian Constitutional Charter, 1971*, known as the Victoria Charter. ...

A study of the Victoria Charter illuminates some of the distinctive features of the Charter as we know it. The range of rights in the Victoria Charter was more limited than Mr. Trudeau's initial proposal or the Charter's eventual formulation. The proposed text did not guarantee legal rights, economic rights, mobility rights or egalitarian rights. It extended protection to "political freedoms" only, including the fundamental freedoms of thought, conscience and religion; of opinion and expression; and peaceful assembly and association. The effect was to negate the exercise of government power rather than to require it. The text also affirmed universal suffrage and eligibility for elected office, free democratic elections, as well as other features of the parliamentary system. In addition, English and French were to become the official languages of Canada, with "status and protection" formulated in language rights in the political process, in the judicial system and in communication with government. There was, however, no provision for rights to minority language education.

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[There was also] an express provision for limitation of rights. This express limitation clause marked the text as one in the family of post second world war rights protecting instruments, which—unlike, for example, the *United States Bill of Rights*—set out express grounds for judicial limits upon otherwise protected interests.

As the excerpt above indicates, the drive to patriate the Constitution was initially motivated by a desire to reach agreement on a domestic amending formula or formulas that would not require the participation of Westminster. Two agreements on an amending formula nearly achieved success—the 1964 Fulton-Favreau formula and the formula proposed in the 1971 Victoria Charter. Both gave a veto to Quebec, but in the end, Quebec signed neither. The persistent failure to agree on a domestic amending formula was one of several factors that contributed to an emerging spectre of the possible secession of Quebec from the federation.

Jean Leclair, "Constitutional Principles in the Secession Reference"

in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1009 (footnotes omitted)

Tensions reached a climax when the *Parti Québécois* (PQ), a political party intent on seeking independence, took power in 1976 and held a referendum on a sovereignty-association proposal on May 20 1980. As the referendum question illustrates, the PQ did not seek straightforward secession, neither did it want to sever all economic ties with Canada:

The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad—in other words, sovereignty—and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

The "No" side won the day with a little less than 60% of the votes cast. Six nights before the fateful day, the federal Prime Minister Pierre Elliot Trudeau, a Quebecer himself, addressed a huge crowd in Montreal (Quebec's metropolis), and pledged that, if the "No" side won, this would be "interpreted [by the central government and the other provinces] as a mandate to change the Constitution, to renew federalism." Referring to his cabinet, he stated: "I can make a most solemn commitment that following a NO vote, we will immediately take action to renew the constitution and we will not stop until we have done that." This pledge would soon come back to haunt him (and the rest of the country).

In the days that followed the referendum, the federal government immediately took action, trying to reach agreement with the provinces on a new constitutional package. These attempts having all met with failure, on October 2 1980, Ottawa announced its decision to proceed unilaterally. The United Kingdom Parliament would be asked to amend the Canadian constitution, even in the face of provincial opposition. The "patriation" proposal would include, among other things, an amending formula similar to the one introduced in the 1971 Victoria Charter, to which would be added the possibility of resorting to a referendum to bypass the need for provincial assent, and a Charter of rights and freedoms whose language rights guarantees clashed with the most controversial provisions of the *Charter of the French Language* adopted by the PQ in 1977 to make French the common public language of the province.

Eight of the ten provinces (including Quebec) objected to the proposal and three of them referred the question of the legality of Ottawa's unilateral action to their appeal courts. The latter's divided opinions paved the way for an appeal to the Supreme Court. In *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, at 808 (*Patriation Reference*), a majority of the Court recognized "the untrammeled authority at law" of Parliament to adopt a resolution unilaterally requesting amendments to the constitution. However, a differently constituted majority concluded that it would be "unconstitutional in the conventional sense" to do so without "at least [obtaining] a substantial measure of provincial consent" (at 808, 805). A year later, in *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR

793, the Court would unanimously conclude that Quebec had no conventional power of veto over constitutional amendments affecting its legislative competence. ...

The Court's decision forced an unwilling Prime Minister back to the table. However, the fragility of the alliance between the eight opposing provinces would soon be demonstrated. Prior to the Court's decision, in April 1981, the "Gang of Eight" had agreed upon a counter-proposal containing an amending formula according to which no provinces had a veto. Nevertheless, it provided that a province wishing to do so could opt out of any amendment transferring jurisdiction from the provinces to the federal parliament. Quebec's Premier, René Lévesque, leader of the now enfeebled PQ government, had agreed to abandon Quebec's veto only on condition that full financial compensation would be guaranteed to provinces opting out. In spite of this agreement, at the end of the hectic three days conference held in Ottawa in the first week of November 1981, in what would become in Quebec's myth-ideology "the night of the long knives," nine provincial premiers finally struck a deal with the federal government that left Quebec on the sidelines. They succeeded in brokering this agreement only by acquiescing to jettison the right to opt out with full compensation. Although René Lévesque and his government bear part of the responsibility for the constitutional isolation of Quebec during this episode, and although it is hard to imagine how a man who had dedicated his entire political life to seeking the independence of Quebec could have agreed to a new federal deal, it remains that the other provinces and the federal government took the (mis)calculated risk of amending the Canadian Constitution, and thus the Canadian State fabric, without the consent of Quebec's political elites.

On the night of the May 14, 1980, the federal prime minister had not specified how and in which direction he intended to steer the promised constitutional changes. Undoubtedly, however, a great number of Quebecers had not expected him to proceed without Quebec's approval. What some experienced as disappointment was felt by others as treason.

This is most unfortunate since most Quebecers did not object so much to the content of the constitutional reform, the *Canadian Charter of Rights and Freedoms* always having been enthusiastically embraced by Quebecers, as with the manner of its adoption. They objected to the fact that the province of Quebec was treated as just any other province. They were also concerned that Canada would from thence on, from a federal society, morph into one essentially made up of equal rights-bearing citizens gradually focussing their primary allegiance on the institutions of the Federal government rather than on their province's local institutions.

Marc E Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada"

(1985) 7 SCLR (2d) 462 at 463-66 (footnotes omitted)

No one has explained adequately why the Quebec delegation was excluded from the meeting, although it seems clear why the other provinces were prepared to strike some deal with the federal government. Public opinion was shifting away from the provinces. Canadians supported the idea of patriation and favoured an entrenched Charter of Rights. The provincial governments were afraid to pay the political cost of appearing to act as obstructionists to a plan supported by a majority of their constituents. In any event, the Quebec delegation was kept in the dark about this crucial meeting and, to this day, no provincial official has explained the exclusion of Quebec to the government of Quebec itself. The inference is irresistible: the

provinces were willing to abandon Quebec in the interest of securing a deal, but were embarrassed to confront the government of Quebec with this decision until after it had been reached.

The political consequences to the government of Quebec were considerable. The government had failed to safeguard Quebec's interests in negotiations and was condemned by the opposition Liberals in the National Assembly. Nonetheless, the event could be turned to some political advantage with the Quebec electorate. In its most innocent light, the result might convince the people of Quebec that they could not trust the other provinces (read English Canada) to respect the position of Quebec: only the government of Quebec could be relied upon to defend the interests of the province. More cynically perhaps, the exclusion of Quebec provided the Parti Québécois government with a powerful new weapon in its drive to secure the independence of Quebec. Having been roundly assailed for having joined the common front and abandoning the claim for a constitutional veto, the Parti Québécois was given a new lease on life. Whether fueled by a genuine sense of betrayal at the hands of the other provinces, motivated by partisan political considerations or most likely by both, the government of Quebec was not about to let events unravel passively.

The Charter was intended to foster a new sense of Canadian patriotism, as the earlier extract from Peter Russell lays out. But did it achieve this purpose? Scholars, including Russell, doubt it. In the following excerpt, Sujit Choudhry examines the claim that the Charter was only partially successful in building this sense of Canadian patriotism. Among other developments, Choudhry ties the debate over the recognition of Quebec as a nation (or a distinct society) to the inability of the Charter to instigate a sense of national identity.

Sujit Choudhry, "Bills of Rights as Instruments of Nation-Building in Multinational States: The Canadian Charter and Quebec Nationalism"

in J Kelly & C Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 233 at 235, 241-47 (footnotes omitted)

[W]hile the *Charter* has been an effective tool for anglophone nation building, it has been unsuccessful in combating Quebec (read francophone) nationalism. Indeed, not only did the *Charter* not offset Quebec's nationalism, it may also have made things worse. This is a cautionary tale to plurinational polities faced with the same challenge as Canada—of building a common political identity against the backdrop of competing nationalisms and attempting to do so through a bill of rights.

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... [T]he *Charter* was also intended to function constitutively as the germ of pan-Canadian constitutional patriotism. As *Federalism for the Future* states, "a constitution is more than a legal document; it is an expression of how the people within a state may achieve their social, economic and cultural aspirations through the exercise and control of political authority."

In a federal state such as Canada, since citizens share these rights irrespective of language or province of residence, a bill of rights serves as a transcendent form of political identification—the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity across the country as a

whole. Cairns puts this point well: "[T]he *Charter* fosters a conception of citizenship that defines Canadians as equal bearers of rights independent of provincial location. This legitimizes a citizen [sic] concern for the treatment of fellow Canadians by other than one's own provincial government."

Russell's skepticism of the constitutive effects of a bill of rights—which is shared by Dion—stems from an underlying skepticism regarding the efficacy of symbolic constitutionalism. For both individuals, a constitution can only become a source of political identification and the basis of a national identity because of its concrete effects on public policy. Subsequent experience has proven that Russell was right and wrong. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism, likely much more quickly than even the most optimistic predictions suggested. However, within Quebec, the *Charter* has decidedly not had this effect. The *Charter* has not served to bind francophone Quebecers to the Canadian constitutional order. Indeed, the sharply differentiated effect of the *Charter* on Canadian constitutional culture suggests that it may now be harder, because of the *Charter*, to build a unifying account of the Canadian constitutional order that transcends linguistic and regional divides.

The conflicting reactions to the Meech Lake Accord within and outside Quebec powerfully illustrate these points. Outside of Quebec, the public reaction to Meech Lake was very hostile . . . There were two points of criticism. The first was the process whereby the accord was reached. The proposed constitutional amendments were arrived at as the result of closed-door negotiations between the premiers and the prime minister. The complete package was then presented to the Canadian public as a *fait accompli*, a seamless whole that could not be altered for fear that the whole deal would unravel. As a legal matter, this approach grew out of the relevant procedures for constitutional amendment themselves, which required the consent of the two chambers of federal Parliament and the provincial legislatures.

During the Meech Lake process, citizens outside Quebec rejected this process for constitutional change by rejecting its underlying theory. They asserted themselves, not the governments, as the constituent actors in the constitutional process. . . The *Charter* had transformed Canadians outside Quebec into constitutional actors and the basic agents of constitutional change. As the Charlottetown process made clear, Canadian constitutional culture would not permit constitutional amendments without widespread public consultation.

The transformative effect of the *Charter* on constitutional culture also explains the hostile reaction to perhaps the central provision in the Meech Lake Accord—the distinct society clause. The clause would have mandated that the Constitution be interpreted to recognize "that Quebec constitutes within Canada a distinct society" and would have affirmed "[t]he role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec." . . . [T]he precise legal effect of the clause was the subject of widespread contestation. Outside Quebec, the fear was that the clause would provide for the unequal application of the *Charter*[.] . . .

Now the question is why the unequal effect of the *Charter* mattered at all. Canadian public policy has long been differentiated on a provincial or regional basis because of vast differences in demography and the structure of the economy. The answer was that for Canadians outside Quebec . . . the potential for its unequal application across Canada was an assault on a basic, non-negotiable term of the Canadian social contract and the very identity of the country. . . .

However, within Quebec, the view on the distinct society clause was exactly the opposite, rooted in a particular account of the history and origins of Canada. For Quebec, the adoption of federalism and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that resulted from

the merger of the previous colonies of Lower Canada (later Quebec) and Upper Canada (later Ontario), which existed between 1840 and 1867. The history here is complex. In brief, citizens of both Lower and Upper Canada elected equal numbers of representatives to a legislative assembly, although the largely francophone citizens of the former outnumbered the largely anglophone citizens of the latter. The language of government was meant to be English. The goal behind the merger and departure from representation by population was to facilitate the assimilation of francophones . . . As time went on, Upper Canada became more populous and demanded greater representation in the joint legislature, which was resisted by francophones who feared they would be outvoted on matters important to their identity. The result was political paralysis. Federalism was the solution—providing for representation by population at the federal level but also creating a Quebec with jurisdiction over those matters crucial to the survival of a francophone society in that province, such as education through institutions that operated in French.

So, to Quebec, Canada is unintelligible except against the backdrop of the idea that the institutions of federalism are designed to protect Quebec's linguistic distinctiveness. This idea is at the heart of the "two nations" or "dualist" theory of Canada. Yet, the odd thing about the Canadian Constitution is that it lacks express recognition of this fact and treats Quebec on a basis of juridical equality to the other provinces. On the symbolic front, the Constitution is absolutely silent on who Canadians were, or were not, to be. This silence may be nothing more than a function of the peculiar legal character and political function of the *British North America Act, 1867* (*BNA Act*) as a statute of the British Parliament that granted Canada extensive powers of internal self-government but not independence. It may also reflect a lack of agreement on such a shared account at the time Canada came into being. Yet . . . whatever the reasons for this silence, the lack of such a statement did not come without its costs.

It was accompanied by a political culture outside of Quebec that refused to acknowledge the French-Canadian understanding of Confederation. . . . The distinct society clause therefore mattered a great deal because it was the first time the Constitution would explicitly acknowledge a view of what Canada was for. . . . Indeed, by the end of the Meech Lake process, the clause mattered much less for what it did than for what it said. And so the repudiation of the clause on the basis of a theory of Canada that was grounded in the *Charter* set up the *Charter* as an obstacle to, rather than as a central component of, how many Quebecers understood the nature of their relationship with Canada.

Now this is not the only reason that the *Charter* has failed to take in Quebec as the seed of pan-Canadian nationalism. Another strike against the *Charter* was the process whereby it was adopted, over Quebec's insistence that there was a constitutional convention granting it a veto over constitutional change. Patriation in the face of the asserted veto damaged the legitimacy of the 1982 Constitution in the eyes of many Quebecers. The claim of a veto for Quebec again derived from a constitutive account of the Canadian constitutional order, in which Canada was understood as a plurinational federation in which Quebec was a constituent actor. So any constitutional amendments that affected Quebec's ability to safeguard its linguistic identity (including its role in central institutions) would require its consent. . . .

The second reason is language. The stated aim of the *Charter* project was to serve as a common basis of citizenship that transcended the linguistic divide. The principal mechanism for doing so was minority language education rights provisions. These provisions . . . communicated a conception about the place of language in Canada, with two components. First, they were designed to inculcate a self-understanding in francophones that Canada as a whole was their home, not simply Quebec, and a

corresponding set of understandings for anglophones in Quebec. Second, by detaching linguistic identity from a province of residence, by opting for personality over territoriality as the basis of language of education, and by granting a right for linguistic minorities to choose their linguistic identity, the *Charter* adopted a stance of neutrality on matters of linguistic choice.

This position challenged the very legitimacy of linguistic nation building by Quebec. Moreover, this constitutional choice was likely to be non-neutral in its effect on Quebec's ability to protect and promote the French language. Although the minority language rights provisions apply symmetrically to francophone minorities outside Quebec and the anglophone minority in Quebec, they are rather unequal in their impact ... [because] the economic pressures for francophones to assimilate are great. What this means is that for Quebec to continue as a French-speaking community in the modern world, it must adopt linguistic policies that in other provinces are unnecessary. The symmetrical character of the minority language education rights provisions conceals a lack of symmetry in fact. This lack of symmetry is symbolically important because it marks a repudiation of Quebec's understanding of what Canada is for.

Conclusion: Bills of Rights as Nation-Building Instruments in Plurinational Places

Had the *Charter* been effective at combating Quebec nationalism and serving as the glue of a pan-Canadian national identity, the last twenty-five years of constitutional politics would not have happened. There would have been no Meech Lake Accord, no Charlottetown Accord, and no referendum in 1995 in which the country came close to break-up because of the threat of a unilateral declaration of independence in the event of a yes vote. ...

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It is very difficult for bills of rights on their own to serve a constituting role in defining a new political identity. Contrary to those who argue for the possibility of a pure "constitutional patriotism" based on the commitment to universalistic principles of political morality, ... [t]he Canadian experience tells us that in plurinational places, ... [t]he task is not simply to situate a bill of rights in a contingent historical and political context. The task is to do so in a context in which the existence of competing nationalisms makes the dominant question of constitutional politics the conflict between competing national narratives. If ... [a bill of rights is meant to stand apart from and transcend] these competing narratives, a plurinational context is a particularly difficult environment in which to do so. Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. This is what has happened in Canada.

In 1981, then Prime Minister Trudeau convened the Special Joint Committee on the Constitution. During the hearings, which were televised for the first time, many provisions were debated. The following extract from Lorraine Weinrib explains how these hearings had an impact on the drafting of the institutional provisions of the Charter, including ss 1 and 33.

Lorraine E Weinrib, "Canada's Charter of Rights: Paradigm Lost?"

(2002) 6 Rev Const Stud 119 at 120, 132-40, 144-45, 147-48
 (footnotes omitted)

With the adoption of the *Canadian Charter of Rights and Freedoms*, 1982, Canada joined the family of nations operating under a postwar regime of rights-protection. This step marked the culmination of decades of discussion about the nature of rights and, as the debate matured, the institutional structure necessary to protect rights effectively in Canada. The challenge was to transform Canada's federal, parliamentary democracy into a modern, rights-protecting polity. Unlike other states making this transition, Canada did not create a special constitutional court or reconstruct its political institutions. It vested the new judicial review function in the existing courts, and, in addition, marked out an innovative constitutional role for the established legislatures.

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Proposals to add a system of rights protection, to stand supreme over the routine exercise of public authority, precipitated discussions as to the comparative competence of courts and legislatures to serve the desired end with extensive reference to the experience of other countries as well as to Canada's international obligations.

In the final stages of the debate, the draft text delineating these functions attracted a remarkable degree of attention precipitating what was, in effect, an intensive national seminar on the substantive content and institutional structure of the modern constitutional state. Politicians wary of any reduction in their powers found themselves pitted against individuals and groups intent on securing precisely such restrictions. The question of institutional legitimacy figured so prominently that the final text of the *Charter* includes a complex array of institutional directives. These directives mark one of the distinctive features of the *Charter*. They set it apart from older texts such as the *United States Bill of Rights*, which does not refer to judicial review, as well as from modern rights-protecting instruments, which do formally establish judicial review but set down less institutional detail. Other countries, deliberating later on the same questions in their own national contexts, have considered the Canadian *Charter* as a distinctive model. ...

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The decades-long debate produced a fascinating series of proposals as to institutional role, some expansive and others restrictive. These rejected alternatives shed light on the final design. They demonstrate that in following a postwar trend, the *Charter* project did not ignore or dismiss concerns raised as to the legitimacy of judicial review of legislation in a democracy. On the contrary, those involved in the *Charter*'s genesis took that controversy very seriously and responded to it. ...

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The most important elements of the *Charter*'s institutional structure are to be found in two companion clauses: section 1, the guarantee and limitation clause, and section 33, the notwithstanding or override clause. ...

The historical material illuminates the ideas and models that informed the *Charter*'s distinctive institutional features. First, the limitation formula, following the postwar model of rights-protecting instruments, requires the state to formulate, as law, any exercise of power that limits guaranteed rights. The second is that the remedial aspirations for Canada's *Charter* adopt the postwar model of rights-protection, in which the normativity of the guaranteed rights offers only one level of constitutional guarantee. The other level is provided by the strict terms of the

limitation formula, which carry the normative content of the guarantees into the strictures for permissible limitation. [The limitation formula will be examined in Chapter 17, *The Framework of the Charter*.] The third is that the legislative override or notwithstanding clause, which applies only to certain rights, ... gives courts the last word [for a maximum period of five years] unless the constitutional context is transformed or the extraordinary consensus necessary for constitutional amendment is satisfied. [The notwithstanding clause will also be addressed in Chapter 17.]

NOTE: THE CONSTITUTION EXPRESS

The Special Joint Committee also heard from several groups, including Indigenous peoples. As Louise Mandell and Leslie Hall Pinder recall:

Before Christmas 1980, hundreds of Indigenous peoples scraped together funds and boarded a train in Vancouver, which they called the Constitution Express. The Express rolled across the country, picking up supporters and support along the way, making headlines day after day. When the train pulled into the Ottawa station, Trudeau announced that the Special Joint Committee on the Constitution, which had previously excluded Indigenous participation, would extend its timetable to February 1981 to hear from Indigenous representatives.

See Louise Mandell & Leslie Hall Pinder, "Tracking Justice: The Constitution Express to s 35 and Beyond" in L Harder & S Patten, eds, *Patriation and Its Consequences* (Vancouver: UBC Press, 2015) 180 at 189.

In her work, Kiera Ladner shows that Indigenous leaders "found creative ways to force the players to acknowledge their existence, address their issues, and offer them a seat at future constitutional tables": see "An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat" in L Harder & S Patten, eds, *Patriation and Its Consequences* (Vancouver: UBC Press, 2015) 267 at 268. Ladner argues that the "attainment of constitutional change by Indigenous peoples was a monumental achievement given the assimilationist (even racist) context or paradigm within which such change was achieved" (at 268). But it was also viewed as "a monumental defeat." As Ladner writes, "Despite all of the efforts to place their issues on the constitutional table and protect Indigenous rights (ultimately through the inclusion of sections 25 and 35 of the Constitution Act 1982), most Aboriginal organizations viewed the amended constitution as a major defeat" (at 270).

For an overview of the debates held during the Joint Committee, see also Adam Dodek, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018).

III. THE MERITS OF ENTRENCHMENT AND THE LEGITIMACY OF JUDICIAL REVIEW

As Lorraine Weinrib wrote in "Canada's Charter of Rights: Paradigm Lost?" (above at 120):

[T]he Charter effected a revolutionary transformation of the Canadian polity from legislative supremacy to constitutional supremacy. The transformation changed the role of every public institution. The Supreme Court became the major agent of this transformation, mandated to bring the entire legal system into conformity with a complex new structure of rights-protection.

This transformation has not been without controversy. The following readings introduce you to the intense and prolific debate on the legitimacy of rights-based judicial review within Canada's democratic system of government. Some commentators reject the Charter altogether because it transforms the democratic structure of Canadian politics. Others praise it for the same reason.

These readings build on the introduction to judicial review and its legitimacy found in Chapter 2, Judicial Review and Constitutional Interpretation. Note the ways in which debates about the wisdom of entrenchment have turned into debates about the appropriate methodology for judicial interpretation of the Charter. Note as well the very different political orientations of the Charter critics—both the right and the left have mounted strong critiques of the Charter.

William A Bogart, Courts and Country: The Limits of Litigation and the Social and Political Life of Canada

(Toronto: Oxford University Press, 1994) at 256-70 (footnotes omitted)

In bluntest terms, two very different models of democracy are at stake. The first recognizes the power of the ballot that is curbed by independent and tenured judges who ensure that rationality and principle are never ejected by impetuous legislatures, rigid bureaucracies, and a dulled citizenry. In this model, courts will shelter the disadvantaged, who will harness that rationality and principle. The second model places its confidence in those who can claim the power of the ballot. Realistic about democracy's foibles, it is even more reserved about using judicial intervention to solve them. In this model, judges' independence and tenure make them unaccountable, élitist, and, at present in any event, unrepresentative. The apprehension is that far from invigorating democracy, judicial review will sap it with regressive decisions, progressive decisions that nonetheless blunt popular responses to societal problems, and barriers to access because of the costs of litigation. In this second model, those who seek social reform may have the most to lose in the courts. ...

The Case for the Charter

A fundamental argument favouring an entrenched bill of rights is that such a document allows individuals, particularly those with minority interests, to seek vindication in an open, public, and responsive process as opposed to legislators who may be unresponsive and, in any event, are more attentive to majority concerns Coupled with this argument is a claim that the coming of the Charter signals the full maturity of the Canadian legal system. This development, the end goal of which is an entrenched Charter, explains the Canadian courts' spotty record with the *Bill of Rights*. ...

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Other more cautious bases for accepting the Charter stipulate certain conditions for its implementation. One condition rests on it being construed only to protect democracy's functioning and not to review substantive decisions made by elected officials. Fundamental to this view is the assertion that the Charter does not oblige a court "to test the substantive outcomes of the political process against some theory of the right or the good, but, instead, its focus is to assure the integrity of politics by buttressing the opportunities for public debate and collective deliberation." ...

Another condition to the acceptance and therefore justification of judicial review under the Charter is the existence and use of s. 33, which allows judicial

decisions under most of the provisions of the Charter to be overridden by the competent legislative body. ...

The Case Against the Charter

In contrast, those who are opposed or at least indifferent to the Charter point out that the Charter and its accompanying judicial role did not come about because of the documentation of widespread abuse, nor did it arise from popular outcry. It was born as a device to shore up the centralizing tendencies that Pierre Trudeau believed were vital to enhance Quebec's stake in the nation and to check the forces of separatism led by his rival, René Lévesque. ...

Those who are opposed are hardly conspiratorial since many of them can agree about little else except their antagonism towards the document. The politics of many of them are left. For some of those so inclined, the vehemence against the judges arises because their role subverts any possibility of true democracy, which "means the greatest possible engagement by people in the greatest possible range of communal tasks and public action." In this conception, the Charter is a "reflection of the inherent contradiction of liberal ideology."

What is the basis for this leeriness, which ranges from scepticism to unbridled antagonism? Though presented in different forms, the arguments can be summarized in three points. The first concerns substantive outcomes and claims that the elected members of government and their agencies have been the more effective vehicle for improving the lives of most Canadians in many circumstances. The second relates to process and asserts that the best chance for a vigorous, responsive, and respected democracy comes from elected representatives. The third is about the costs of access to the courts which privilege the powerful and organized and thus allow them disproportionate use of judicial review, either to dismantle legislation and programs or to shield themselves from attack by government or other groups. These three points are comparative. This is not to deny that courts have sometimes acted in admirable ways or that there have been some progressive—even visionary—judges: on the Supreme Court alone names such as Rand, Laskin, Dickson, and Wilson easily come to mind. Nor is it to claim that legislatures and their agents have always reached just outcomes by adequate processes. What is contended is that relatively, the chance for greatest justice will come from legislatures. ...

The first argument claims that assistance of the disadvantaged and the poor, as well as ordinary citizens, has more often happened because of legislative action. Whether in health, occupational safety, workers' rights, housing, peace and order in the streets, or other aspects of life, the advancement has come because of the popular support of political will. In this view, government, while open to searing criticisms about waste and inefficiency, has also been the agent of civilizing and progressive change. It has mediated between those who wish *laissez-faire* and the enrichment of the few (regardless of the consequences) and those who insist upon a basic claim to entitlement for all. Conversely, this argument contends that the historical record reveals that courts, rather than achieving conditions to nurture and protect ordinary people in their everyday lives, have instead been uncaring or actively hostile. The explanation for this lies in an embrace of liberal ideology and an active suspicion of the political process as intrusion upon the purity of the judge-made common law that did not develop to meet these ends. State regulation and programs, designed to be responsive to the concerns of such people, have often been cut back under the guise of interpretation of statutes when in reality it was to allow the ideas of the judiciary to hold sway. ...

The second argument urges that for democracy not to be sapped but invigorated, basic decisions affecting the people must be made by elected representatives. This point does not suggest that such a process has not led to mistakes, sometimes horrible ones, such as our failure to save as many Jews as we could have in the Second World War. The tragedies that beset our [Indigenous peoples] is surely another. Nor does it suggest that there are not major impediments to popular participation. What it argues is that concerted efforts should be exerted to eliminate them and that we should not rely upon a small unelected corps. Unlike the first argument, the concern here is not so much that judges will impose their views on a democratic majority. Rather, the worry is that critical, social, and political questions will be translated into legal issues that will be left to judges and lawyers instead of the citizenry working out acceptable and supportable solutions.

In this view, even a cycle of progressive and enlightened decisions entails costs, although the results may be desirable. There may be benefits, but they come from a small group of judges and lawyers who are bound together by a limited set of ideas and attitudes and who impose conclusions rather than persuade and build consensus among the electorate. The danger is that the basis for having citizens make their own decisions and face future issues will be eroded, and that the resentment felt by having solutions handed down will make future progress even more difficult and may even contribute to regressive backlash. ...

The third point focuses upon the costs of any court response. The contention is that whatever meaning is possible in interpreting the Charter, it will inevitably come to be slanted towards the rich and the organized. Obviously, access to the political and bureaucratic processes is imperfect, but it is not as expensive and complicated and is available without necessarily being mediated through the language of the law, a discourse largely available only to lawyers.

Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda"

(1987) 45 Advocate 857 at 857-63 (footnotes omitted)

My purpose in this short essay is to put forward an argument that does not enjoy a great deal of currency on the "Charter circuit" these days. It is an argument that most lawyers do not wish to hear. And some may regard as downright impolite.

The argument is that, while sold to the public as part of a "people's package," the Canadian *Charter of Rights and Freedoms* is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians. The reasons for this lie partly in the nature of the rights themselves and partly in the nature of the judicial system which is charged with their interpretation and enforcement.

I. The Nature of Charter Rights

The first thing that must be recognized about the Charter is that it is, at root, a 19th century liberal document set loose on a 20th century welfare state. The rights in the Charter are founded upon the belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state. Thus one finds in the Charter little reference to positive economic or social entitlements, such as rights to employment, shelter or social services. Charter rights are predominantly negative in nature, aimed at protecting individuals from state interference or control with respect to this matter or that.

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The negative nature of the rights embodied within the Charter reflects what John Hart Ely refers to as a "systematic bias" in favour of the interests of the "upper middle-class, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn." These people see their social and economic status most threatened by the regulatory and redistributive powers of the modern state. It is not surprising therefore that they regard as "fundamental" those values that afford them protection from such state powers. But, as Ely observes, "watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food or housing: those are important sure, but they aren't *fundamental*."

This "systematic bias" is reinforced by a highly selective view of what constitutes the state. The presumption underlying the Charter is that existing distributions of wealth and power are products of private initiative as opposed to state action. Never mind that these distributions depend for their existence and legitimacy upon a panoply of state sponsored laws and institutions. They are nevertheless viewed as outside politics and beyond the scope of Charter scrutiny. Thus far from being subject to Charter challenge, such distributions comprise the "natural" foundation upon which Charter rights are conferred and against which the constitutionality of "state action" is to be judged.

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The negative nature of Charter rights combined with this selective view of state action remove from Charter scrutiny the major source of inequality in our society—the unequal distribution of property entitlements among private parties. At the same time, they direct the restraining force of the Charter against the arm of the state best equipped to redress fundamental economic inequalities—the democratic arm, consisting of the legislature and the executive.

The irony of this will not be lost on those with a sense of history. The victories that have been won in this century on behalf of workers, the unemployed, women and other socially and economically disadvantaged Canadians are victories that have been achieved, for the most part, in the democratic arena. They are victories that have been won by harnessing the powers of the modern state to redistribute wealth and to place limits on the exercise of "private" economic power.

Thus workers have been granted the collective bargaining rights they now enjoy by virtue of legislation overriding common law rules that protected employers' liberty and privity of contract and that treated trade unions as illegal conspiracies. The economic benefits guaranteed to the unemployed flow from redistributive policies of modern government. The lot of women has been advanced, to the degree that it has, by means of legislative intervention in the form of labour standards legislation, minimum wage laws and human rights codes.

This is not to imply that these responses have been comprehensive or adequate. In my view they have not. The point is simply that where there has been progress, with few exceptions it has come in the democratic rather than the judicial arena. Such progress has been achieved through political action aimed at displacing the common law vision of unbridled individual autonomy with a countervision of collective social responsibility. Put simply, the negative conception of liberty imposed by the courts to protect the interests of the "haves" in society has been partially supplanted by a positive conception of liberty imposed by legislatures to further the interests of the "have-nots."

Yet the Charter now threatens to slow, or even reverse, this process. The rights and freedoms in the Charter are predicated on the same hostility to legislative action, and the same reverence for individual autonomy, that animated the common law. I am not suggesting that the present legislative regime of social and economic

regulation will suddenly be eliminated under the Charter. The political costs of doing so are, thankfully, too great for the courts to contemplate. What the Charter is more likely to do is to enable the courts to chisel away at certain aspects of the regime, and to erect barriers to future innovation.

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This does not mean that there will be no "progressive" Charter decisions. Undoubtedly there will be some, although the bulk of such decisions will involve the courts in upholding legislation—in other words doing nothing. Additionally, there will be a few decisions in which the Charter is used to enhance legislative protections, for example by striking down an obsolete or inappropriate exemption in a regulatory regime. Such cases, however, will be the exception rather than the rule. Indeed, the very notion of looking to the courts to improve legislation is somewhat perverse. Most legislation, after all, was enacted to counteract the laissez-faire individualism of court-made, common law. Courts, even today, remain suspicious of, and at worst hostile to, the "eccentric principles of socialist philanthropy" upon which the welfare state is founded. Thus to look at the courts to repair flaws in the existing regulatory regime is a bit like taking one's car to be fixed by an auto wrecker.

In addition to eroding existing and stymieing future social and economic regulation, the Charter will serve to weaken the impetus for further legislative reform by diverting resources from the political to the judicial arena. Women's groups, for example, are raising millions of dollars to engage in Charter litigation, a considerable portion of which is being used to defend from Charter challenge legislation that is beneficial to women. The money, time and energy devoted by such groups to the Charter are money, time and energy that will be taken away from lobbying and other forms of political action.

II. The Nature of the Judicial System

The regressive impact of the Charter is exacerbated by the nature of the judicial system that is charged with its interpretation and enforcement. There are two features of this system that make it a particularly inappropriate forum for advancing the interests of the disadvantaged. The first is the cost of gaining access to the system; the second is the composition of the judiciary itself.

[T]he process of vindicating one's rights under the Charter is an extremely expensive one. ...

[Such costs] represent a major obstacle to disadvantaged Canadians who wish to pursue their Charter rights in court. ... [B]eyond the confines of criminal law, the effect of having chosen the courts as the adjudicative forum for resolving Charter claims is to favour those who command substantial economic resources.

The institutional barrier created by money not only denies the disadvantaged access to the courts; in doing so, it serves to shape the rights themselves. ...

If the issues raised in non-criminal Charter cases tend to represent the interests of those with economic resources in society, the interpretation of rights will necessarily respond to and, over time, will reflect those interests. ...

Consider ... the Charter right to freedom of expression. The opportunity to raise a claim concerning this right will be restricted to those who can command sufficient resources to bring an action in court and who consider it economically or politically worthwhile to do so. Litigation concerning this right is thus more likely to be brought by economically powerful interests in society, such as business interests, for whom the costs of litigation are small in relation to the potential economic gains. But if litigation relating to freedom of expression disproportionately represents the interests

of business, the jurisprudence surrounding freedom of expression will come to reflect business concerns.

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There might be less cause for concern on this score if the judiciary had an equal understanding of, and empathy for, the problems of all segments of Canadian society. Unfortunately, there is no reason to suppose that this is the case. There are few public institutions in this country whose composition more poorly reflects, and whose members have less direct exposure to, the interests of the economically and socially disadvantaged. Canadian judges are "exclusively recruited from the small class of successful, middle-aged lawyers" and, if not of wealthy origin, most became wealthy or at least achieved a degree of affluence before accepting their judicial appointments. The majority made their name in private practice where they held themselves out as business people and shared business concerns. Furthermore, unless they practiced criminal or family law, much of their professional time was spent catering to the needs of the business community. In short, there is nothing about the Canadian judiciary to suggest that they possess the experience, the training or the disposition to comprehend the social impact of claims made to them under the Charter, let alone to resolve those claims in ways that promote, or even protect, the interests of lower income Canadians.

At a more fundamental level, the attitudes of lawyers and of judges tend to reflect the values of the legal system in which they were schooled and to which they owe their livelihood.

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From this perspective, one can see that property rights—the body of "natural" rules governing the ownership and exchange of property—is the core political value underlying the common law.

This does not imply that the desire to protect property is the sole force driving Canadian judiciary. What it does imply, however, is that deep in the judicial ethos there exists a special concern and reverence for property rights—a concern and reverence that over the course of time will guide and constrain judicial decision-making in Charter cases.

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The assumption of lawyers that property rights flow from a "natural" system of private ordering is also significant. This assumption reinforces the dichotomy between private and state action that underlies the Charter, thus making it more difficult for individuals to mobilize the Charter against underlying social disparities. Judges conceive their role under the Charter not as interest balancing, which they view as the preserve of politics, but rather as one of policing the boundary between the "natural" zone of individual autonomy (represented by the market) and the "unnatural" activities of the state (represented by the regulatory and redistributive instruments of modern governments). Thus the bias that judges bring to their task augments the bias of the Charter itself: "liberty" is represented by those things that expand the zone of individual autonomy by limiting the ability of the state to "interfere" in the lives of individual Canadians. The task of the judge is to interpret the Charter generously so as to "secur[e] for individuals the full benefit of the Charter's protection." Hence narrow Charter interpretations are "bad" while expansive interpretations are "good."

What is conveniently forgotten in all of this is that the liberty of many Canadians is better protected by the regulatory and redistributive policies of the state than by the market (assuming "liberty" includes the liberty to be clothed, housed and fed, and the liberty not to be preyed upon by those who command social and economic power). [Emphasis in original.]

As you read the Supreme Court of Canada's Charter decisions in subsequent chapters, consider whether the left's critique of the Charter as articulated by Petter is justified. To what extent has the Court attempted to respond to this critique?

Further readings providing a critique from the left include Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev ed (Toronto: Thompson, 1994); Allan C Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

In the early years of the Charter, the main criticisms of entrenchment and judicial review came from the political left (as reflected in the piece by Petter, above), raising concerns that the Supreme Court of Canada would use the Charter to restrain socially desirable regulation and economic redistribution. Criticism about illegitimate "judicial activism" has also come from the political right, however, with contentions that the Court is acting undemocratically by forcing unwilling majorities to accept the rights of unpopular minorities: see Ted Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000), discussed further below, for an example of this wave of criticism of judicial activism. In 1997, Peter Hogg and Allison Bushell, responding to these increasing charges of "judicial activism," added a new strand to the debates about the legitimacy of judicial review—the idea of judicial review under the Charter as a form of "dialogue" between courts and legislatures.

Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)"

(1997) 35 Osgoode Hall LJ 75 at 79-91 and 104-5 (footnotes omitted)

A. The Concept of Dialogue

The uninitiated might be excused for believing that, given the deluge of writing on the topic, everything useful that could possibly be said about the legitimacy of judicial review has now been said. However, one intriguing idea that has been raised in the literature seems to have been left largely unexplored. That is the notion that judicial review is part of a "dialogue" between judges and legislatures.

At first blush the word "dialogue" may not seem particularly apt to describe the relationship between the Supreme Court of Canada and the legislative bodies. After all, when the Court says what the Constitution requires, legislative bodies have to obey. Is it possible to have a dialogue between two institutions when one is so clearly subordinate to the other? Does dialogue not require a relationship between equals?

The answer, we suggest, is this. Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded. Examples of this will be given later in this article.

B. How Dialogue Works

Where a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished. To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have to deal with. And, of course, the precise terms of any new law would have been powerfully influenced by the Court's decision. The legislative body would have been forced to give greater weight to the *Charter* values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are constraints on the democratic process, no doubt, but the final decision is the democratic one.

The dialogue that culminates in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process. Later in this article we will show that this is the normal situation. There is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be substantially carried out, albeit by somewhat different means. Moreover, when the Court strikes down a law, it frequently offers a suggestion as to how the law could be modified to solve the constitutional problems. The legislative body often follows that suggestion, or devises a different law that also skirts the constitutional barriers. Indeed, our research, which surveyed sixty-five cases where legislation was invalidated for a breach of the *Charter*, found that in forty-four cases (two-thirds), the competent legislative body amended the impugned law. In most cases, relatively minor amendments were all that was required in order to respect the *Charter*, without compromising the objective of the original legislation.

Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose, and what is required is a narrower law. Sometimes a broader law is needed, because an invalid law confers a benefit, but excludes people who have a constitutional equality right to be included. Sometimes what is needed is a fairer procedure. But it is rare indeed that the constitutional defect cannot be remedied. Hence, as the subtitle of this article suggests, "perhaps the *Charter of Rights* isn't such a bad thing after all." The *Charter* can act as a catalyst for a two-way exchange between judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions.

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A. The Four Features [of the Charter] That Facilitate Dialogue

Why is it usually possible for a legislature to overcome a judicial decision striking down a law for breach of the *Charter*? The answer lies in four features of the *Charter*: (1) section 33, which is the power of legislative override; (2) section 1, which allows for "reasonable limits" on guaranteed *Charter* rights; (3) the "qualified rights," in sections 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and (4) the guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures. Each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the *Charter* as articulated by the courts.

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Section 33 of the *Charter* is commonly referred to as the power of legislative override. Under section 33, Parliament or a legislature need only insert an express

notwithstanding clause into a statute and this will liberate the statute from the provisions of section 2 and sections 7–15 of the *Charter*. The legislative override is the most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of *Charter* rights. Section 33 allows the competent legislative body to re-enact the original law without interference from the courts.

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When a law that impairs a *Charter* right fails to satisfy the least restrictive means standard of section 1 justification, the law is, of course, struck down. But the reviewing court will explain why the section 1 standard was not met, which will involve explaining the less restrictive alternative law that would have satisfied the section 1 standard. That alternative law is available to the enacting body and will generally be upheld. Even if the court has a weak grasp of the practicalities of the particular field of regulation, so that the court's alternative is not really workable, it will usually be possible for the policymakers to devise a less restrictive alternative that is practicable. With appropriate recitals in the legislation, and with appropriate evidence available if necessary to support the legislative choice, one can usually be confident that a carefully drafted "second attempt" will be upheld against any future *Charter* challenges.

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Dialogue seems an apt description of the relationship between courts and legislative bodies [in these cases]. Certainly, it is hard to claim that an unelected court is thwarting the wishes of the people. In each case, the democratic process has been influenced by the reviewing court, but it has not been stultified.

[Hogg and Bushell do recognize that there are certain circumstances in which there are "barriers" to dialogue and in which courts will have the last word. These include situations where, because the issue is so controversial, political forces make it impossible for the legislature to fashion a response to the Court's *Charter* decision. An example they provide of the latter is the situation that arose after the Supreme Court of Canada's decision in *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90, excerpted in Chapter 22, The Right to Life, Liberty, and Security of the Person, which struck down the restrictions on abortion in the *Criminal Code*. Although the Court's decision left open the possibility that a less restrictive abortion law could be upheld, the divisiveness of the abortion issue precluded the formation of any democratic consensus, and no new legislation was enacted.

Hogg and Bushell then go on to discuss, in greater detail, their research in which they looked at the sequels to all cases (65 in number) in which laws had been struck down by the Supreme Court of Canada for violations of the *Charter*. They found that legislative action followed in the vast majority of cases, and that the typical outcome was new legislation that accomplished the same legislative objective, but which was more protective of rights. In two cases, the Court's ruling was effectively reversed by the legislature: once by invoking s 1, and once by invoking s 33.]

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D. Dialogue May Occur Even When Laws Are Upheld

This article focussed primarily on the legislative changes that have followed decisions striking down laws for a breach of the *Charter*. However, it should be noted that judicial decisions can occasionally have an impact on legislation even when the Court does not actually strike down any law.

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... [I]t is a mistake to view the *Charter* as giving non-elected judges a veto over the democratic will of competent legislative bodies. Canada's legislators are not indifferent to the equality and civil liberties concerns which are raised in *Charter* cases,

and do not always wait for a court to "force" them to amend their laws before they are willing to consider fairer, less restrictive, or more inclusive laws. The influence of the *Charter* extends much further than the boundaries of what judges define as compulsory. *Charter* dialogue may continue outside the courts even when the courts hold that there is no *Charter* issue to talk about.

VI. Conclusion

Our conclusion is that the critique of the *Charter* based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.

In 2007, Hogg, Thornton (née Bushell), and Wade K Wright wrote a follow-up to the 1997 study above. The authors noted that since the original 1997 study, 14 of 23 cases in which courts had invalidated legislation for being constitutionally impermissible elicited some response from the competent legislative body. While the numbers were not as overwhelming as those reported in 1997, they provided evidence that Charter dialogue still factored prominently in the development of Canadian legislation: see Peter W Hogg, Allison AB Thornton & Wade K Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1, together in that same issue of the journal (devoted to the theme of "Charter Dialogue: Ten Years Later") with commentaries by other scholars and a reply; see also Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue and Deference" (2007) 47 Osgoode Hall LJ 235.

The concept of judicial review under the Charter as part of a democratic dialogue between courts and legislatures is further explored in Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, rev ed (Toronto: Irwin Law, 2016). Roach argues that the American debate about judicial activism has been inappropriately imported into Canada, without a recognition of the fundamental structural differences between the Charter (and other modern bills of rights) and the American *Bill of Rights*. In Canada, he argues, because of the presence of ss 1 and 33, which explicitly allow governments to limit and even override rights, judges do not have the last word on controversial issues of social policy. In Roach's view, the Charter has created "a fertile and democratic middle ground between the extremes of legislative and judicial supremacy." He writes (at 332):

A constructive and democratic dialogue between courts and legislatures under a modern bill of rights such as the *Charter* can improve the performance of both institutions. The independent judiciary can be robust and fearless in its protection of rights and freedoms, knowing that it need not have the last word. The legislature will be encouraged to consider whether it can pursue its objectives in a manner more respectful of rights and to establish rules in legislation to authorize and justify the conduct of the police and other state officials. ... The democratic dialogue between courts and legislatures under a modern bill of rights such as the *Charter* can avoid the monologues and unchecked power that may be produced by either unfettered legislative supremacy or unfettered judicial supremacy. It is especially necessary to diffuse

power in countries where the parliamentary system of government, combined with tight party discipline, gives governments more or less absolute power between elections. Strong courts are needed to balance the power of strong legislatures.

He worries, however, about the negative impact that allegations of excessive "judicial activism" may have on the important role courts must play in this "dialogue" (at 332-33):

The greatest danger in the dialogue between courts and legislatures is not excessive judicial activism, because legislatures can and will correct judicial overreaching on behalf of minorities and the unpopular. The result will be a self-critical and democratic dialogue, even if judicial decisions do not prevail. If, however, the Court is too weak in protecting the rights of minorities and the unpopular, it is less likely that elected governments will do more. The result can be a complacent and majoritarian monologue that is less truly democratic. Excessive judicial deference will allow legislatures and officials to act without being questioned by the Court about the effects of their actions on the most unpopular among us. The sense that courts will not challenge questionable laws may inhibit their reform, especially if those adversely affected by the law have little political power. The greatest danger of the judicial activism debate is that it may produce excessive judicial deference. If this happens—and there are signs that it may be happening in Canada, and that misperceptions about the Canadian experience have dampened enthusiasm for judicial review in other places—then the democratic and dialogue potential of the *Charter* will be squandered by the unnecessary importation of an American-style judicial activism debate based on the false dichotomy of judicial supremacy or legislative supremacy. This failure would be a tragedy not only for Canada but for other countries as well. It might mean that we will all continue to spin our wheels in the two-century American debate about judicial activism, one that ignores the potential under modern bills of rights with parliamentary forms of government to have the benefits and the responsibility of both judicial activism and legislative activism.

The answer to unacceptable judicial activism under a modern bill of rights is legislative activism and the assertion of democratic responsibility for limiting or overriding the Court's decisions. Citizens can enjoy the benefits of judicial activism without the costs of judicial supremacy.

In the *Vriend* decision, excerpted immediately below, the Supreme Court of Canada directly addressed the appropriate relationship between courts and legislatures.

Vriend v Alberta

[\[1998\] 1 SCR 493, 1998 CanLII 816](#)

IACOBUCCI and CORY JJ (Lamer CJ and Gonthier, McLachlin, and Bastarache JJ concurring):

[129] Having found the exclusion of sexual orientation from the *IRPA* to be an unjustifiable violation of the appellants' equality rights, I now turn to the question of remedy under s. 52 of the *Constitution Act, 1982*. Before discussing the jurisprudence on remedies, I believe it might be helpful to pause to reflect more broadly on the general issue of the relationship between legislatures and the courts in the age of the *Charter*.

[130] Much was made in argument before us about the inadvisability of the Court interfering with or otherwise meddling in what is regarded as the proper role of the legislature, which in this case was to decide whether or not sexual orientation would be added to Alberta's human rights legislation. Indeed, it seems that hardly a day

goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.

[131] When the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy ("Keynote Address," in *The Cambridge Lectures 1985* (1985), at pp. 3-4). Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away. However, as rights and freedoms are not absolute, governments and legislatures could justify the qualification or infringement of these constitutional rights under s. 1 as I previously discussed. Inevitably, disputes over the meaning of the rights and their justification would have to be settled and here the role of the judiciary enters to resolve these disputes. ...

[132] We should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid.

[133] However, giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the "legitimacy" of courts taking such action. ... [J]udicial review, it is alleged, is illegitimate because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators)

[134] To respond, it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.

[135] So courts in their trustee or arbiter role must performe scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.

[136] Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

[137] This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the

legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75).

[138] As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.

[139] To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches has the effect of enhancing the democratic process, not denying it.

[140] There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in [*R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46], at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society, which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

[141] So, for example, when a court interprets legislation alleged to be a reasonable limitation in a free and democratic society as stated in s. 1 of the *Charter*, the court must inevitably delineate some of the attributes of a free and democratic society. ... [In this respect] Dickson C.J.'s comments remain instructive

[142] Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*

[Justice Iacobucci went on to deal with the remedial issue, and concluded that the appropriate remedy was to "read in" discrimination on grounds of sexual orientation. That portion of the judgment is found in Chapter 25, Enforcement of Rights.]

In *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#), however, the Court seemed to frame its support for dialogue in narrower terms (at para 17):

[T]he fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue." Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again."

See Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue and Deference" (2009) 45:2 Osgoode Hall LJ 235 at 286. As Sigalet, Webber, and Dixon explain, "This quip prompted one scholar to describe the judgment as 'the day dialogue died'": see Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, "Introduction: The 'What' and 'Why' of Constitutional Dialogue" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue* (Cambridge: Cambridge University Press, 2019) 1 at 6 (footnotes omitted).

Ted Morton and Rainer Knopff, strong critics of "judicial activism," have argued that the dialogue theory is flawed and does not remove their fundamental concerns about the undemocratic nature of judicial review. In their book *The Charter Revolution and the Court Party*, also discussed above, Morton and Knopff argue that Hogg's defence of judicial review as a form of dialogue between legislatures and courts is too simplistic because it fails to recognize the "staying power" of a new, judicially created policy status quo, "especially when the issue cuts across the normal lines of partisan cleavage and divides a government caucus" (at 162). One example they give is the political aftermath of the 1988 *Morgentaler* decision, in which the Supreme Court struck down the restrictions on abortion in the *Criminal Code* on the basis that they violated s 7 of the Charter. The government introduced new legislation recriminalizing abortion, but with less onerous requirements. The legislation was ultimately defeated in the Senate, however, because both the pro-choice and pro-life minorities voted against the compromise legislation.

For a direct response to Morton and Knopff's critique of the Charter revolution, see Peter Hogg, "The Charter Revolution: Is It Undemocratic?" (2001) 12:1 Const Forum 1. Here is Hogg's answer to their criticisms of the dialogue concept (at 5-7):

The compatibility of the *Charter* with democracy is reinforced by the notion of judicial review as a "dialogue" between the Supreme Court of Canada and the legislatures. ...

This idea of a dialogue between courts and legislatures is a serious challenge to the Morton-Knopff thesis. If *Charter* decisions are ultimately reviewable by elected legislative bodies, using the distinctively Canadian vehicles of sections 1 or 33, then it becomes much less significant whether the decisions have been achieved through the efforts of the Court Party or have been made in disregard of popular sentiment. In the last few pages of the book, the authors grapple with this problem. Professors Morton and Knopff acknowledge that the dialogue theory is "undoubtedly true in the abstract," but they say that it is "too simplistic." It is too simplistic because it "fails to recognize the staying power of a new, judicially created policy status quo." By this they mean that once the Court has spoken, governments may find it expedient to leave the issue alone, thus preserving the judicial decision.

One of the two examples Morton and Knopff provide of "the staying power of the new judicially-created policy status quo" is the aftermath to the *Morgentaler* decision, which struck down the therapeutic abortion provisions of the *Criminal Code* on the ground that they offended section 7 of the *Charter*. The Government of Canada introduced a new bill to recriminalize abortion, but with less onerous requirements for legal therapeutic abortions. The new bill was passed by the House of Commons and then defeated in the Senate on a tie

vote. To be sure, the *status quo* created by the Supreme Court of Canada (no regulation of abortion) was preserved. But this example could as easily be treated as a case of dialogue since the Government did propose a substitute law for the one struck down and very nearly succeeded in enacting it.

The other example they provide is the aftermath of the *Vriend* decision, where the Supreme Court of Canada added sexual orientation to the grounds of discrimination for which a remedy was available under Alberta's *Human Rights, Citizenship and Multicultural Act*. The Government of Alberta mused publicly about restoring the old version of the statute by invoking section 33, but eventually decided not to do so, thus leaving the new ground of sexual orientation in the Act. The authors comment that the judicial ruling had "raised the political costs of saying no to the winning minority" and the Government concluded that "the safest thing was to do nothing." But what does this example show? Only that it is politically difficult to directly reverse a decision of the Supreme Court of Canada on an equality issue. Is that not as it should be? Reversal is possible in a case where there is a sufficiently strong popular revulsion of the Court's ruling, and this is an exceedingly important safeguard

... The decision of the Government of Alberta not to attempt to reverse the *Vriend* decision was probably based on a correct judgment that popular support was lacking for such a move. The fact that the move was legally possible and was seriously examined by the Government means that the sequel to *Vriend* could easily be regarded as an example of dialogue rather than as an example that contradicts the dialogue idea[.] ...

In the great majority of *Charter* cases, there is no political impulse to directly reverse the judicial decision. Usually, the attitude of the government whose law was struck down is not one of hostility to the Court's civil libertarian concern; rather, the issue for the government is (as it was after *Morgentaler*) the crafting of a new law that accommodates the Court's concerns while preserving the legislative objective

To return to the Morton-Knopff thesis, in the majority of *Charter* cases, the "staying power of a new judicially created policy status quo" is not very strong at all. In those rare cases where government simply cannot abide the Court's interpretation of the *Charter*, reversal is usually legally possible, and can be accomplished politically where public opinion is particularly strong, as *Ford* and *Daviault* demonstrate. Where public opinion is less strong or is divided, government may choose to leave the decision in place, as *Vriend* demonstrates.

The important point about the idea of dialogue is that judicial decisions striking down laws are not necessarily the last word on the issue, and are not usually the last word on the issue. The legislative process is influenced by but is not stopped in its tracks by a *Charter* decision. The ultimate outcome is normally up to the legislative body.

There has been a veritable avalanche of scholarship on dialogue theory since Hogg and Bushell first wrote their article in 1997. While their thesis has often been subject to criticism, dialogue theory continues to attract interest. As Sigalet, Webber, and Dixon explain in their introduction to *Constitutional Dialogue*, referenced above (at 4-5):

Although the Canadian debate over "dialogue" began with Hogg and Bushell's avowedly descriptive appeal to the idea of dialogue, the Canadian debate now involves the explicit development of "dialogue theory," which is rooted in a deeper set of normative concerns for the democratic legitimacy of judicial decisions striking down or altering political decisions made by elected legislatures.

In *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (more fully excerpted in Chapter 22), Lamer J commented on the doubts surrounding the legitimacy of judicial review

being unpersuasive because, in his view, the decision to entrench the Charter was taken by "the elected representatives of the people of Canada." As he further explained (at para 16):

[The] argument [that the judiciary is not representative] was heard countless times prior to the entrenchment of the *Charter* but ... has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

There is a close link between the courts' perception of the legitimacy of their role and their general approach to rights adjudication. Despite the protests of Lamer J, concerns about the legitimacy of Charter-based judicial review, and the competence of the courts to address complex social and political issues, have almost certainly affected their approach to the interpretation of particular rights and to the justification of limits under s 1.

CHAPTER SEVENTEEN

THE FRAMEWORK OF THE CHARTER

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I. INTRODUCTION

The Charter establishes a two-step process for the adjudication of rights claims where a law is being challenged. The first step is concerned with whether a Charter right has been limited. The court must define the scope of the right and determine whether it has been breached. At this stage, the burden of proof lies with the party claiming a breach of rights on a balance of probabilities. The court will proceed to the second step of the adjudicative process only if it finds that a Charter right has been breached. This second step is concerned with the justification of limits on Charter rights. Section 1 of the Charter states that the protected rights and freedoms may be limited provided the limits are “prescribed by law,” “reasonable,” and “demonstrably justified.” At this stage, the burden of proof lies with the party seeking to uphold the limitation.

This chapter examines, in general terms, the two-step structure of Charter adjudication—the interpretation of rights and the justification of limits. It also examines how courts review administrative decisions that engage Charter rights, a somewhat different process that has important parallels with the two-stage process just described. Finally, the chapter examines s 33, the “notwithstanding clause,” which enables the federal Parliament or provincial legislature to insulate a law from challenge on certain grounds. Other components of Charter analysis are examined in subsequent chapters. The question of who is bound to respect Charter rights is considered in Chapter 18, Application, and the question of what remedies are available to a court if it finds that a Charter right has been breached is considered in Chapter 25, Enforcement of Rights.

II. INTERPRETING RIGHTS

The remaining chapters in Part V, Rights, deal in detail with the interpretation of specific Charter rights. The material here is intended to provide a brief introduction to the courts' general approach to the interpretation of these rights.

A. THE PURPOSIVE APPROACH

The courts have adopted a "purposive" approach to the interpretation of Charter rights. In *Hunter v Southam*, which immediately follows, the Supreme Court of Canada stated (at 157) that a judgment about the scope or value of a particular right can be made only after the court has "specified] the purpose underlying" the right or "delineate[d] the nature of the interests it is meant to protect."

Hunter v Southam Inc

[1984] 2 SCR 145, 1984 CanLII 33

[This early Charter case involved the s 8 guarantee of freedom from unreasonable search and seizure. The Combines Investigation Branch carried out a search of newspaper offices. The statute that gave the Branch the power to search did not require prior judicial authorization. In the following excerpt, Dickson CJ, writing for the Court, discussed Charter interpretation.]

DICKSON CJ (Ritchie, Beetz, Estey, McIntyre, Chouinard, Lamer, and Wilson JJ concurring):

As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one."

The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Edwards v. Attorney-General for Canada* ... [1930] A.C. 124 at p. 136, cited and applied in countless Canadian cases:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

More recently, in *Minister of Home Affairs v. Fisher* [1980] A.C. 319, dealing with the Bermudian Constitution, Lord Wilberforce reiterated at p. 328 that a constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character," and that as such, a constitution incorporating a *Bill of Rights* calls for:

... a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects, is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It is, as well, the approach I intend to take in the present case.

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

Since the proper approach to the interpretation of the *Canadian Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

[Chief Justice Dickson's analysis of the purpose for granting protection against unreasonable search and seizure led him to conclude that s 8 protects an individual's reasonable expectation of privacy. Accordingly, he found ss 10(1) and (3) of the *Combines Investigation Act*, RSC 1970, c C-23 invalid. These provisions authorized the issuance of search warrants by officials whose functions were investigative, without any requirement for reasonable and probable grounds, based on sworn material, to believe that an offence had been committed and that the place of search would afford evidence of the commission of the offence.]

Appeal dismissed.

NOTES AND QUESTIONS

1. Then Justice Brian Dickson recognized that the Supreme Court's decision in *Hunter v Southam* would be an important one for establishing the Court's approach to Charter interpretation, and in particular, for distinguishing it from how rights had been interpreted under the *Bill of Rights*. In their biography of the Chief Justice, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), Robert Sharpe and Kent Roach state (at 309) that

Dickson was painfully aware that the Court had been almost universally criticized for its restrictive interpretation of the statutory Canadian Bill of Rights. As a signatory to the Court's much criticized 1979 *Bliss* decision that the denial of a benefit on grounds of pregnancy did not amount to sex discrimination, Dickson himself had felt the critics' sting.

Strands of what would ultimately become the Court's *interpretative approach* appeared in several of Dickson's speeches in the early years of the Charter. As Sharpe and Roach further explain in their biography (at 310),

Dickson made no secret of his own determination to breathe life into its vague and general language. He saw the Charter in grand terms. It entrenched "the foundations of Canadian society: democracy, social justice, freedom and human dignity" and he urged judges, lawyers, and legal academics to meet head-on the challenge of "advancing the role of law in upholding these principles." Using language derived from Canadian and American constitutional scholars who pushed for a robust judicial interpretation of fundamental rights and freedoms and that would soon find its way into his own judgments, Dickson told a Calgary audience that "a constitution is a document designed to grow and develop over time to meet new social, political and historic realities unimagined by its framers." He warned that courts would "have to take a philosophic approach in our interpretive endeavours" and that Charter rights would have to be interpreted in light of "the purpose of protecting" the right at issue. Dickson told law students at Dalhousie Law School that the meaning of the terms of the Charter "are not to be found by consulting a dictionary" and Charter interpretation "requires a philosophic and possibly political theory as context." The courts, he said, "will have to go beyond abstract logic and disembodied precedent" and he urged Canada's judges to rise to the challenge: "When the occasion cries out for new law, let us dare to make it. Let us recognize that the law is a living organism, its purpose is to serve life, its vitality is dependent upon renewal."

After oral argument in *Hunter v Southam*, the Court conferred several times about the decision, an unusual practice for a court accustomed to meeting once to deliberate. As Sharpe and Roach continue (at 313-14):

Dickson and Lamer agreed to prepare memoranda that would provide the basis for a detailed discussion of the case in mid-December 1983, when the Court would finish its fall sittings. Lamer was inclined to write narrowly—"The least said generally about the Charter the better."—he worried that the Court might unduly limit powers needed by the police in more routine cases. Dickson disagreed. He thought that the Court could not decide the case without setting out some basic principles of Charter interpretation and he did not want the Court to lose the opportunity to make its mark. He told his colleagues: "This is the first clear-cut Charter case before this court, and therefore it is desirable, I think, to lay sufficient groundwork for an orderly and logical development of the jurisprudence under section 8 and under the Charter in general." ...

In the discussions that followed, it was agreed that Dickson should write the Court's judgment, and there was confidence that any differences between Dickson and Lamer could be reconciled. On one point, however, Dickson's views prevailed: the Court's unanimous judgment made some sweeping Charter pronouncements. The opening sentences of Dickson's judgment, although paraphrased from the Charter itself, read like a judicial declaration of what was to come in the years to follow: "The Constitution of Canada, which

includes the Canadian Charter of Rights and Freedoms, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

2. In *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69, another early Charter case, included in Chapter 19, Freedom of Religion, Dickson CJ (at paras 116-17) reiterated the Court's commitment to a purposive approach:

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, ... [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, ... [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

More recently, in *Quebec (AG) v 9147-0732 Québec inc*, 2020 SCC 32, a case that examined whether s 12, prohibiting cruel and unusual treatment or punishment, applied to corporations, the majority of the Supreme Court of Canada reiterated that although the current approach to Charter interpretation starts with an inquiry into the purpose of a right, it also focuses on the text of the provision:

[7] To claim protection under the *Charter*, a corporation—indeed, any claimant—must establish that "it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision": *R. v. CIP Inc.*, ... [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": *Big M Drug Mart*, at p. 344; see also *Poulin*, [2019 SCC 47] at para. 32. The approach is "generous, purposive and contextual" and should be done in a "large and liberal manner": *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 35.

A. Preliminary Observations on Purposive Interpretation

[8] This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision. As this Court made clear in *British Columbia (Attorney General) v. Canada (Attorney General)* ... [1994] 2 S.C.R. 41 ("Vancouver Island Railway"), "[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question": p. 88. This was reiterated in *Grant*, where the Court stated that "[a]s for any constitutional provision, the starting point must be the language of the section":

para. 15 (emphasis added). Recently, in *Poulin*, the Court yet again affirmed that the first step to interpreting a *Charter* right is to analyze the text of the provision: para. 64.

[9] This is so because constitutional interpretation, being the interpretation of the text of the Constitution, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain “the most primal constraint on judicial review” and form “the outer bounds of a purposive inquiry”: B. J. Oliphant, “Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms” (2015), 65 U.T.L.J. 239, at p. 243. The Constitution is not “an empty vessel to be filled with whatever meaning we might wish from time to time”: *Reference re Public Service Employee Relations Act (Alta.)*, ... [1987] 1 S.C.R. 313 (“*Re PSERA*”), at p. 394; *Caron*, at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reassured “the primacy of the written text of the Constitution”: para. 36; see also para. 37.

[10] Moreover, while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: *Poulin*, at paras. 53 and 55; *R. v. Stillman*, 2019 SCC 40, at paras. 21 and 126; *R. v. Blais*, ... [2003] 2 S.C.R. 236, at paras. 17–18 and 40; *Big M Drug Mart*, at p. 344. Giving primacy to the text—that is, respecting its established significance as the first factor to consider within the purposive approach—prevents such overshooting. [Emphasis in original]

3. In *Hunter v Southam*, the Court stated that the task of interpreting the Constitution is “crucially different” from that of interpreting an ordinary statute. Do the courts not interpret statutes in light of the interests they are intended to protect? Are statutes not also forward looking? The *Charter* uses language that is more general than that which ordinarily appears in statutes. It often entrenches abstract moral and political ideals, which are, in their elaboration or application, subject to significant disagreement. As you study specific rights in the chapters that follow, consider how much guidance the purposive approach gives the courts when defining the scope and limits of these rights. On the one hand, the court wants the attribution of a particular purpose to be relatively uncontroversial. (The attributed purpose sometimes sounds like a restatement of the right in equally abstract terms.) On the other hand, this attribution of purpose is meant to give real content to the right and to guide the court in the resolution of particular issues.

4. In *R v Therens*, [1985] 1 SCR 613, 1986 CanLII 29, the Supreme Court of Canada observed at para 49 that the inclusion of s 1 in the *Charter* is conducive to a broad and purposive approach to interpretation:

[U]nder the *Charter* the right [to counsel] is made expressly subject by s. 1 to such reasonable limits as are demonstrably justified in a free and democratic society. Thus the right is expressly qualified in a way that permits more flexible treatment of it.

Because competing interests can be recognized at the s 1 stage, it is not necessary for the courts to read “internal” limits into the definition of a particular right—to narrow their understanding of the interests protected by the right. Do some rights have inherent, or internal limits? For example, s 3 guarantees “every citizen” the right to vote. Presumably, ten-year-old citizens do not have the right to vote. Is age an inherent limit on the right to vote?

Note that the words “infringement” and “limit” are sometimes used interchangeably by the Court. In *Frank v Canada (AG)*, 2019 SCC 1, the Supreme Court of Canada was divided over whether residence requirements were a justifiable limit on s 3 (the law at the time prohibited Canadian citizens who had not resided in Canada for five years from voting). The majority considered the residence provisions a justified *infringement*, whereas Côté and Brown JJ, writing in dissent, preferred the view that the restrictions were an unjustified *limit* on a *Charter* right:

[120] To be clear, then, a reasonable limit does not justify an *infringement*, but is inherent in the right itself, shaping the right’s outer boundaries (B. W. Miller, “Justification and Rights

Limitations", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008), 93, at p. 96). Our recent jurisprudence confirms this treatment of s. 1's provision for "reasonable limits" (see, e.g., *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906). In short, a right is infringed only where the right, as *reasonably limited*, is breached. The issue presented by this appeal, then, is not whether the limit to the right to vote effected by the restriction on long-term non-resident voting justifies an infringement of s. 3, but whether that limit is unreasonable, such that s. 3 is infringed. [Emphasis in original.]

The courts sometimes seem to use the expressions "purposive interpretation" and "generous interpretation" interchangeably. Is there a difference between them? Is it not possible that a purposive interpretation could result in limits being placed on the potential scope of a right? Tarunabh Khaitan suggests that these two types of interpretation "can sometimes pull in different directions": see Tarunabh Khaitan, "'Constitution' as a Statutory Term" (2013) 129 LQR 589 at 594.

5. The two-step structure of adjudication rests on the idea that there are two distinct issues to be addressed—the definition of the right and the justification of limits. The scope of the right is defined in terms of the interests it protects or advances. Any activity that advances the right's purpose falls within its scope. Other interests that compete or conflict with those that underlie the right may be taken into account under s 1 as possible grounds for limitation. When you read the cases in later chapters, consider whether the distinction between these different interests really is so straightforward—particularly if the purposive approach is unable to yield a bright line between activity that advances the purpose (and is protected) and activity that does not. How distinct are scope and limitations issues in the case of s 2(a) and s 2(b)? When you study rights such as s 15, the right to equality, and s 7, the right to fundamental justice, consider how much space the courts' interpretation of these rights leaves for the justification of limits under s 1.

6. In its early Charter judgments, the Supreme Court of Canada seemed comfortable reviewing legislative and other forms of state action to ensure that it conformed with constitutional rights and freedoms. A few decades down the road, the Court became more engaged in "fine tuning" than bold assessments, as Jamie Cameron points out in the following excerpt of "The McLachlin Court and the Charter in 2012" (2013) 63 SCLR 16 at 39:

In the post-1982 boom, the Supreme Court stepped up, addressing seemingly obvious and egregious Charter violations—often boldly—and setting standards for Charter compliance in a number of landmark decisions. Yet the Chief Justice and others take the view today that the transformational energy of those early years has been depleted, and there is not so much left for the courts to do. Being satisfied that Canada's primary shortcomings on rights compliance have been redressed makes complacency about the Charter a less troubling choice at this point. Under that view it follows, now the deep thinking on rights has been done and is in the past, that balancing rights and limits is a different exercise. The grand pronouncements give way to fine tuning and subtle interpretation. Deference to the legislatures is more standard when issues do not present conflicts in principle but sit, instead, in the margin of appreciation. Presenting differences of opinion that way may mean that reasonable limits will typically prevail over rights protection. Meanwhile, the legislatures have grown savvy over the years and gained confidence in their ability to Charter-proof statutes, legislating to the limits of Charter compliance without having to invoke section 33.

B. AIDS TO INTERPRETATION

Purposive interpretation of Charter rights poses an enormous challenge for courts. How does a judge go about determining the purpose of a particular Charter right? Dickson CJ offers some preliminary guidance in the passage from *Big M* found in note 2, above. What follows is a brief overview of some of the possible aids to Charter interpretation and the extent to which the courts have been willing to make use of them.

1. Interpretive Provisions in the Charter

The Charter includes several general provisions (ss 25 to 29) that do not entrench a particular right, but instead affirm or highlight certain values that are to be taken into account when interpreting the entrenched rights and assessing the justification of limits under s 1. These provisions include s 27, which provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," and s 28, which provides that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

According to Luc Tremblay, there are two ways to conceptualize these provisions. On one view, they

establish an order of priority between Charter rights and certain rights or prerogatives arising from either treaties (s. 25), or the rights and privileges associated to denominational schools and acquired under s 93 Constitution Act, 1867 (s. 29). Accordingly, s. 27 would signify that no Charter rights could have priority over incompatible rights, benefits, powers, or privileges arising ... from distinct legal sources aimed at "promoting and maintaining the multicultural heritage of Canadians," including the 1971 multiculturalism policy and the *Multiculturalism Act* which entered into force in 1989. [at 334]

Even if there is reason to believe that this was the original intention of the framers of s 27, Tremblay observes that the Supreme Court of Canada has never endorsed it. Rather, it embraced Walter Tarnopolsky's view, according to which s 27 is a "declaratory provision" akin to a preamble establishing the moral objectives or fundamental principles underlying a constitutional text. As Tremblay writes (at 335):

These provisions, which usually are the opening provisions of a Constitution, may serve as interpretative aid to the substantial provisions which follow. According to Tarnopolsky, "[i]t is [...] the clear purpose of s. 27 that, where applicable, any right or freedom in the Charter shall be interpreted in light of this section.

See Luc Tremblay, "Pierre Elliott Trudeau et le multiculturalisme constitutionnel" [Pierre Elliott Trudeau and Constitutional Multiculturalism] in N Karazivan & J Leclair, eds, *The Political and Constitutional Legacy of Pierre Elliott Trudeau* (Toronto: LexisNexis, 2020) 333. (Editors' translation.)

The impact of these interpretive provisions in particular cases is, however, difficult to measure. In *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (more fully excerpted in Chapter 20, Freedom of Expression), a decision concerning the constitutionality of a criminal ban on hate promotion, Dickson CJ said about s 27:

This Court has where possible taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. Section 27 has therefore been used in a number of judgments of this Court, both as an aid in interpreting the definition of *Charter* rights and freedoms ... and as an element of the s. 1 analysis.

2. Parliamentary and Committee Debates

In *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81, referred to in Chapter 16, The Advent of the Charter, the Court considered the relevance of the committee and Parliamentary debates that preceded the enactment of the Charter to the interpretation of the entrenched rights:

LAMER J (Dickson CJ and Beetz, Chouinard, and Le Dain JJ concurring):

[50] If speeches and declarations by prominent figures are inherently unreliable ... and "speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight" ... the Minutes of the Proceedings of the Special Joint Committee, though admissible, and granted somewhat more weight than speeches should not be given too much weight. The inherent unreliability of such statements and speeches is not altered by the mere fact that they pertain to the *Charter* rather than a statute.

[51] Moreover, the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?

[52] Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

[53] Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the *Charter* debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.

To sum up, though they are admissible, debates or legislative history have limited weight in Charter interpretation.

Mary Dawson, who was at the time a leading member of the legislative drafting section of the Department of Justice in Ottawa, recalls her experience in drafting the *Charter*. Her comments echo Lamer J's observation about the "multiplicity of actors" involved in Charter drafting:

A special joint committee was established to consider the proposed amendments, and it was through this process that the proposals truly became a people's package. Representations were heard from a wide variety of groups and resulted in many amendments to what was to become the *Charter*. Perhaps of most significance was the fact that the proceedings of the committee were ... televised for the first time ever. Many Canadians watched the proceedings, and this generated a sense of excitement around the changes being proposed, which gave the package additional legitimacy.

I prepared amendments to the package to incorporate the changes [accepted] from among the many proposals made by witnesses appearing before the parliamentary committee. At the same time, I had the chance to make a significant number of editorial improvements to the drafts. A comprehensive document including these changes was tabled by Jean Chrétien, then Minister of Justice, in February of 1981.

I cannot overstate the breadth and significance of the changes that were made over the course of the several months during which the proposals were being discussed and considered. Many of the fundamental rights and freedoms set out in the *Charter* were significantly strengthened. As well, a number of new provisions were added to the *Charter*. These additions included an enforcement section (section 24), a new paragraph in the language rights provisions to include children of parents who received their primary-school education in the province involved (section 23), and interpretive provisions to protect multicultural heritage and denominational schools (sections 27 and 29).

• • •

The changes tabled in February 1981 were by and large accepted by Parliament, and there were several more added before the package was finally approved. These later alterations included a change of the amending formula that would apply to part II (Aboriginal and treaty rights); the addition of section 28, intended to give supremacy to equality rights; and a preamble recognizing the supremacy of God and the rule of law.

See Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57:4 McGill LJ 955 at 960-62 (footnotes omitted).

3. Canadian Pre-Charter Jurisprudence

In several early Charter judgments, the Supreme Court of Canada signalled that decisions under the *Canadian Bill of Rights* had only limited relevance in Charter cases, given the different constitutional status and structure of the Charter. In *R v Therens*, Le Dain J stated (at para 48) that:

In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the *Charter*, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history ... : that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate [to limit or qualify] the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the Charter was emphasized by this Court in ... *Hunter v. Southam*.

4. Comparative and International Sources

In seeking to give meaning to the Charter's rights and to determine whether the limits imposed on these rights by democratic institutions are reasonable and just, Canadian courts have drawn on international experience in rights protection. Even though much of the language of the Charter's text was new and "made in Canada," the drafters of the Charter had in many cases drawn on the text of other rights-protecting instruments. It made sense then that the Canadian courts would look to judgments in other jurisdictions interpreting these rights documents. The American *Bill of Rights* provided an obvious model for the Canadian courts. It is a centuries-old document that has generated a considerable body of case law.

While the early decisions of Canadian courts often referred to American cases and commentary in their Charter decisions, the Supreme Court of Canada has said that these sources should be used with caution. In *R v Keegstra* (which dealt with the restriction of hate promotion), Dickson CJ noted:

In the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts. On the other hand, we must examine American constitutional law with a critical eye, and in this respect La Forest J. has noted in *R v. Rahey*, ... [1987] 1 S.C.R. 588, at p. 639:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances

Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common

sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.

Over time, the Supreme Court of Canada has broadened the range of jurisdictions whose jurisprudence it considers in its decisions: see Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2018) 305 at 313-14, 315 (footnotes omitted):

A recent survey of the Supreme Court's foreign citation patterns in constitutional cases reports a total of 1,944 such citations from 1982 to 2013. Of this total, 1,183 (61 per cent) were American cases, 516 (27 per cent) were United Kingdom cases, and about 12 per cent were rulings from other jurisdictions such as Australia (87 citations), New Zealand (35 citations) and the European Court of Human Rights (69 citations). The majority of references to American court rulings were made in the first fifteen years of the Charter, while the late 1990s saw a considerable decline in citation of American sources, reflecting both the declining relevance of US jurisprudence as persuasive authority, and at the same time, the increasing confidence of the Supreme Court of Canada.

The Supreme Court of Canada has also looked to international sources when interpreting the scope of Charter rights and assessing the justification of limits—notably, the *International Covenant on Civil and Political Rights* (adopted by the United Nations in 1966 and which came into force in 1976); the *International Covenant on Social, Economic and Cultural Rights* (adopted by the United Nations in 1966 and which came into force in 1976); and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (a rights document binding European countries, which came into force in 1953 and under which cases of infringement are brought before the European Court of Human Rights). According to Dickson CJ in *R v Keegstra*, above, "the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself."

That being said, courts have often distinguished among binding sources of international law, such as international treaties ratified by Canada and customary international law, and non-binding, more "persuasive" sources such as treaties signed but not ratified by Canada, and comparative and foreign law. In the case of *Quebec (AG) v 9147-0732 Québec inc*, referred to above, the Court divided over the proper use of international law in interpreting s 12 of the Charter. At issue was whether corporations could enjoy s 12 rights. While the entire Court concluded they cannot, it differed on the appropriate use of international legal sources. Below is an excerpt from the majority opinion of five judges presenting a "principled framework" for the rules governing the use of international and comparative law in Charter interpretation. The majority frequently refers to the opinion of Abella J, who wrote for three judges. Writing for himself, Kasirer J found it unnecessary to address the issue.

Quebec (AG) v 9147-0732 Québec inc 2020 SCC 32

B. The Proper Role of International and Comparative Law in Charter Interpretation

[19] We differ fundamentally from our colleague Abella J. on the prominence she gives to international and comparative law in the interpretive process. We see this as

a significant and unwarranted departure from this Court's jurisprudence. Specifically, her claim that all international and comparative sources have been "indispensable" to Canadian constitutional interpretation (at para. 100) does not hold true when considering this Court's jurisprudence and the varying role and weight it has assigned to different kinds of instruments.

[20] As a constitutional document that was "made in Canada" (Prime Minister Pierre Elliot Trudeau, *Federal–Provincial Conference of First Ministers on the Constitution* (morning session of November 2, 1981), at p. 10), the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history.

[21] This remains unchanged by the purposive approach developed in *Big M Drug Mart*. That judgment makes no reference to international and comparative law, except inasmuch as it relates to the historical origins of the concepts enshrined in the *Charter*.

[22] While this Court has generally accepted that international norms can be considered when interpreting domestic norms, they have typically played a limited role of providing support or confirmation for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. As Professor Beaulac and Dr. Bérard explain:

[TRANSLATION] In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach. ...

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[23] Furthermore, ... the weight and persuasiveness of each of these international norms in the analysis depends on the nature of the source and its relationship to our Constitution. The reason for this is the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty. ...

[24] Although this Court has been careful to attach the appropriate weight to international and comparative law in *Charter* interpretation, it has not always explained how or why different international sources are being discussed or relied on, while others are not. The result has been a want of clarity, even confusion, to which, we say with respect, our colleague Abella J. adds by indiscriminately drawing from binding instruments and non-binding instruments, instruments that pre-date the *Charter* and instruments that post-date it, and decisions of international tribunals and foreign domestic courts, before concluding that, combined, they represent an "international consensus [that] does not dictate the outcome [but] provides compelling and relevant interpretive support": para. 107.

[25] As we will discuss, ... various instruments and case law ... play different roles in the analysis and receive different weight. Treating them all alike ... actually risks undermining the importance of Canada's international obligations:

The temptation may be great to treat all international law, whether binding on Canada or not, as "optional information" and to disregard the particular interpretative onus that is placed upon courts by the presumption of conformity with Canada's international obligations. There is a significant difference between international law that is binding on Canada and other international norms. The former is not only potentially persuasive but also obligatory. This distinction matters—when we fail to uphold our obligations, we undermine the respect for law internationally. ...

(J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at p. 41 (emphasis added); see also J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 260.)

[26] We are not alone in expressing concern about the need for structure when citing international and foreign sources. Commentators have called for clarification in this regard [including, specifically]:

... the standards by which courts will determine whether treaties have been implemented; what role non-binding sources (such as treaties which Canada has signed but not ratified, treaties which Canada has neither signed nor ratified, or "soft law" instruments) should play in interpreting domestic law; and whether these various categories of non-binding sources should be treated differently from one another or Canada's binding international legal obligations.

(Currie, at p. 262)

[27] A principled framework is therefore necessary and desirable, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants ... Given the issue raised in this case, our focus is on the use of international and comparative law in constitutional interpretation.

[28] This Court has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been to support or confirm an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights. Respectfully, our colleague Abella J.'s approach represents a marked and worrisome departure from this prudent practice.

[29] This Court (generally, albeit not invariably) has been careful to specify the normative value and weight of different kinds of international sources. Our colleague Abella J.'s approach simply abandons this important practice.

[30] A useful starting point is Dickson C.J.'s guidance in *Re PSERA*. While it appeared in a dissenting opinion, his approach to international and comparative law has since shaped the way this Court treats these sources. His consideration of the scope of s. 2 (d) of the *Charter* looked first to Canadian and Privy Council jurisprudence and then to U.S. and international law: p. 335. On international sources specifically, he explained:

The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.

In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. (Emphasis added; pp. 348-49.)

[31] Continuing, Dickson C.J. then clarified that *not all* of these sources carry identical weight in *Charter* interpretation, stating that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified": p. 349 (emphasis added). This proposition has since become a firmly established

interpretive principle in *Charter* interpretation, the presumption of conformity [case citations have been omitted].

[32] Importantly, Dickson C.J. referred to instruments that Canada had *ratified*. In other words, his focus in framing this presumption was on *binding* international instruments ... Similarly, Dickson C.J. explained that in becoming a party to international human rights conventions, "Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*" and that "[t]he content of Canada's international human rights obligations is ... an important indicia of the meaning of 'the full benefit of the *Charter*'s protection": p. 349 (emphasis added).

[33] Subsequent case law has continued to tie the presumption of conformity to the language of Canada's international *obligations* or *commitments*: *Ktunaxa*, at para. 65; *Badesha*, at para. 38; *Saskatchewan Federation of Labour*, at paras. 62 and 64–65; *Divito*, at para. 22; *Health Services*, at para. 69.

[34] This Court has explained that the presumption of conformity "operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights" ... But, being a presumption, it is also rebuttable and "does not overthrow clear legislative intent"

[35] Dickson C.J.'s approach to *non-binding* sources—treating them as relevant and persuasive, but not determinative, interpretive tools—also holds true: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 80. Non-binding sources notably include international instruments to which Canada is *not* a party. Such instruments do not give rise to the presumption of conformity. They therefore have only persuasive value in *Charter* interpretation.

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[37] In addition to properly characterizing their use, courts must not allow consideration of such instruments to displace the methodology for *Charter* interpretation set out in *Big M Drug Mart*. This Court has been careful to proceed in this manner. For example, in *Ktunaxa*, the Court first reviewed Canadian case law on the scope of freedom of religion before confirming that scope with reference to binding international instruments: paras. 62–65. It then briefly looked to non-binding instruments that "also" supported the Canadian case law, being careful to specify that the instruments were "not binding on Canada and therefore do not attract the presumption of conformity" but were "important illustrations of how freedom of religion is conceived around the world": para. 66. Similarly, in *Saskatchewan Federation of Labour*, the Court began with Canadian case law on s. 2 (d) of the *Charter* and its history: paras. 28–55. It then explained that Canada's international human rights obligations "also" mandated protecting the right to strike, with particular emphasis on binding instruments and the presumption of conformity: paras. 62–70. Finally, it noted that its conclusion was "[a]dditionally" supported by foreign domestic law: paras. 71–74.

[38] It follows from all this, and, specifically, from the presumption of conformity, that binding instruments necessarily carry more weight in the analysis than non-binding instruments. While resort may be had to both, courts drawing from a non-binding instrument should be careful to explain *why* they are drawing on a particular source and *how* it is being used. ...

[39] In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, and the International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47 ("ICCPR"), are both binding on Canada, thus triggering the presumption of conformity. However, ... neither extends protection from cruel and unusual punishment to corporations.

[40] [In her opinion, our colleague Abella J considers] the *American Convention on Human Rights*, 1144 U.N.T.S. 123, adopted by Mexico and nations in the Caribbean and central and South America, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. While we agree that neither instrument has been found to extend protection to corporations against cruel and unusual punishment, we are wary of ... [giving] these non-binding instruments similar weight to binding ones. We therefore highlight that these instruments are merely persuasive here, and that a court relying upon them should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them).

[41] Another important distinction is between instruments that pre- and post-date the *Charter*. ... International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed. Here, whether Canada is or is not a party to such instruments is less important, as the "drafters of the *Charter* drew on international conventions because they were the best models of rights protection, not because Canada had ratified them": L. E. Weinrib, "A Primer on International Law and the Canadian Charter" (2006), 21 *N.J.C.L.* 313, at p. 324. In this case, then, the context of the English *Bill of Rights*, and the Eighth Amendment is highly relevant as each contained similar—but, importantly, not identical—protections as s. 12, as we have explained above. Similarly, it is entirely proper and relevant to consider the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which Canada voted to adopt and which inspired the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, and related protocols Canada has ratified: Weinrib, at p. 317.

[42] As for instruments that post-date the *Charter*, however, the question becomes once again whether or not they are binding on Canada[.] ...

[43] Finally, we turn to decisions of foreign and international courts. In *Re PSERA*, these decisions were included among those non-binding sources that "are relevant and may be persuasive": p. 348. Particular caution should, however, be exercised when referring to what other countries have done domestically, as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the *Canadian Charter*, a point stated emphatically by this Court in *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 62. ...

[Here, the majority took issue with Abella J's use of foreign domestic jurisprudence, charging that she failed "to explain in what way they are instructive, how they are being used, or why the particular sources are being relied on" (at para 44). It noted, too, that a number of the Supreme Court cases cited by Abella J in this regard "largely focus[ed] on binding instruments" or were (correctly) oriented towards "whether an international consensus existed because of the nature of the questions asked," for example, regarding the death penalty (at para 45).]

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[46] As this Court's jurisprudence amply shows, the normative value and weight of international and comparative sources has been tailored to reflect the nature of the source and its relationship to our Constitution. ...

[47] In all, courts must be careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law. The analysis must be dominated by the former and draw on the latter only as appropriate, accompanied by an explanation of why a non-binding source is being considered and how it is being used, including the persuasive weight being assigned to it. ...

[Emphasis in original.]

III. LIMITATIONS UNDER SECTION 1

This section introduces the two main structural components of s 1: first, the requirement that all limits on rights be “prescribed by law,” and second, the requirement that limits be “reasonable” and “demonstrably justified in a free and democratic society.”

A. PRESCRIBED BY LAW

Before the government may argue that competing interests justify the limitation of a Charter right, it must first show that the limit is “prescribed by law.” The requirement that a limit on a Charter right have the form of “law” serves a gatekeeper function, limiting the number of instances in which an infringement will be upheld under s 1.

The prescribed by law requirement has been interpreted as being concerned with two distinct facets of the rule of law: first, is the limit on the right authorized by a “law?” and, second, does the law have the required degree of precision? (Here we see a concern with undue vagueness in the drafting of the law.)

The Supreme Court of Canada’s most comprehensive discussion of the “prescribed by law” requirement is found in the case that follows.

Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component

2009 SCC 31

[In GVTA, two transit authorities—BC Transit and TransLink—refused to carry the political advertisements of a student organization and a public-sector union on the sides of their buses. In doing so, they relied on their advertising policies, which permitted commercial but not political advertising on public transit vehicles. The Supreme Court addressed the question of whether those policies were “law” and hence capable of satisfying the “prescribed by law” requirement.

The student organization and union argued that the relevant sections of the transit authorities’ policies violated their right to freedom of expression guaranteed by s 2(b) of the Charter. The trial judge dismissed the action, finding that there had been no infringement of the right to freedom of expression. A majority of the Court of Appeal reversed the trial judgment, finding an infringement of freedom of expression that could not be justified under s 1. The Supreme Court of Canada dismissed the appeal. The portions of the judgment dealing with freedom of expression can be found in Chapter 20. The case also involved a preliminary issue of application, which is dealt with in Chapter 18 (both BC Transit and TransLink were found to be government entities, and hence subject to the Charter).]

DESCHAMPS J (McLachlin CJ and Binnie, LeBel, Abella, Charron, and Rothstein JJ concurring):

3.3.1 Case Law on the “Prescribed by Law” Requirement

[50] ... In assessing whether the impugned policies satisfy the “prescribed by law” requirement, it must first be determined whether the policies come within the meaning of the word “law” in s. 1 of the *Charter*. To do this, it must be asked whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. If so, the policies can be “law” for the purposes of s. 1. At the second stage of the enquiry, to find that the limit is

"prescribed" by law, it must be determined whether the policies are sufficiently precise and accessible. Professor Peter W. Hogg describes the rationale behind the "prescribed by law" requirement in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 122:

The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.

[51] In *R. v. Therens*, ... [1985] 1 S.C.R. 613, the Court emphasized that the "prescribed by law" requirement safeguards the public against arbitrary state limits on Charter rights. Le Dain J. set out the Court's initial interpretation of the expression "prescribed by law" in s. 1 of the *Charter* (at p. 645):

The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.

[52] Thus, the Court does not require that the limit be prescribed by a "law" in the narrow sense of the term; it may be prescribed by a regulation or by the common law. Moreover, it is sufficient that the limit simply result by necessary implication from either the terms or the operating requirements of the "law." ...

[53] The Court has also implicitly recognized other forms of limits that were not originally identified in *Therens* as being prescribed by law, including limits contained in municipal by-laws ... , provisions of a collective agreement involving a government entity ... and rules of a regulatory body Such limits satisfy the "prescribed by law" requirement because, much like those resulting from regulations and other delegated legislation, their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply. In these regards, they satisfy the concerns that underlie the "prescribed by law" requirement insofar as they preclude arbitrary state action and provide individuals and government entities with sufficient information on how they should conduct themselves.

[54] The Court has likewise taken a liberal approach to the precision requirement. . . .

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[55] These cases show that the Court has chosen to take a flexible approach to the "prescribed by law" requirement as regards both the form (e.g., statute, regulation, municipal by-law, rule of a regulatory body or collective agreement provision) and articulation of a limit on a *Charter* right (i.e., a standard intelligible to the public and to those who apply the law). In the end, the Court has emphasized, as in *Therens*, the need to distinguish between limits which arise by law and limits which result from arbitrary state action; those resulting from arbitrary state action continue to fail the "prescribed by law" requirement.

[56] This inclusive approach is based on a recognition that a narrow interpretation would lead to excessive rigidity in a parliamentary and legislative system that relies heavily on framework legislation and delegations of broad discretionary powers.

McLachlin J. (as she then was) commented on this as follows in *Committee for the Commonwealth of Canada* (at p. 245):

From a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under s. 1. In my view, such a technical approach does not accord with the spirit of the *Charter* and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary.

See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, ... [2000] 2 S.C.R. 1120, at para. 137.

[57] Bearing in mind the broad interpretation given the "prescribed by law" requirement and the principles underlying the Court's approach, I must now consider whether limits resulting from policies of a government entity satisfy the "prescribed by law" requirement.

3.3.2 Government Policies and the "Prescribed by Law" Requirement

[58] Government policies come in many varieties. Oftentimes, even though they emanate from a government entity rather than from Parliament or a legislature, they are similar, in both form and substance, to statutes, regulations and other delegated legislation. Indeed, as a binding rule adopted pursuant to a government entity's statutory powers, a policy may have a legal effect similar to that of a municipal by-law or a law society's rules, both of which fall within the meaning of "law" for the purposes of s. 1. Other government policies are informal or strictly internal, and amount in substance merely to guidelines or interpretive aids as opposed to legal rules. The question that arises is this: Does a given policy or rule emanating from a government entity satisfy the "prescribed by law" requirement? It can be seen from the case law that a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature.

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[63] What [the case law] demonstrate[s] is a concern about the administrative nature of the policies and guidelines of the government entities in question. Administrative rules relate to the implementation of laws contained in a statutory scheme and are created for the purpose of administrative efficiency. The key question is thus whether the policies are focussed on "indoor" management. In such a case, they are meant for internal use and are often informal in nature; express statutory authority is not required to make them. Such rules or policies act as interpretive aids in the application of a statute or regulation. They cannot in and of themselves be viewed as "law" that prescribes a limit on a *Charter* right. An interpretive guideline or policy is not intended to establish individuals' rights and obligations or to create entitlements. Moreover, such documents are usually accessible only within the government entity and are therefore unhelpful to members of the public who are entitled to know what limits there are on their *Charter* rights. No matter how broadly the word "law" is defined for the purposes of s. 1, a policy that is administrative in nature does not fall within the definition, because it is not intended to be a legal basis for government action.

[64] Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. ... [T]he policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights

and obligations of the individuals to whom they apply (D.C. Holland and J.P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.

[65] Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law."

[66] The question which now remains is whether the transit authorities' advertising policies meet the "prescribed by law" requirement under s. 1 of the *Charter*.

3.3.3 Application of the Principles to the Transit Authorities' Policies

[67] A review of the enabling legislation suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink.

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[70] The enabling statutes ... confer broad discretionary powers on each entity's board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system through advertising sales. ...

[71] Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. In this case, TransLink is empowered to "establish rules" and to "enter into contracts," "adopt bylaws" and "pass resolutions." Bylaws and contracts are intended to bind. In the context of the enabling provisions, it follows that resolutions have the same binding effect as the other enumerated instruments.

[72] The policies are not administrative in nature, as they are not meant for internal use as an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply. Moreover, the policies can be said to be general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case. They therefore fall within the meaning of the word "law" for the purposes of s. 1 and will satisfy the "prescribed by law" requirement provided that they are sufficiently accessible and precise.

[73] In my view, the transit authorities' advertising policies are both accessible and precise. They are made available to members of the general public who wish to advertise on the transit authorities' buses, and they clearly outline the types of advertisements that will or will not be accepted. Thus, the limits on expression are accessible and are worded precisely enough to enable potential advertisers to understand what is prohibited. The limits resulting from the policies are therefore legislative in nature and are "limits prescribed by law" within the meaning of s. 1 of the *Charter*.

NOTE

One of the cases discussed in GVTA is *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, discussed in more detail in Chapter 20. The case involved claims by a bookstore that customs officials, in administering a statutory prohibition on the importation of obscene material, had targeted gay and lesbian material and that this constituted a violation

of s 15 of the Charter. A violation of s 15 was established and under s 1 of the Charter, the policy of targeting gay and lesbian material was found not to be "prescribed by law." The policy was based on an internal memorandum that set out guidelines for interpreting the legislation and was simply an "internal administrative aid" that did not constitute "law." The statute itself, which was the source of customs agents' authority to prohibit the importation of obscene material, did not authorize such discriminatory action.

In many cases, courts have preferred to deal with the claim that a restriction is too vague or too broad in its grant of discretion at the second stage of its s 1 analysis as part of a general (and contextual) balancing of competing interests. For example, in *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 1990 CanLII 26 (discussed in Chapter 20), McLachlin J, dissenting, but not on this point, said:

[T]he difficulty in ascribing a constant and universal meaning to the terms used [in the section being challenged] is a factor to be taken into account in assessing whether a law is "demonstrably justified in a free and democratic society." But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a "limit prescribed by law," unless the provision could truly be described as failing to offer an intelligible standard.

The Court in *Taylor* unanimously held that a provision of the *Canadian Human Rights Act*, RSC 1985, c H-6, which provided that it was a discriminatory practice to use the telephone to communicate repeatedly any matter likely to expose persons to hatred or contempt on certain grounds was sufficiently precise to constitute a limit prescribed by law.

B. JUSTIFICATION

The following excerpt, written by a former president of the Supreme Court of Israel, introduces the complex topic of how rights infringements may be justified.

Aharon Barak, "Proportionality and Principled Balancing"

(2010) 4:1 Law and Ethics of Human Rights 1 at 3-5 (footnotes omitted)

Human rights are not the only considerations to be taken into account in a democracy and limitations on these rights are unavoidable and of two types: The first includes limitations that are necessary to allow others to exercise their own rights. Democracies can limit rights in order to protect "the rights of others," a concept that was expressed first in France as early as 1789 in the Declaration of the Rights of Man and the Citizen. The second type of limitation includes those limitations that are necessary for society to achieve its goals. Democracies may restrict an individual's rights in order to: ensure the continued existence of the state, preserve its democratic nature, maintain public health and order, and provide public education, along with other national or collective objectives. To achieve those goals, the state may limit human rights. The special nature of the democratic political system—which is based on cooperation between the society and the individual—is thereby realized. Democracy is based on a proper relationship between the interests of society and human rights. Both society's interests and human rights are part of a unified legal structure that determines the scope of human rights and allows for their limitation.

C. The Proper Relationship Between the Public's Needs and Human Rights

What is the proper relationship between human rights and society's interests, and when is the state justified in restricting human rights? There is no universally accepted answer to this question; rather, responses vary from society to society and from era to era. Thus, each democracy gives meaning to this relationship according to its own circumstances, reflecting that society's unique challenges, history, and self-perception. Accordingly, in the wake of the Nazi atrocities and the Holocaust, post-World War II Germany viewed human dignity as the central component of its democracy; not surprisingly, the primary values in the post-apartheid South African democracy are equality, human life, and dignity; nor is it surprising that Israel strives for the proper relationship between the public's needs and individual rights in realizing its values not only as a democratic state but also as a Jewish one.

Human rights are a central feature of all democracies, but the degree of their centrality varies from one democracy to another. As a result, democratic societies disagree on the proper relationship between human rights' and society's interests and here is where the concept of proportionality comes into play.

The Role of Proportionality

A. The Meaning of Proportionality

Proportionality creates a conceptual framework in which to define the appropriate relationship between human rights and considerations that may justify their limitation in a democracy. Proportionality is an analytical and methodological doctrine as well as a legal construction. In and of itself, it does not provide a substantive solution to the appropriate relationship between human rights and justifications for their limitation. It is neither libertarian nor communitarian, and it is influenced by external factors. However, with that said, it is not a "neutral" construction and aims to protect human rights in a manner compatible to democracy.

The point of departure for understanding proportionality is the basic distinction between the scope of the right and the limitations imposed on it by law that prevent its full realization. Determining the scope of a right requires its interpretation in a manner that realizes the underlying purpose of the right. I believe that the scope of the right does not change when it is in conflict with other constitutional values—such as society's interests (national security, public order) or other conflicting rights. The clash between conflicting interests or values should not be expressed in the scope of the right, but rather in the manner the right is exercised and realized, and it is in this domain that proportionality plays a central role.

Proportionality in the *broad sense* is based on two principle components. The *first* is legality, which requires that the limitation be "prescribed by law"; the *second* is legitimacy, which is fulfilled by compliance with the requirements of proportionality in the *regular sense*. Its concern is with the conditions that justify the limitation of a constitutional right by a law. There are two main justificatory conditions: an appropriate goal and proportionate means. An appropriate goal is a threshold requirement and in determining it no consideration is given to the means utilized by the law for attaining the goal. A goal is appropriate even if the means of attaining it are not. The proportionate means must comply with three secondary criteria: (a) a rational connection between the appropriate goal and the means utilized by the law to attain it; (b) the goal cannot be achieved by means that are less restrictive of the constitutional right; (c) there must be a proportionate balance between the social

benefit of realizing the appropriate goal, and the harm caused to the right (proportionality *stricto sensu* or the proportionate effect).

Proportionality therefore fulfills a dual function: On the one hand, it allows the limitation of human rights by law, and on the other hand, it subjects these limitations to certain conditions; namely—those stemming from proportionality. Proportionality reflects the idea that the constitutional right and its limitations are flip sides of the same constitutional concept. It expresses the idea that human rights are not absolute, but at the same time it makes it clear that the limitations themselves have limits. [Emphasis in original.]

1. The Oakes Test

The Supreme Court of Canada's first comprehensive treatment of the meaning of s 1 came in *R v Oakes*, immediately below, which remains the primary referent for this second stage of Charter adjudication.

R v Oakes

[\[1986\] 1 SCR 103, 1986 CanLII 46](#)

[Section 8 of the *Narcotic Control Act*, RSC 1970, c N-1 created a "rebuttable presumption" that once the fact of possession of a narcotic had been proven, an intention to traffic would be inferred unless the accused established the absence of such an intention. In *Oakes*, the accused challenged this "reverse onus" provision, arguing that it violated s 11(d) of the Charter. After finding that s 8 did violate s 11(d), the Court went on to discuss whether the limit could nonetheless be upheld under s 1.]

DICKSON CJ (Chouinard, Lamert, Wilson, and Le Dain JJ concurring):

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration* [[1985] 1 SCR 177, 1985 CanLII 65], at 218: "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter."

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.* [[1984] 2 SCR 145, 1984 CanLII 33].

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness," "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case[.] ...

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Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion." Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. ... A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v. Big M Drug Mart Ltd.*, [[1985] 1 SCR 295, 1985 CanLII 69] at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components

of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question; *R v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[The Court went on to apply the above analysis to the reverse onus provision found in s 8 of the *Narcotic Control Act*. It concluded that the objective of protecting society from the ills associated with drug trafficking was of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases and, moreover, that the seriousness of the problem was to a large extent self-evident. The federal government had submitted some evidence to establish the seriousness of the problem of drug trafficking. The evidence included several governmental reports on the problems of drug abuse and an International Protocol on the international trade in and use of opium that Canada had signed. However, the Court concluded that the means chosen to implement this objective—that is, the reverse onus—failed the first step of the proportionality test. The means were not rationally connected to the objective of curbing drug trafficking because there was no rational connection between possession of a small quantity of narcotics and an intent to traffic.]

Appeal dismissed.

NOTES AND QUESTIONS

1. *Pressing and Substantial Purpose*. As you read the cases in subsequent chapters, you will see that courts rarely find that a restriction fails this first step of the *Oakes* test. *R v Big M Drug Mart Ltd* (excerpted in Chapter 19) is an exceptional case. In *Big M*, the Supreme Court of Canada found that the law's purpose, which was to compel a religious practice (observance of Sunday as the Sabbath), could not be considered "pressing and substantial." In the Court's view, such a purpose directly contradicted the constitutional commitment to religious freedom.

The courts seem prepared to regard almost any purpose (that is not a direct denial or contradiction of the right) as "pressing and substantial." They prefer to take account of the insubstantial character of a restriction's purpose at the proportionality stage of the *Oakes* test. Why do you think they have taken this approach?

In *Big M*, the Court also said that in defending a law under s 1, the government could not rely on a purpose different from that which animated the law at the time of its enactment. According to the Court: "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable" (at para 91). Any other view would mean that (at para 90)

[I]aws assumed valid on the basis of persuasive and powerful authority could be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage re-litigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations.

Are the Court's concerns justified? In *R v Butler*, [1992] 1 SCR 452, 1992 CanLII 124 (excerpted in Chapter 20), the Court said that the rule against "shifting purpose" does not preclude a shift in the emphasis of the law's general purpose. When you read *Butler*, consider whether this distinction between "shifting purpose" and "permissible shift in emphasis" is workable.

2. *Rational Connection and Minimal Impairment*. While the first step of the *Oakes* test focuses on the purpose of the impugned law, the next two steps consider the means chosen to advance that purpose. The rational connection and minimal impairment tests are closely related. A law that does not rationally advance the pressing and substantial purpose for which it was enacted can be described as unnecessarily restricting the right or freedom. Similarly, a law that restricts the right or freedom more than is necessary to advance its pressing purpose (that does not minimally impair the freedom) can be described as partially ineffective or irrational.

As the Supreme Court of Canada noted in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (at para 85), "Parliament is not required to use the perfect, or least restrictive, alternative to achieve its objective." In that case, despite deference being owed to Parliament, the Court found that the legislature could have done more to protect the individual's rights, considering that other countries had achieved similar objectives using less intrusive alternatives. In *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 1995 CanLII 64, the Court found that when Parliament's preferred approach falls "within a range of reasonable alternatives," the minimal impairment test will be satisfied. But if the Court can identify "equally effective" and less intrusive means to achieve the objective, it will rule that the law does not minimally impair the rights or freedoms at stake (at para 160).

3. *The Final Balance*. In *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 1994 CanLII 39, Lamer CJ, writing for five members of the Court, added a refinement or clarification to the third part of the *Oakes* proportionality test. This last component of the *Oakes* test, which is referred to as the "deleterious effects" test or the "disproportionate effects" test, requires a proportionality between the effects of the measures that are responsible for limiting the Charter right or freedom, and the objective that has been identified as of "sufficient importance." The *Dagenais* refinement requires that in applying this test, courts consider not only the objective of the impugned law but also its salutary effects. The rationale for refining the test in this way is set out in the following extract (at 887-89):

As Dickson C.J. stated in *Oakes* ... "[e]ven if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve." In many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both

that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects.

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In my view, characterizing the third part of the second branch of the *Oakes* test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

The *Dagenais* requirement that the actual salutary effects of the law be considered may be relevant in cases where the challenged law may not be completely successful in achieving the objectives for which it was enacted. Such was the case in *Dagenais* itself, which involved a publication ban ordered for the purpose of guaranteeing a fair trial, but which, in operation, was found to have only limited effect given the difficulty of effectively enforcing such bans in light of technological advances.

With respect to the overall structure of s 1 analysis, the first step of the *Oakes* test involves a general judgment about the significance of the law's purpose. The next two steps involve a general assessment of the effectiveness of its means. At the final stage of the test, the Court

is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

See *Canada (AG) v Bedford*, [2013 SCC 72](#) at para 126.

In *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#), McLachlin CJ, writing for the majority, emphasized the importance of the final step in the *Oakes* test and the need to distinguish it from the minimal impairment analysis:

[75] Despite the importance Dickson C.J. accorded to this stage of the justification analysis, it has not often been used. ...

[76] It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis—pressing goal, rational connection, and minimum impairment—could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the “severity of the deleterious effects of a measure on individuals or groups.” As President Barak explains:

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the

need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right ... It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]

In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

It is an open question whether this ruling has significantly changed dominant patterns of s 1 interpretation. It remains rare for courts to invalidate a provision on the basis of the final step of the *Oakes* test. In 2016, it was used in order to overturn a provision of the *Criminal Code* (see *R v KRJ*, 2016 SCC 31 at paras 77-79). Justice Karakatsanis, writing the majority opinion, found that the retrospective operation of a criminal law provision infringed s 11(d). Though the objective was deemed real and urgent, and the rational connection and minimum impairment requirements were met, the majority found the deleterious effects of the provision disproportionate to the (marginal and speculative) beneficial effects on society.

4. *Standard of Proof*. In *Oakes*, the Court stated that the justification of a limit on a Charter right or freedom must be proved on a balance of probabilities, the civil rather than criminal standard of proof. This reference to standard of proof suggests that the limitation issue is (principally) a factual one. Yet most contemporary defences of judicial review regard the court as a "forum of principle," a place where basic value issues are addressed. If the key issues to be resolved under s 1 are factual, should the courts not give significant space to the legislature's judgment? Or are the courts better equipped to make factual determinations?

In *Oakes*, Dickson CJ indicated that it might not always be necessary for the government to provide evidence—"that there may be cases where certain elements of the s 1 analysis are obvious or self-evident" (at para 68). Moreover, as discussed below, courts are often prepared to defer to the legislative reading of ambiguous social science evidence.

2. The Subsequent Development of the *Oakes* Test: Context and Deference

Two important and closely related developments in the Supreme Court of Canada's s 1 analysis have occurred since the introduction of the *Oakes* test. The first is the emergence of the contextual approach to the assessment of limits under s 1. This approach requires that courts assess the value or significance of the right and its restriction in their context rather than in the abstract. For example, when deciding whether a legislative restriction on hate speech is justified under s 1, courts should not simply balance the value of the restriction's general purpose—that is, preventing the spread of hatred—against the value of free expression. Instead, they should compare or balance the value of what the restriction achieves in practice—its likely impact on the spread of hatred—against its actual cost to freedom of expression values. Significantly, the Supreme Court of Canada has held that certain forms of expression such as hate promotion are less valuable—that is, less directly connected to the values underlying freedom of expression—than other forms of expression, and that this lesser value is a relevant contextual factor in the balancing of interests under s 1.

The second trend is the Court's willingness to defer in certain circumstances to the legislature's judgment about the need for, and effectiveness of, a particular limit on a Charter right.

Deference is often linked to context, for the Court has held that deference is more appropriate in some contexts than in others.

As you will see when you read the case extracts in this section, there is significant disagreement among the members of the Supreme Court of Canada about when, and to what degree, the courts should defer to legislative judgments. Not only is there disagreement about what contextual factors the courts should take into account when assessing limits under s 1, but also about whether these factors should affect the application of the rational connection and minimal impairment stages of the Oakes test, or only the final balancing stage.

The origins of the “contextual” approach to s 1 lie in *Edmonton Journal v Alberta (AG)*, immediately below.

Edmonton Journal v Alberta (AG)

[\[1989\] 2 SCR 1326, 1989 CanLII 20](#)

[A newspaper challenged s 30(1) of the Alberta *Judicature Act*, RSA 1980, c.J-1, which limited the publication of information arising out of the court proceedings in matrimonial disputes, claiming that the provision was contrary to s 2(b) of the Charter, the guarantee of freedom of expression. The Alberta attorney general argued that the law protected individual privacy. Although all members of the Court found that s 30(1) violated freedom of expression, they were split on the justification issue. Four members of the Court ruled that the provision was not a reasonable limit under s 1. Justice Cory wrote one decision supporting this result, with which Dickson CJ and Lamer J concurred. Justice Wilson wrote a separate concurring judgment. Justice La Forest wrote a dissenting judgment, with which L’Heureux-Dubé and Sopinka JJ concurred, in which he found that the limit on freedom of expression could be justified as a reasonable limit under s 1. In her judgment, a portion of which has been extracted, Wilson J described a context-sensitive approach to s 1 that was later adopted by the entire court.]

WILSON J:

In my view, this case raises an important issue regarding the proper method of application of the *Canadian Charter of Rights and Freedoms* to individual cases and, because my reasons for finding s. 30(1) of the Alberta *Judicature Act* unconstitutional reflect one of two possible approaches to the *Charter*’s application, I thought it might be appropriate at the outset to say a word or two about the different approaches.

Of the two possible approaches to the *Charter*’s application one might be described as the abstract approach and the other the contextual approach. While the mechanics of application, i.e., the proper analytical steps to be taken, are the same under each, which one is adopted may tend to affect the result of the balancing process called for under s. 1.

Under each approach it is necessary to ascertain the underlying value which the right alleged to be violated was designed to protect. This is achieved through a purposive interpretation of *Charter* rights. It is also necessary under each approach to ascertain the legislative objective sought to be advanced by the impugned legislation. This is done by ascertaining the intention of the legislator in enacting the particular piece of legislation. When both the underlying value and the legislative objective have been identified, and it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society.

It seems to me that under the abstract approach the underlying value sought to be protected by s. 2(b) of the *Charter* is determined at large as my colleague Cory J. has done. He finds freedom of expression to have been fundamental to the historical development of our political, social and educational institutions in Canada. He emphasizes the seriousness of restricting the free exchange of ideas and opinions in a democratic form of society and concludes that it is difficult to imagine a more important right in a democracy than freedom of expression.

I do not disagree with my colleague that freedom of expression plays that vital role in a political democracy. The problem is that the values in conflict in the context of this particular case are the right of litigants to the protection of their privacy in matrimonial disputes and the right of the public to an open court process. Both cannot be fully respected. One must yield to the exigencies of the other. I ask myself therefore whether a contextual approach in balancing the right to privacy against freedom of the press under s. 1 is not more appropriate than an approach which assesses the relative importance of the competing values in the abstract or at large.

It is of interest to note in this connection that La Forest J. completely agrees with Cory J. about the importance of freedom of expression in the abstract. He acknowledges that it is fundamental in a democratic society. He sees the issue in the case, however, as being whether an open court process should prevail over the litigant's right to privacy. In other words, while not disputing the values which are protected by s. 2(b) as identified by Cory J., he takes a contextual approach to the definition of the conflict in this particular case. Notwithstanding the enormous importance of freedom of expression in a political context, he finds that it must yield in the context of this case to the litigant's right to privacy. The impugned legislation is accordingly, in his view, a reasonable limit on freedom of the press. Cory J. reaches the converse conclusion and the concern raised is whether the difference in result may be conditioned by the methodology adopted in assessing the importance of the values in conflict.

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case. Nor should one, it seems to me, balance a private interest, i.e., litigant X's interest in his privacy against a public one, the public's interest in an open court process. Both interests must be seen as public interests, in this case the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process.

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One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of overcrowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smokestacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather

than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then, in accordance with the dictates of this court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.

The *Dagenais* clarification of the *Oakes* test (discussed above in note 3 following *Oakes*) may be seen as a response to Wilson J's call, in *Edmonton Journal*, for a more contextual approach to limits under s 1. Under the final step of the *Oakes* test, courts are now required to compare the actual impact of the law on the affected right—for example, on the freedom of expression interests—with the actual contribution the law makes to its pressing and substantial purpose. However, the Court, or several of its members, seems also to have understood the call for a more contextual approach as requiring greater flexibility in the application of each of the steps of the *Oakes* test and greater deference to legislative judgment (in certain circumstances) when applying the test. The result has been a more deferential, reasonableness-based approach to the various strands in the s 1 analysis in certain contexts.

Irwin Toy v Quebec (AG), immediately below, may represent the high-water mark of judicial deference.

Irwin Toy Ltd v Quebec (AG)

[1989] 1 SCR 927, 1989 CanLII 87

[This case, which involved restrictions on advertising directed at children, is excerpted in Chapter 20. Reproduced below is the portion of the judgment of Dickson CJ and Lamer and Wilson JJ in which they set out some of the circumstances in which deference to legislative judgment is appropriate.]

DICKSON CJ and LAMER and WILSON JJ:

... Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another. In dealing with inherently heterogeneous groups defined in terms of age or a characteristic analogous to age, evidence showing that a clear majority of the group requires the protection which the government has identified can help to establish that the group was defined reasonably. . . .

Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In [*R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 1986 CanLII 12], Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals

to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (*Edwards Books and Art Ltd., supra*, at p. 772).

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

In *Irwin Toy*, the Court held that greater deference to legislative choice is appropriate in a variety of circumstances: where the government has sought to balance competing rights, to protect a socially vulnerable group, to balance the interests of various social groups competing for scarce resources, or to address conflicting social science evidence as to the cause of a social problem. Many themes emerge in the Court's discussion of the need for deference under s 1. Social justice concerns that the Charter not be used as a tool to roll back legislative measures protecting socially vulnerable groups combine with more general institutional concerns about the inappropriateness of courts second-guessing legislative decisions on social policy on grounds of both legitimacy and competence.

Irwin Toy introduced a distinction between those cases in which the government is seeking to mediate the interests of competing groups (where a more deferential application of s 1 is appropriate) and those cases in which the government is the singular antagonist of the individual whose right has been infringed (where a more stringent application of s 1 is warranted). How workable is this distinction?

In a variety of subsequent judgments, different members of the courts have argued that the *Oakes* test should be applied in a flexible manner. You will read many of these decisions in subsequent chapters. As Richard Moon explains in "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40:3/4 Osgoode Hall

LJ 337, there are at least three different ways in which a court can “defer” to legislative judgment or lower the standard of justification. The courts, however, do not always distinguish these different forms of deference. The first involves judicial deference to relevant findings of fact by the legislature (or a lowering by the court of the standard of proof that the legislature must meet in establishing the factual basis for its justification argument). For example, in *Irwin Toy*, there was little dispute that protecting children from manipulation was an objective important enough to justify restricting free expression. The more difficult issue was whether the government had proved that the restriction on advertising advanced this important end effectively, and without unnecessarily impairing freedom of expression. In seeking to justify the restriction on advertising directed at children up to the age of 13, the legislature relied on social science evidence that children were unable to assess advertisements critically. However, this evidence was not clear-cut, particularly on the question of whether older children were subject to the manipulative impact of advertisements. The Court decided to defer to the government’s reading of the social science evidence, perhaps because it recognized that it had limited competence in such matters, or no greater competence than the legislature.

For a different outcome, see *R v KJR*, in which the majority closely scrutinized the social science evidence tendered by the government in its analysis of the final stage of the *Oakes* test. Justice Brown critiqued this approach in dissent, noting (at para 144) that

given the complex social context in which Parliament often develops policy—of which the prevention of recidivism in cases of sexual offences against children is clearly an instance—it will sometimes be difficult, if not impossible, for the state to provide reliable and direct evidence of the benefit its measures will achieve.

The second form of deference by the courts is to the legislature’s accommodation of competing values or interests. If the legislature has made an apparently reasonable judgment that concerns about the manipulation of children (or some other interest) justify a limited restriction on expression, then the courts may be reluctant to substitute their own judgment for that of the legislature. The reason for this form of deference may be the courts’ lingering doubts about the legitimacy of second-guessing the value judgments of democratic institutions. A court’s reluctance may be greater when it recognizes that the legislature is making a reasonable attempt to protect the interests of a vulnerable group or to accommodate competing “private” interests. In practice, these first two forms of deference are difficult to separate.

The third form of deference is really a lowering of the standard of justification under s 1. The courts recognize that a broad and inclusive definition of the scope of a right such as freedom of expression means that there may be significant variation in the value of different instances of the protected activity. The courts have held that a less substantial or significant competing interest may support the restriction of a less valuable form of expression, such as commercial advertising or hate promotion. In *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877, 1998 CanLII 829 (discussed in Chapter 20), Bastarache J acknowledged that different forms of expression protected under s 2(b) of the Charter may have greater or lesser value under s 1. In theory, at least, a court could lower the standard of justification (based on the lesser weight of the protected activity) without also deferring to the legislature’s judgment that this standard has been satisfied (the standard of proof). In practice, however, this distinction may be impossible to draw. A judicial decision that the legislature may restrict a right or freedom on less than substantial or compelling grounds looks a lot like judicial deference to legislative judgment about the proper balance between competing interests, particularly if we are skeptical about the commensurability of competing values and the possibility of striking the perfect or correct balance between them.

In *R v Lucas*, [1998] 1 SCR 439, 1998 CanLII 815, a majority of the Court upheld the defamatory libel offence in the *Criminal Code* as a justified restriction on freedom of expression. McLachlin J argued that the lesser value of a particular form of expression should only play a

role in the final stage of the proportionality analysis and should not affect the court's assessment of rational connection and minimal impairment. Her disagreement with judges such as Cory and La Forest JJ, who assumed that the lesser value of the expression should affect the application of each of the proportionality tests in *Oakes*, may rest on a different understanding of what these tests involve. If the rational connection and minimal impairment tests involve some degree of balancing of competing interests (as was suggested above) then they will also be affected by the judgment that a certain form of expression has greater or lesser value. If, on the other hand, as McLachlin J seems to believe, these tests are concerned exclusively with the effectiveness of the law in advancing its pressing and substantial purpose and are to be applied without any kind of balancing of competing interests, then the relative value of the restricted expression will be relevant only later at the third and final step of the *Oakes* proportionality analysis.

There may be another reason why the *Oakes* test remains vague and flexible. In *Oakes*, the Court sought to establish a generic approach to the assessment of limits under s 1 of the Charter. Such an approach to limits rests on the idea that the rights protected in the Charter have the same basic structure—each right represents a zone of privacy or independence that should not be interfered with by the state except in very special circumstances. Yet if the rights and freedoms in the Charter are more diverse in character, representing different aspects of human flourishing or human dignity, and do not all fit within a single liberty rights model, then the form or character of limits on these rights may differ in significant ways. The limits on different rights may not have a common structure. A limit on freedom of religion may be very different from a limit on the right to equality. While it may be possible to develop a reasonably clear or coherent set of standards or tests for the limitation of particular rights, the effort to develop standards applicable to all Charter rights may lead inevitably to ambiguity and inconsistency. It is worth noting that this understanding of limits provides a good reason for keeping this chapter of the book short. There may be little value in examining the limitations issue in a general and preliminary way outside the context of particular Charter rights.

Consider the following account of the role of deference in the application of the *Oakes* test.

Sujit Choudhry, "So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1"

(2006) 35:2d SCLR 501 at 503-4, 522-25, 527-30 (footnotes omitted)

There is a dominant narrative on what the true legacy of *Oakes* and the retreat from *Oakes* are. The argument is that *Oakes* set out a uniform approach for assessing justifiable limitations on Charter rights irrespective of differences in context, but that in the decade following *Oakes*, the Court searched for criteria of deference, to reliably and predictably categorize cases where deference was warranted and those where it was not. These categories were not applied consistently by the Court, and, indeed, produced disagreement within the Court over how they should be applied in specific cases. Underlying both trends were concerns regarding the cogency of the distinctions employed by the Court to delineate the boundaries of these categories. The broader lesson of *Oakes* is the need to tailor judicial review to the unique context of each case.

Although the dominant narrative captures much of *Oakes'* legacy, it misses much of what is at stake in many recent section 1 cases, and by implication, what the true legacy of *Oakes* and the retreat from *Oakes* are. In my view, *Oakes* created an

enormous institutional dilemma for the Court, by setting up a conflict between the demand for definitive proof to support each stage of the section 1 analysis, and the reality of policy making under conditions of factual uncertainty. And so the legacy of *Oakes* is that the central question of section 1 is how the Court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information. ... But not only has the Court failed to recognize this as a central question; it has failed to adopt a consistent approach in how it answers it. ...

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[W]ith 20 years of hindsight, it is questionable whether the Court was wise to strike out as boldly as it did in *Oakes*. For in addition to setting up a stringent test of justification, *Oakes* also made empirics central to every stage of the *Oakes* test. As the Court said in a largely ignored passage:

Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

This passage appears to have been largely overlooked in the academic literature. Moreover, it has been quoted infrequently by the Court—only in four Charter cases, whereas *Oakes* has been cited by the Court in 152 subsequent judgments. But it is becoming increasingly central to the Court’s jurisprudence. The justice most responsible for bringing the Court’s attention to this issue has been McLachlin CJ. As she explained in [*RJR-MacDonald Inc v Canada (AG*, in which the Court struck down a general ban on tobacco advertising (discussed in Chapter 20)], the *Oakes* test sets up a process of “reasoned demonstration,” as opposed to simply accepting the say-so of governments. By this, she meant that “[t]he s. 1 inquiry is by its very nature a fact-specific inquiry.” ... [R]ights can only be justifiably limited in response to concrete, precise and real problems or harms whose existence can be demonstrated to the satisfaction of a court through the normal trial process.

Needless to say, in *Oakes* itself, no such factual record was before the Court, because the parties had no notice that they were required to produce one. To understand why *Oakes* may have been unwise, imagine if the Crown had known the requirements of the *Oakes* test in advance and attempted to adduce evidence sufficient to justify the challenged provision. Would it have been possible to provide evidence meeting the civil standard of proof mandated by *Oakes* with respect to each constituent element of the test? In particular, would it have been possible to definitely prove that the means chosen minimally impaired the right to be presumed innocent—i.e., that other less intrusive means would not have been equally effective? Indeed, what kind of proof would have sufficed? The conundrum raised by this hypothetical is in fact a more general problem that has emerged as a central feature of Charter adjudication. Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in [*McKinney v University of Guelph*, [\[1990\] 3 SCR 229, 1990 CanLII 60](#)], which rings true: “[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society.”

In other words, *Oakes’* approach to interpreting section 1 has unwittingly created a major institutional dilemma for the Court, given the practical reality that public policy is often made on the basis of incomplete knowledge. In many important cases, disputes over justifiable limits on Charter rights have been *factual* disputes about

the nature of social problems, and the effectiveness of government policy instruments in combating them. Although it has never been framed in this way, the basic question in these cases is the same: who should bear the risk of empirical uncertainty with respect to government activity that infringes Charter rights? This has become one of the unarticulated yet central questions in Charter litigation. It has given rise to an extensive jurisprudence, and is one of the principal legacies of Oakes.

One answer would be that in a constitutional, rights-based regime, in which rights are the rule and of presumptive importance, limitations on rights are the exception, governments bear the onus of justification in upholding rights-infringing measures, and the state bears the risk of empirical uncertainty. But to set such a high bar for governments may be to ask too much of them. It may simply be impossible to prove with scientific certainty that the means chosen to combat the problem actually will do so, and that other, less intrusive means to tackle the problem are equally effective. As La Forest J wrote in his dissenting judgment in *RJR-MacDonald* to require governments to bear the risk of empirical uncertainty "could have the effect of virtually paralyzing the operation of government ... it will be impossible to govern ... it would not be possible to make difficult but sometimes necessary legislative choices. There would be conferred on the courts a supervisory role over a state itself essentially inactive." And so another answer would be for the courts to not require governments to adduce much in the way of a factual record at all. But this would seem to read out the requirement that reasonable limits be "demonstrably justified," set out in the text of section 1 itself, and to ask courts to accept the say-so of governments on the existence of public policy problems, and the relative efficacy of policy instruments in dealing with them.

The Court has struck a compromise between these two extremes. In cases in which there is conflicting or inconclusive social science evidence, the question is whether the government has a "reasonable basis" for concluding that an actual problem exists, that the means chosen would address it, and that the means chosen infringes the right as little as possible. This standard is understood as expecting something less of governments than definitive, scientific proof. But an absolute lack of evidence is unacceptable; there must be some factual basis for the public policy. [Emphasis in original.]

In *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#), a case dealing with the constitutional validity of the statutory provision against hate speech in the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, a unanimous Court replied to critics and defended its approach based on a "reasonable apprehension of harm" in the following terms:

[130] Critics argue that the deference to the legislature shown by this Court in *Keegstra, Taylor, Butler and Sharpe* is an abdication of its duty to require that limitations on Charter rights be "demonstrably justified" under the s. 1 analysis: Sumner, at pp. 83 and 202-3. The Court's "deferential approach under section 1 to state restrictions on expression," has been said to erode the constitutional protection for freedom of expression: Moon (2000), at p. 37. The basic nature of the criticism is that it is an unacceptable impairment of freedom of expression to allow its restriction to be justified by the mere likelihood or risk of harm, rather than a clear causal link between hate speech and harmful or discriminatory acts against the vulnerable group.

[131] Such an approach, however, ignores the particularly insidious nature of hate speech. The end goal of hate speech is to shift the environment from one where harm against vulnerable groups is not tolerated to one where hate speech has created a place where this is either accepted or a blind eye is turned.

[132] This Court has addressed such criticism in a number of situations involving the applicability of s. 1 and has adopted a "reasonable apprehension of harm" approach. This approach recognizes that a precise causal link for certain societal harms ought not to be required. A court is entitled to use common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms.

C. JUDICIAL REVIEW AND THE CHARTER: THE DORÉ FRAMEWORK

As the following case makes clear, in the context of determining the constitutionality of administrative decisions, s 1 of the Charter is not the only way of relying on proportionality principles in constitutional adjudication.

Doré v Barreau du Québec

[2012 SCC 12](#)

ABELLA J (McLachlin CJ and Binnie, LeBel, Fish, Rothstein, and Cromwell JJ concurring):

[1] The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.

[2] The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*.

[3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

[5] We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection—meaning its guarantees and values—we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

[6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

[7] As this Court has noted, ... the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

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[35] ... Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are always required to consider fundamental values. ... [A]dministrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship"

[36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53 ...) When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

[37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).

[38] Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the "pressing and substantial" objective of a decision is, or who would have the burden of defining and defending it.

[39] This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law, "where there is no

specific enactment that can be examined in terms of objective, rational connection, least drastic means and proportionate effect" (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.15). In *R. v. Daviault*, [1994] ... 3 S.C.R. 63, for example, in assessing the common law rule relating to establishing intent under extreme intoxication, the Court held that no *Oakes* analysis was required when reviewing a common law rule for compliance with *Charter* values

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[42] Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.

[43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

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[45] It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

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[55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. ...

[56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)* ... [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives." The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in [*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6], when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes*

framework, since both contemplate giving a "margin of appreciation," or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[In applying these principles to the case at bar, Abella J dismissed Doré's appeal with costs, finding that the disciplinary council's decision to reprimand him was reasonable.] [Emphasis in original.]

NOTES

1. In *Loyola High School v Quebec (AG)*, [2015 SCC 12](#) (excerpted in Chapter 19), the first Charter values case to be heard by the Supreme Court post-Doré, the Court reviewed the decision to deny a Jesuit school in Quebec an exemption from the province's Ethics and Religious Culture curriculum. Exemptions are available for schools providing "equivalent" programs. Writing for a majority, Abella J offered a new, if substantially similar, framing of the Charter values analysis:

[4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter*—both the *Charter*'s guarantees and the foundational values they reflect—the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

Later in the decision (at para 35), the majority reiterated that "*Doré* requires administrative decision-makers to proportionately balance the *Charter* protections—values and rights—at stake in their decisions with the relevant statutory mandate."

Two aspects of these statements are worth noting. The first is the shift in terminology between *Doré* and *Loyola*. The second is the explicit incorporation of a minimal impairment requirement into the Charter values analysis. *Doré* and *Loyola* are both discussed further in Chapter 18.

2. In *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#), the disagreement among members of the Court on how administrative decisions that engage Charter rights should be judicially reviewed further intensified, resulting in four separate opinions, each offering a slightly different approach to the Charter values analysis, and with one registering "fundamental concerns" (at para 266) about the viability of the approach set out in *Doré*. Justice Abella wrote the reasons for the majority. The majority adopted a clear two-stage analysis. It explicitly described the Law Society's decision as imposing a "limitation on the *Charter* right" (at para 299) of freedom of religion. It framed the requirement of "proportionate balancing" contextually, and incorporated elements of minimal impairment and narrow proportionality.

After TWU, how similar or different are the Oakes test and the Charter values analysis?

3. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#), the Supreme Court explicitly declined to reconsider *Doré* as part of its recalibration of the standard of review analysis in administrative law.

IV. THE OVERRIDE

Section 33 of the Charter, the "override," or "notwithstanding" clause, has always been a controversial part of the Charter. The Quebec commercial sign law case, *Ford v Quebec (AG)*,

[1988] 2 SCR 712, 1988 CanLII 19 (excerpted below), is the only case in which the Supreme Court of Canada has been asked to review the exercise of the override power.

The history of the *Ford* case begins with the exclusion of the Parti Québécois government of Quebec from the final discussions and agreement that led to the amendment and patriation of the Constitution, discussed in Chapter 16. In November 1981, the other ten governments agreed to a package of constitutional amendments that included the Charter.

As a way of protesting a significant constitutional amendment to which it had not agreed and which did not, in its view, take adequate account of its interests, the government of Quebec made use of s 33 to shield its laws, as much as possible, from the Charter's application. To do so, the Quebec government used what came to be called a "standard override clause," which made reference to all the rights subject to the override:

This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the *Constitution Act, 1982* (Schedule B of the *Canada Act*, chapter 11 in the 1982 volume of the *Act of Parliament of the United Kingdom*).

By an omnibus amendment enactment, the National Assembly repealed and re-enacted, with the addition of this standard clause, all pre-Charter provincial legislation. This technique insulated all existing provincial legislation from those Charter rights and freedoms to which the override applies. Then, statute by statute, it inserted the standard clause into all new enactments, including amending instruments.

The omnibus enactment came into force on June 23, 1982, three months after the Charter came into effect. However, by its terms, the omnibus amendment was to be applied retroactively to April 17, 1982, the day the Charter came into force. While the Court concluded that it was acceptable to derogate from the Canadian Charter using an omnibus amendment, it held that the retroactive effect of s 33 was invalid. In the end, however, the provisions of the *Quebec Charter of the French Language*, CQLR c C-11 (as amended) that were challenged on freedom of expression grounds were invalidated partly because the Quebec legislature had omitted to derogate from the *Quebec Charter of Rights and Freedoms*, CQLR c C-12, ss 3 and 52, which it had adopted several years before the Canadian Charter came into force.

Ford v Quebec (AG)

[\[1988\] 2 SCR 712, 1988 CanLII 19](#)

[This case involved a challenge to provisions of the *Quebec Charter of the French Language* that required French only in public signs, posters, and commercial advertising. The appellants challenged these provisions successfully under both the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*. The extract here focuses on the question of whether Quebec's omnibus use of the override was valid. Another issue in the case, whether the French-only rule infringed freedom of expression, appears in Chapter 24, Language Rights.]

THE COURT (Dickson CJ and Beetz, Estey, McIntyre, Lamer, Wilson, and Le Dain JJ): ...

[The National Assembly of Quebec passed the following law in June 1982:]

Sections 1, 2, 5, 6 and 7 of *An Act respecting the Constitution Act, 1982*, SQ 1982, c. 21, which was assented to on June 23, 1982, provide:

1. Each of the Acts adopted before 17 April 1982 is replaced by the text of each of them as they existed at that date, after being amended by the addition, at the end and as a separate section, of the following:

This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

The text so amended of each of these Acts constitutes a separate Act.

No such Act is to be construed as new law except for the purposes of section 33 of the Constitution Act, 1982; for all other purposes, it has force of law as if it were a consolidation of the Act it replaces.

Every provision of such an Act shall have effect from the date the provision it replaces took effect or is to take effect.

Such an Act must be cited in the same manner as the Act it replaces.

2. Each of the Acts adopted between 17 April 1982 and 23 June 1982 is replaced by the text of each of them as they existed on 23 June 1982, after being amended by the addition, provision set out in the first paragraph of section 1.

The second, third, fourth and fifth paragraphs of section 1 apply, *mutatis mutandis*, to the Acts referred to in the first paragraph.

5. This Act shall operate notwithstanding the provision of sections 2 and 7 to 15 of the Constitution Act, 1982.

6. The sanction of this Act is valid for each of the Acts enacted under section 1 or 2.

7. This Act comes into force on the day of its sanction.

However, section 1 and the first paragraph of section 3 have effect from 17 April 1982; section 2 and the second paragraph of section 3 have effect from the date from which each of the Acts replaced under section 2 came into force.

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The essential contention ... against the validity of the standard override provision, ... was that the provision did not sufficiently specify the guaranteed rights or freedoms which the legislation intended to override. In support of this contention reliance was placed not only on the wording of s. 33(1) and 33(2) of the *Charter* but on general considerations concerning the effectiveness of the democratic process. ...

It was contended that the words "a provision included in section 2 or sections 7 to 15 of this *Charter*" in s. 33(1) and the words "but for the provision of this Charter referred to in the declaration" in s. 33(2) indicate that in order to be valid, a declaration pursuant to s. 33 must specify the particular provision within a section of the *Charter* which Parliament or the legislature of a province intends to override. That is, the specific guaranteed right or freedom to be overridden must be referred to in the words of the *Charter* and not merely by the number of the section or paragraph in which it appears. The rationale underlying this contention is that the nature of the guaranteed right or freedom must be sufficiently drawn to the attention of the members of the legislature and of the public so that the relative seriousness of what is proposed may be perceived and reacted to through the democratic process. As the Attorney General for Ontario, who argued against the constitutionality of the standard override provision, put it, there must be a "political cost" for overriding a guaranteed right or freedom.

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In the course of argument different views were expressed as to the constitutional perspective from which the meaning and application of s. 33 of the *Canadian Charter of Rights and Freedoms* should be approached: the one suggesting that it reflects the continuing importance of legislative supremacy, the other suggesting the seriousness of a legislative decision to override guaranteed rights and freedoms and the importance that such a decision be taken only as a result of a fully informed democratic process. These two perspectives are not, however, particularly relevant or helpful in construing the requirements of s. 33. Section 33 lays down requirements

of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review. It appears to require that the legislature identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights or freedoms. That would seem to require a *prima facie* justification of the decision to exercise the override authority rather than merely a certain formal expression of it. There is, however, no warrant in the terms of s. 33 for such a requirement. A legislature may not be in a position to judge with any degree of certainty what provisions of the *Canadian Charter of Rights and Freedoms* might be successfully invoked against various aspects of the Act in question. For this reason it must be permitted in a particular case to override ... all of the provisions which it is permitted to override by the terms of s. 33. The standard override provision in issue in this appeal is, therefore, a valid exercise of the authority conferred by s. 33 in so far as it purports to override all of the provisions in s. 2 and ss. 7 to 15 of the *Charter*. The essential requirement of form laid down by s. 33 is that the override declaration must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*. With great respect for the contrary view, this Court is of the opinion that a s. 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden. Of course, if it is intended to override only a part of the provision or provisions contained in a section, subsection or paragraph then there would have to be a sufficient reference in words to the part to be overridden. In so far as requirements of the democratic process are relevant, this is the form of reference used in legislative drafting with respect to legislative provisions to be amended or repealed. There is no reason why more should be required under s. 33. A reference to the number of the section, subsection or paragraph containing the provisions or provisions to be overridden is a sufficient indication to those concerned of the relative seriousness of what is proposed. It cannot have been intended by the word "expressly" that a legislature should be required to encumber a s. 33 declaration by stating the provision or provisions to be overridden in the words of the *Charter*, which, in the case of the standard override provision in issue in the appeal, would be a very long recital indeed.

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... [I]t remains to be considered whether the Court should exercise its discretion to rule on the other aspects of the validity of the standard override provision: ... the "omnibus" character of the enactment; and the retrospective effect given to the override provision. ... The Court has concluded that although both of these provisions have ceased to have effect it is better that all questions concerning their validity should be settled in these appeals because of their possible continuing importance in other cases. Given the provision in the form indicated above is a valid exercise of the authority conferred by s. 33 of the *Canadian Charter of Rights and Freedoms*, this Court is of the opinion that the validity of its enactment is not affected by the fact that it was introduced into all Quebec statutes enacted prior to a certain date by a single enactment. That was an effective exercise of legislative authority that did not prevent the override declaration so enacted in each statute from being an express declaration within the meaning of s. 33 of the *Canadian Charter*. Counsel referred to this form of enactment as reflecting an impermissibly "routine" exercise of the override authority or even a "perversion" of it. It was even suggested that it amounted to an attempted amendment of the *Charter*. These are once again essentially submissions concerning permissible legislative policy in the exercise of the override authority rather than what constitutes

a sufficiently express declaration of override. As has been stated, there is no warrant in s. 33 for such considerations as a basis of judicial review of a particular exercise of the authority conferred by s. 33. The Court is of a different view, however, concerning the retrospective effect given to the standard override provision. ... In this regard, the wording of s. 33(1) of the Canadian *Charter* is not without ambiguity. For purposes of clarity, we set out the relevant provision in both languages:

33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.

33.(1) Le Parlement ou la législature d'une province peut adopter une loi ou il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7-15 de la présente charte.

In English, the critical phrase is "shall operate notwithstanding." Generally, the word "shall" may have either a prospective or an imperative meaning or both. Similarly, the French "*a effet indépendamment*" is susceptible of a valid interpretation in more than one tense. ... Where, as here, an enabling provision is ambiguous as to whether it allows for retroactive legislation, the same rule of construction applies. In this case, s. 33(1) admits of two interpretations; one that allows Parliament or a legislature to enact retroactive override provisions, the other that permits prospective derogation only. We conclude that the latter and narrower interpretation is the proper one, and that s. 7 cannot give retrospective effect to the override provision. Section 7 of *An Act respecting the Constitution Act, 1982*, is to the extent of this inconsistency with s. 33 of the Canadian *Charter*, of no force or effect, with the result that the standard override provisions enacted by s. 1 of that Act came into force on June 23, 1982 in accordance with the first paragraph of s. 7.

Appeal dismissed.

NOTES AND QUESTIONS

1. Those who see judicial review as an important and effective way to protect fundamental rights from the give and take of majoritarian politics tend to view s 33 as an undermining of the Charter's protection of individual rights. In their view, s 33 allows governments to "override" fundamental rights. On the other hand, those who are troubled by the undemocratic practice of appointed judges second-guessing the policy and value judgments of elected legislatures seem to be untroubled by s 33. In their view, s 33 gives the legislature the final say on the appropriate scope and limits of certain basic rights. Section 33 simply permits the legislature to override the judicial interpretation of those rights (and their appropriate limits).

Some supporters of judicial review, however, take a more positive view of s 33 as an important component of the Charter's complex institutional structure. Lorraine Weinrib, for example, argues that the notwithstanding clause may blunt the argument that judicial review under the Charter is anti-democratic and may give the courts greater confidence when reviewing legislation:

Even when dormant, the [notwithstanding] clause insulates the judicial function from illegitimate political entanglement. The fact that legislatures may abrogate most Charter rights, as long as they do so expressly, means that judges can carry out their responsibilities without constantly looking over their shoulders. Their task is to protect the normative values for which rights stand, e.g., liberty, dignity, equality, on a case-by-case basis. This task is suited

to the expertise, experience and independence of the judiciary. Judges should concentrate on providing the strongest support for their position to assist the legislators in performing their function.

See Lorraine Weinrib, "The Notwithstanding Clause: The Loophole Cementing the Charter" (1998) XXVI *Cité Libre* 47 at 53.

2. Section 33 was not used often in the first three decades of the Charter. In recent years, however, provincial legislatures have been more willing to use it in order to shield their laws from potential declarations of invalidity. Ontario threatened to invoke s 33 to avoid the courts invalidating the legislature's move to slash the number of seats on Toronto City Council (in the end it was not necessary). The Ontario legislature did invoke it even more recently in 2021 in a law restricting third-party spending in elections. In 2019, Quebec, which has a history of recourse to the notwithstanding clause (see Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47:2 *Rev G Droit* 343) famously invoked s 33 in its *Laicity Act*, SQ 2019, c 12, a bill prohibiting public servants from wearing religious signs, from Charter scrutiny. Noura Karazivan and Jean-François Gaudreault-DesBiens, in the following excerpt, consider the impacts of this use of the clause:

One narrative put forward was that the *Laicity Act* protected Quebec's identity and its right to make distinct policy choices which, allegedly, are not shared by the rest of Canadian provinces. Many commentators felt that the notwithstanding clause was a perfectly legitimate tool to be used by Quebec, especially given the perceived lack of legitimacy of the Canadian constitution in the province.

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Substantively, [s 33] can be used to achieve several, legitimate purposes. Kahana, for instance, identifies six distinct models providing justifications for the use of that clause up until 2004 [Tsvi Kahana, "What Makes for a Good Use of the Notwithstanding Mechanism?" (2004) 23 *SCLR* 191]. First, there is the "compromise model," under which the clause would somehow allow legislatures to do as if the Charter did not exist. The "compromise" refers here to the political circumstances surrounding the incorporation of section 33 into the Charter. Second, the "legislative exception" model envisages section 33 as a tool to be used when a legislature knows that a statute risks being found unconstitutional under the Charter. Third, the "litigation avoidance" model posits that the clause can be used preventively even when the legislature believes that the statute could withstand a Charter-based constitutional challenge. Fourth, the "legislative disagreement" model envisages the notwithstanding clause as a way to impose a legislative interpretation of a right, or of the conciliation between competing rights, that goes against the judicial one, even when the legislature knows that the latter is arguably well-founded. Fifth, the notwithstanding clause may be used as a tool to correct "subjective judicial errors," which refer to court rulings that the legislature subjectively believes to be unfounded. Sixth, and last, the clause may also be used to correct "objective judicial errors," that is, judicial rulings which are reasonably and generally viewed as incorrect.

As Newman summarizes [Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 209] some uses are quasi-procedural; others aim at expressing views on the impracticality of a particular definition of rights, or seek to curb an errant court, as suggested by Peter Lougheed. Still other uses, to take Allan Blakeney's formulation, allow a legislature to give priority to moral rights that are not codified in the Charter. Blakeney saw parliamentarians as better equipped to juggle with the greater complexity of rights, including socio-economic rights, than what is strictly codified in the Charter. ...

Yet there is another, perhaps overlapping category, and that is the idea that section 33 allows for some value-pluralism, or the expression of distinct Canadian identities within the federation. This is the most difficult category to deal with, because it shifts to parliamentarians the responsibility to balance legitimate interests and rights which may detract from the principle of equality, especially when nationalist discourse is involved. As Andrei Marmor pointed out [Andrei Marmor, "Are Constitutions Legitimate?" (2007) 20 Can JL & Juris 69], section 33 may very well be what federal societies need in order to "mitigate pluralism's concerns." The question is just how much, and how to strike a right balance.

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In a way, section 33 allows a legislature which believes the Court has not accommodated enough value-pluralism to have the last word on a particular matter, something Quebec has invoked in the *Laicity Act*, its own most recent use of section 33. ... Marmor recognizes that to determine "to what extent" a notwithstanding clause such as section 33 mitigates pluralism is a "very difficult question to answer." In the Canadian federal context, it is increasingly becoming the constitutional question of the century.

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The last, and most important substantial justification [advanced by the government] for the *Laicity Act* is that it represents an affirmation of Quebec's collective choices and distinct character, hence the need to shield it from judicial challenges. Quebec being a nation, it may decide of its orientations in all respects, including, and particularly, when it comes to determining the relationship between the state and religions. The *Laicity Act* is thus an expression of the *distinctive* choices made with respect to that relationship by the *distinct* nation that Quebec constitutes. This nationalist narrative is all the more evident in Premier François Legault's words at the launch of the legislative debate on the use of parliamentary closure to hasten the adoption of the *Laicity Act*. Legault indeed accused the Liberal opposition, which denounced the bill as unduly infringing upon individual rights, of defending Canadian (read multicultural) values in Quebec, while the government was, for its part, affirming and defending Quebec values within Canada. It is as if Quebec values were ontologically incompatible with Canadian ones. [Emphasis in original.]

See N Karazivan & J-F Gaudreault-DesBiens, "Rights Trivialization, Constitutional Legitimacy Deficit, and Derogation Clauses: the Example of Quebec's Laicity Act" in N Karazivan & J Leclair, eds, *The Political and Constitutional Legacy of Pierre Elliott Trudeau* (Toronto: Lexis-Nexis, 2020) 487 at 488, 497-98, 500, 507.

3. Why do you think that s 33 applies to only some Charter rights? Does it make sense that s 33 applies to a right such as freedom of expression, which is generally regarded as one of the most fundamental in the Charter?

4. There have been several occasions when certain groups have vocally advocated use of s 33. For example, following the Supreme Court of Canada's judgment in *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (discussed in Chapter 16, Chapter 18, and Chapter 23, Equality Rights), in which the Court ruled that the Alberta *Individual Rights Protection Act*, RSA 1980, c I-2 violated s 15 of the Charter because it failed to extend protection against discrimination to gays and lesbians, conservative forces in the province pressed the government to use s 33. The Conservative government of Alberta declined to do so. What do you think might have motivated the government to refuse?

CHAPTER EIGHTEEN

APPLICATION

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I. INTRODUCTION: THE DEBATE ABOUT APPLICATION TO PRIVATE ACTION

The Supreme Court of Canada in *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 1986 CanLII 5 held that the Charter applies only to government action. In other words, only the state, or actors exercising state power, have obligations under the Charter. The Court concluded that the Charter does not apply directly to private actors, nor does it apply directly to litigation between private parties that involves the application of common law rules. (The application of the Charter to common law will be addressed later in this chapter.) Private action that interferes with an individual's rights, such as freedom of expression, may be prohibited by provincial or federal law, but it is not subject to review under the Charter.

The Court based this decision about the limited application of the Charter on s 32(1) of the Charter, which provides:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Was s 32 intended to limit the application of the Charter to the activities of governments and legislatures, leaving private actors free from an obligation to conform to Charter norms? Or was s 32 added to the Charter simply to make it clear that the particular governmental bodies it identifies were to be bound, without restricting the Charter's application solely to governmental action?

There are, of course, other arguments made in support of this limit on the Charter's application. It is sometimes argued that the Charter is appropriately focused on state action because the state represents the most significant threat to individual liberty. Another argument is that different standards apply to the exercise of state and private power; that more is expected for the state, and so the Charter should focus on state action. Do you think these arguments have merit? Finally, there is the more practical argument that if the Charter were to apply to private action, the courts would be overwhelmed with claims and would be required to develop parallel systems of norms in a variety of areas such as criminal law and anti-discrimination law.

While the rule that the Charter only applies to state action seems simple enough, it turns out that distinguishing between state and private action is often anything but simple. The distinction is difficult because private action is always surrounded by, or enmeshed in, state action that permits or empowers private actors to do what they do. State law is then always implicated in private action. For a discussion of this and the resulting tensions—particularly in the context of freedom of expression—see Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000).

There are two significant stress points in the government action doctrine, both of which stem from the fact that private actors can act as they do only because state law permits or enables them to do so. The first issue is: when is a state grant or delegation of power to a person or entity sufficient to make that person or entity a government actor or their action a government action? In other words, who is a government actor and/or what counts as government action? The Supreme Court of Canada has said that a university is not ordinarily a state actor, nor is a hospital. Yet the Court has also said that when an institution, such as a hospital, is implementing a specific government program, such as the delivery of health care, its actions related to that program constitute government action subject to the Charter.

When the state delegates power to an otherwise private actor, that actor may be viewed as exercising state power and as clothed with state authority. However, not just any delegation will be sufficient to make the actor a "state" agent. Otherwise, a private property owner excluding someone from their property, relying on property and trespass law, could be considered a state actor (an extension of the state) and their actions could be considered government action, subject to Charter review.

The question is: what kind or degree of power delegation is sufficient to turn a private actor into a reviewable state actor? One answer is that an otherwise "private" actor becomes a state actor when the state delegates to them the power to perform a public function. The category of state actors would then include entities that perform important functions traditionally associated with the state. As we will see, the Canadian courts have shied away from a public function test, perhaps because there is significant disagreement about the proper or ordinary functions of government.

The courts in the United States adopted an approach of this sort in *Marsh v Alabama*, 326 US 501, 90 L Ed 265 (1946), where it was held that the decision of a company-owned town to exclude communication from its streets was subject to constitutional review. The Court held that the company's decision to exclude communication from its property (and its use of the State of Alabama's trespass law) to enforce that decision was subject to review under the First Amendment because the town was "operated primarily to benefit the public" and its operation was "essentially a public function" (at 506). According to the Court, the streets and parks

of the company town were the “functional equivalents” of state properties. The State of Alabama had permitted the company to “use its property as a town, operate a ‘business block’ in the town and a street and sidewalk on that block” (at 507). Yet in *Marsh*, the constitutional “wrong” was the application of the state trespass law, rather than the exclusion of expression—and so the judgment can also or instead be seen as a case in which the state is responsible for enabling a private wrong, which is the second point of stress in the doctrine.

In cases concerning the applicability of the Charter to hospitals and universities, the Supreme Court has said that the key question is not whether the institution performs a public function, but whether the institution is effectively under the direction of government (*McKinney v University of Guelph*, [1990] 3 SCR 229, 1990 CanLII 60). If an institution, such as a university, has significant autonomy in the governance of its affairs, it will not be subject to Charter review, even though it may perform an important public function. Yet the Court has also said that when a private entity is implementing a specific government policy or program, its implementation decisions will be subject to the Charter. Exactly when this will be the case is not entirely clear, although one factor is almost certainly the public nature of the policy.

The second issue concerns the state’s responsibility for wrongs committed by private actors. If private power depends on state authority, the state may be seen as bearing some responsibility for the wrongs committed by private actors. When is the state sufficiently implicated in a private wrong, so that it can be said that the state has also done wrong—has also breached a Charter right? For example, when the state enforces a privately negotiated restrictive covenant that prohibits the future sale of property to the members of a particular racial or religious group, can it be seen as participating in an act of discrimination? In *Shelley v Kraemer*, 334 US 1, 92 L Ed 1161 (1948), the US Supreme Court held that the state was implicated in this act of discrimination.

In Canada, the difficulty in fixing the boundary between state and private action was apparent in *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816. The Court held in that case that the omission of sexual orientation as a ground of discrimination in the Alberta *Individual’s Rights Protection Act*, RSA 1980, c I-2 amounted to an act of state discrimination by the government of Alberta contrary to s 15.

It is important to note here that the Charter includes a number of positive rights that require the state to take action to advance or secure particular interests, and not simply refrain from taking action that interferes with protected interests. The rights and freedoms set out in the Charter impose a mix of positive and negative obligations on governments. To the extent that the Charter imposes positive obligations on governments, it will sometimes apply to government inaction. For example, the right to minority language educational facilities in s 23, or the right to an interpreter in s 14, would be meaningless if the Charter did not apply to a state failure to take steps to implement these rights. For this reason, the text of s 32 does not refer to government action; rather, it says that the Charter applies to governments “in respect of all matters within [their] authority.”

The material that follows begins, in Section II, with an exploration of the different kinds of government action subject to the Charter, looking at the ways the courts have defined governmental actors and governmental acts. Section III discusses some circumstances in which the courts have applied the Charter to government inaction or have viewed the state as responsible for, or implicated in, an otherwise private wrong. Section IV turns to the special problems of applying the Charter to the courts, the common law, and administrative decision-makers. Section V considers territorial limits on the application of the Charter—in what circumstances will the Charter apply to decisions taken by the Canadian government abroad? Although the bulk of this chapter is concerned with determining who is required to comply with the obligations imposed by the Charter, the final section, Section VI, looks briefly at the application issue from the other side—who can claim the benefit of Charter rights and freedoms?

II. GOVERNMENTAL ACTION

In *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, [\[2009 SCC 31\]](#), Deschamps J, whose reasons on this issue were supported by all members of the Court, summarized the existing law on the application of the Charter:

[16] ... [T]here are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the *entity* or by enquiring into the nature of the *activities*. If the entity is found to be "government" either because of its very nature or because the government exercises significant control over it, all of its activities will be subject to the *Charter*. If the entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*. [Emphasis added.]

The materials in this section are organized in light of these two inquiries. First, in Section II.A, "Governmental Actors," we examine the issue of what *entities* might be classified as being part of the government. The leading cases here are *McKinney*, cited above, and *Stoffman v Vancouver General Hospital*, [\[1990\] 3 SCR 483, 1990 CanLII 62](#). Second, in Section II.B, "Governmental Acts," we examine the application of the *Charter* to non-governmental entities to the extent they are engaged in governmental *activities*. The leading case here is *Eldridge v British Columbia (AG)*, [\[1997\] 3 SCR 624, 1997 CanLII 327](#).

A. GOVERNMENTAL ACTORS

If an entity is part of government, then the *Charter* will ordinarily apply to all its actions and decisions. The references to Parliament and provincial legislatures in s 32 of the *Charter* mean that when laws are passed by those bodies, they must comply with the *Charter*. Federal, provincial, and territorial statutes and regulations made thereunder are subject to the *Charter* (as are other forms of delegated legislation, such as municipal by-laws and by-laws and regulations of other creatures of Parliament and the legislatures). Moreover, the *Charter* applies to actions taken by a legislative assembly so long as those actions are not shielded from *Charter* scrutiny by constitutionally protected parliamentary privileges: see *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [\[1993\] 1 SCR 319, 1993 CanLII 153](#).

In *Dolphin Delivery*, the Court held that the term "government" did not include the judiciary, although, as we will see in Section IV, below, subsequent developments have attenuated the impact of that holding. "Government" in s 32 clearly covers the executive branch of government, including Cabinet (see *Operation Dismantle v The Queen*, [\[1985\] 1 SCR 441, 1985 CanLII 74](#)), ministers, and public servants in government departments. But how far does "government" extend beyond this? What factors should courts emphasize in making a determination that an actor is governmental—the possession of statutory powers; public funding of the actor; or whether the objectives or functions of the entity are public or private in nature?

The evolving case law has established that there are two ways for an entity to be considered part of "government": because (1) the government exercises significant control over it, or (2) it is 'governmental' in nature—that is, it exercises governmental functions.

1. Entities Controlled by Government

McKinney v University of Guelph

[1990] 3 SCR 229, 1990 CanLII 60

[Eight faculty members and a librarian challenged the mandatory retirement policies of four Ontario universities on the basis of the protection, in s 15, against age discrimination. They raised as a preliminary issue whether the Charter applied to the actions of universities—that is, whether universities could be said to be government actors under s 32 of the Charter. In the alternative, the challengers argued that the provincial human rights code, which only protected persons between the ages of 18 and 65 from age discrimination, violated s 15 of the Charter by allowing discrimination against persons over 65. On the issue of the application of the Charter to universities, a majority of the Court concluded that the universities were not government actors, and, in the absence of government participation or compulsion, their adoption of mandatory retirement policies did not amount to government action. The main judgment on the application issue was written by La Forest J.]

LA FOREST J (Dickson CJ and Gonthier J concurring):

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.

To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act." ...

Opening up private activities to judicial review could impose an impossible burden on the courts. ...

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The Court in *Dolphin Delivery* did not have to decide on the extent to which the *Charter* applies to the actions of subordinate bodies that are created and supported by Parliament or the legislatures, but it did leave open the possibility that such bodies could be governed by the *Charter*. ...

The appellants first argued that "universities constitute part of the legislature or government of the province within the meaning of s. 32 of the *Charter*, insofar as they are creatures of statute which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority." Undoubtedly, as the Court of Appeal recognized, a statute providing for mandatory retirement in the universities would violate s. 15 of the *Charter*, and it is also true that the government could not do so in the exercise of a statutory power. That is because, as McIntyre J. pointed out, they—the legislative, executive and administrative branches of government—are the actors to whom the *Charter* applies under s. 32(1).

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But the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government. It would significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining the *Charter* to which I have already referred. ...

The appellants strongly relied on a statement by Hogg, *Constitutional Law of Canada*, (2nd ed. 1985), at p. 671 ... to the effect that Parliament and the legislatures cannot authorize action by others that would be in breach of the *Charter*. [Hogg included universities within the group of governmental institutions exercising statutory power bound by the *Charter*.] That statement would, no doubt, be true of a situation such as occurred in *Slight Communications Inc. v. Davidson* [[1989] 1 SCR 1038, 1989 CanLII 92], where a statute authorizes a person to exercise a discretion in the course of performing a governmental objective. But the *Charter* was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility. ...

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The *Charter* apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a *Charter* attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the *Charter*. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse. ... A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty. It is simply not the test mandated by s. 32. ...

... [I]f the *Charter* covers municipalities, it is because "municipalities perform a quintessentially governmental function." They enact coercive laws binding on the public generally, for which offenders may be punished The same can obviously not be said of universities. I hasten to add that ... the *Charter* is not limited to entities which discharge functions that are inherently governmental in nature. As to what other entities may be subject to the *Charter* by virtue of the functions they perform, I would think that more would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments. ...

The appellants also submit that the universities constitute part of the government under s. 32 of the *Charter* having regard to the nature of their relationship to the provincial government. The entire context must, they say, be looked at including the facts that they are established by statute which determines their powers, objects and governmental structures, that their historical development was as part of a public system of post-secondary education, that their survival depends on public funding,

and that government structures largely coordinate and regulate their activities, through operating and capital grants, special funds, control over tuition fees and approval of new programs.

There is no question that the relationship of government to Canadian universities has always been significantly different from that existing in Europe when communities of scholars first banded together to pursue learning. From the early days of this country, several of the provinces acted to establish provincial universities . . . [The statutes establishing Ontario universities are then reviewed.] These statutes set out the universities' powers, functions, privileges and governing structure. While these vary from university to university, they are in general much the same. As well, the *University Expropriation Powers Act*, R.S.O. 1980, c. 516, gives them expropriation powers, a matter not in issue here. The *Degree Granting Act, 1983*, S.O. 1983, c. 36, restricts the entities that can operate a university and grant university degrees.

There can be no doubt that the reshaping in the 1950s and 1960s of the universities of Ontario (a process that also occurred in other provinces) resulted from provincial policies aimed at promoting higher education. Nor did the Legislature confine itself to rationalizing the existing system. It heavily funds universities on an ongoing basis. The operating grants alone range . . . between a low for York of 68.8% of its operating funds to a high for Guelph of 78.9%. The Ontario Council on University Affairs makes annual global funding recommendations to the government, but the latter assumes responsibility for determining the amounts. It also effectively defines tuition fees within a formula that limits the universities' discretion within a narrow scope. The province also provides most of the funds for capital expenditures, and provides special funds earmarked to meet specific policies. It exercises considerable control over new programs by requiring that they be specifically approved to be eligible for public funds.

It is evident from what has been recounted that the universities' fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government. There are many other entities that receive government funding to accomplish policy objectives governments seek to promote. The fact is that each of the universities has its own governing body. Only a minority of its members (or in the case of York, none) are appointed by the Lieutenant-Governor in Council, and their duty is not to act at the direction of the government but in the interests of the university . . . The remaining members are officers of the Faculty, the students, the administrative staff and the alumni.

The government thus has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources. . . .

The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is

nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.

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I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*. Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy.

[Both Sopinka and L'Heureux-Dubé JJ wrote short separate reasons concluding that universities were not part of government. Justice Wilson, writing in dissent (Cory J concurring), rejected the concept of the "minimal state" on which she saw La Forest J's decision resting, contrasting the Canadian attitude to government and its role with that of the United States. She instead opted for a broader view of government that is "sensitive ... to the wide variety of roles that government has come to play in our society and the need to ensure that in all of these roles it abides by the constitutional norms set out in the *Charter*." Justice Wilson then set out three tests to help identify the kinds of bodies that ought to be constrained by the *Charter*: (1) the "control" test, which asks whether the legislative, executive, or administrative branch of government exercises general control over the entity in question; (2) the "government function" test, which asks whether the entity performs a traditional government function or a function that in more modern times is recognized as the responsibility of government; and (3) the "statutory authority and public interest" test, which asks whether the entity is one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest. She went on to find that the universities satisfied all three tests.

Although the argument that the universities' mandatory retirement policies were subject to the *Charter* was rejected by a majority of the Court, the Court concluded that the provision in the Ontario *Human Rights Code*, 1981, SO 1981, c 53, allowing mandatory retirement after age 65 was subject to *Charter* challenge. That provision was found to violate s 15 of the *Charter*, but was upheld as a reasonable limit under s 1.]

Appeal dismissed.

NOTES

1. At the same time as *McKinney*, the Supreme Court of Canada decided three other mandatory retirement cases, all of which also involved issues concerning the application of the *Charter*. *Harrison v University of British Columbia*, [1990] 3 SCR 451, 1990 CanLII 61, like *McKinney*, involved a challenge to a university's mandatory retirement policy. A majority of the Court followed *McKinney*. While the facts suggested that UBC was subject to greater government control than the Ontario universities were in *McKinney*—for example, the government appointed a majority of UBC's Board of Governors and closely monitored its expenditures—this was insufficient to make it part of government. Justice La Forest, for the majority, wrote that the fact that the government had "ultimate or extraordinary control" over the university, such as the capacity to withdraw statutory powers or public funds, was not enough. To be part of government and therefore bound by the *Charter*, he held that the university had to be subject to "routine or regular control" by the government. Because UBC, like the Ontario universities, enjoyed a high degree of internal autonomy, the majority found that it was not part of government.

Stoffman involved a challenge by doctors at the Vancouver General Hospital to a hospital board policy of mandatory retirement at 65. Fourteen of the 16 members of the board were appointed by the government. Moreover, the governing statute required that all regulations be approved by the minister of Health Services and Hospital Insurance. Nonetheless, a majority of the Court concluded that the hospital was not part of government nor was the regulation in issue an act of the government. The majority emphasized that routine control of the hospital was in the hands of the hospital's board of trustees rather than in the hands of the provincial government. If routine or regular control of hospital policies was in the hands of government, or if the mandatory retirement policy had been dictated by government, the Charter would have applied. The majority also ruled that provision of a public service, even one as important as health care, did not qualify as a government function under s 32. Justice L'Heureux-Dubé, who had concluded in *McKinney* that universities were not part of government, joined Wilson and Cory JJ in dissent in *Stoffman*, concluding that the hospital was acting as government. She found a greater degree of government involvement in this case than in *McKinney*, where in her view governmental involvement was primarily in the form of funding.

In *Douglas/kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 1990 CanLII 63, the Court reached a different result. This case involved a community college and a challenge to a mandatory retirement provision in a collective agreement. The affairs of the college were managed by a board appointed by the provincial government. The minister was allowed to establish and issue directions and approved all by-laws of the board. The Court was unanimous in concluding that the Charter applied to the actions of the college in the negotiation and administration of the collective agreement between itself and the association representing the teachers and librarians at the college. Justice La Forest distinguished the situation of the college from the universities in *McKinney* and *Harrison*:

Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of *McKinney v. University of Guelph* ... and *Harrison v. University of British Columbia* ... , which, though extensively regulated and funded by government, are essentially autonomous bodies.

Thus, because Ontario and BC universities enjoyed a significant measure of internal autonomy, while BC community colleges were subject to routine or regular government control, the colleges were part of government and therefore always subject to the Charter, while the universities were not. Does this distinction make sense?

2. Justice La Forest suggests in his opinion in *McKinney* that applying the Charter to universities could have negative consequences for academic freedom. Others have suggested that, to the contrary, allowing universities to operate as "Charter-free zones" could be detrimental to academic values. For example, in *Pridgen v University of Calgary*, 2012 ABCA 139, Paperny J wrote that "[a]cademic freedom and freedom of expression are inextricably linked" (at para 114) and that they "are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason they cannot comfortably co-exist" (at para 117). She found that the university had violated s 2(b) of the Charter by not considering students' freedom of expression when disciplining them for posting comments on Facebook that were critical of one of their professors. Similarly, Dwight Newman has argued that the application of the Charter to universities could further academic values. In his view, "[w]here universities limit Charter rights, they may have a justification for doing so in considerations of academic freedom, but they should need to

prove this justification rather than simply to waive around generalized academic freedom considerations before claiming Charter immunity": see Dwight Newman, "Application of the Charter to Universities' Limitation of Expression" (2015) 45 Sherbrooke L Rev 133 at 151-52. Keep in mind that even though universities are not part of government, the Supreme Court of Canada's subsequent decision in *Eldridge v British Columbia (AG)*, discussed below in Section II.B, has raised the possibility that some of their activities may be subject to the Charter if they involve the implementation of specific government policies or programs or the exercise of statutory powers of compulsion.

3. The *Douglas College* ruling was followed in *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68, which involved a Charter challenge by a faculty member at a community college to the union's expenditure of dues on political causes that he did not support. The collective agreement between the Ontario Council of Regents for Colleges of Applied Arts and Technology (which had exclusive statutory authority to negotiate collective agreements on behalf of all the community colleges in the province) and the union provided that it was compulsory for all employees to pay union dues, whether or not they belonged to the union. The Supreme Court ruled that, although the Charter would not apply to the union's activities, it did apply to those of the Council of Regents. Like Douglas College, the Ontario Council of Regents was subject to "routine or regular control" by the minister of education. The minister exercised "full control over all of the Council's activities," including collective bargaining with college employees. The council was therefore an emanation of government for the purposes of s 32. The provision in the collective agreement providing for the compulsory payment of union dues was found to be subject to the Charter, since the council's agreement to it was government conduct. Justice La Forest rejected the submission that the Charter should apply only to the regulatory activities of government, leaving its commercial or contractual activities exempt. This proposition, he said, rested on an outdated understanding of government. Contemporary governments may pursue policies by engaging in commercial activities and should not be exempt from the Charter when they do so. *Lavigne* is dealt with more extensively in Chapter 21, Freedom of Association.

4. In *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, the Court had to decide whether two corporations that operated public transportation systems in British Columbia, BC Transit and TransLink, had violated the Charter's guarantee of freedom of expression by refusing to accept political advertising on the sides of their buses. The Court found that both were bound by the Charter, and that their advertising policies had to be rewritten to comply with s 2(b) of the Charter. The Court found (at para 17) that BC Transit

is a statutory body designated by legislation as an "agent of the government," with a board of directors whose members are all appointed by the Lieutenant Governor in Council (*British Columbia Transit Act*, R.S.B.C. 1996, c. 38, ss. 2(5) and 4(1)). Moreover, the Lieutenant Governor in Council has the power to manage BC Transit's affairs and operations by means of regulations (s. 32(2)). Thus, BC Transit cannot be said to be operating autonomously from the provincial government, because the latter has the power to exercise substantial control over its day-to-day activities.

The Court reached the same conclusion for TransLink. It based its conclusion on a close reading of the relevant legislation, which gave the entity constituting the local level of government (the Greater Vancouver Regional District, hereafter GVRD), itself part of the apparatus of government, substantial control over TransLink's day-to-day operations. Pursuant to statute, the GVRD was required to appoint 12 of the 15 directors on TransLink's board and to ratify TransLink's strategic transportation plan and a variety of taxes and levies. Moreover, TransLink was required to prepare all its capital and service plans and policies and carry out all its activities and services in a manner that was consistent with its strategic transportation plan. Therefore, while TransLink was not itself part of the apparatus of government, it was governmental

in the light of the substantial control that the GVRD exercised over it. (In the alternative, as discussed in Section II.B.1, below, the Charter was found applicable, following *Eldridge*, because the GVRD was implementing government policy with respect to public transit.)

See also *R v Booyink*, [2013 ABPC 185](#), in which the Calgary Airport Authority (CAA) was found to be a government entity because of the significant degree of control exercised over it by the federal, provincial, and municipal levels of government. The Charter was thus applicable to the removal of anti-abortion protesters from the Calgary International Airport. (Alternatively, as discussed in Section II.B.1, the Charter was found to apply because the CAA was implementing a government program.)

5. Do public schools or school boards enjoy the kind of internal autonomy possessed by the universities in *McKinney* and *Harrison*, or are they subject to routine or regular ministerial control like the college in *Douglas College* (see note 1, above)? The Supreme Court of Canada has not yet ruled on the issue of whether public schools are subject to the Charter. The application of the Charter was conceded by the Crown in *R v M (MR)*, [\[1998\] 3 SCR 393, 1988 CanLII 770](#); as a result, the Court did not have to address the accused's submission that public school boards, schools, and their employees are part of the apparatus of government on the test set out in *McKinney*, *Harrison*, *Stoffman*, and *Douglas College*. The Court assumed, without deciding, that public schools "constitute part of government" (at para 25). In *R v AM*, [\[2008 SCC 119](#), a case involving a "sniffer-dog" search for drugs at a high school, the Court's analysis focused on the actions of the police without directly addressing the question of whether school authorities are subject to the Charter.

Even if schools or school boards are not controlled by government, they may still be found to be governmental actors, and therefore subject to the Charter in all of their activities, on the ground that they exercise governmental functions: see *Godbout v Longueuil (City)*, [\[1997\] 3 SCR 844, 1997 CanLII 335](#) in Section II.A.2, below. Moreover, even if schools or school boards are neither controlled by nor operating as government, they may be subject to the Charter when making discretionary decisions pursuant to statutory authority: see *Slaight Communications Inc v Davidson*, [\[1989\] 1 SCR 1038, 1989 CanLII 92](#), as discussed below in Section II.B.2. For example, in *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006 SCC 6](#), the Court held that a decision of a school board's council of commissioners prohibiting a student from wearing a kirpan to school infringed his freedom of religion. Writing for the majority, Charron J found that "[t]here is no question that the Canadian Charter applies to the decision of the council of the commissioners" (at para 22). She noted that the council "is a creature of statute and derives all of its powers from statute" (at para 22). Citing the Court's ruling in *Slaight*, she held that where an administrative body makes a discretionary decision pursuant to statutory powers, it is bound to comply with the Charter. *Multani* is discussed further in Chapter 19, Freedom of Religion.

6. The "routine or regular" or "substantial" control test articulated by the majority in the mandatory retirement cases has left a number of quasi-governmental organizations beyond the reach of the Charter: see, for example, *Canadian Blood Services v Freeman*, [2010 ONSC 4885](#) (Canadian Blood Services not controlled by government; decision to exclude men who have had sex with men from donating blood not subject to the Charter); *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, [2009 BCCA 522](#) (organizing committee for Vancouver Olympics not controlled by government; decision to exclude women ski jumpers from participation in the games not subject to the Charter). Does the control test unduly limit the scope of the Charter's application? Would a public function test or a public purpose test, as proposed by Wilson J in *McKinney*, have been preferable?

7. An issue that still remains unsettled is whether Crown corporations (such as Canada Post) are subject to the Charter. Should the fact of governmental ownership be a sufficient connection to government for the purposes of Charter application? Should designation as a Crown agent be determinative? Will the degree of ministerial control be examined? Will Crown corporations be found subject to the Charter with respect to some of their activities but not

others? Before the Supreme Court of Canada's decision in *Lavigne*, for example, several lower courts had expressed the view that while some aspects of Canada Post's operations might be subject to the Charter, the collective bargaining relationship between it and its union was not: see *Canadian Union of Postal Workers, Calgary Local 710 v Canada Post Corporation*, [1987 CanLII 3387, 40 DLR \(4th\) 67 \(Alta QB\)](#) (holding that Canada Post security rules that required inspection of employees were open to review under the Charter); cf *Canada Post Corp v CUPW*, [1991 CanLII 8320, 84 DLR \(4th\) 150 \(Ont Gen Div\)](#) (holding that the Charter had no application to union picketing of a post office during a labour dispute). Note, however, that in *Lavigne*, discussed above in note 3, the Supreme Court of Canada disapproved of the attempt to distinguish between the public and commercial/private transactions of government.

A number of decisions have found that the Charter does not apply to the Canadian Broadcasting Corporation. Although recognizing that the CBC is a Crown agency whose functions are public in nature, the decisions have gone on to emphasize that the CBC has programming independence and its policy decisions are neither decisions of government nor subject to government influence or interference: see *Trieger v Canadian Broadcasting Corp*, [1988 CanLII 4568, 54 DLR \(4th\) 143 \(Ont H Ct J\)](#); *National Party of Canada v Canadian Broadcasting Corp*, [1993 CanLII 7151, 106 DLR \(4th\) 568 \(Alta QB\)](#), aff'd [1993 ABCA 269](#), leave to appeal to SCC refused, [\[1993\] 3 SCR 651, 1993 CanLII 85 \(4 October 1993\)](#) (decision of CBC to produce and televise a leadership debate that did not include the participation of the leader of the applicant party not subject to Charter scrutiny); *Natural Law Party of Canada v Canadian Broadcasting Corp*, [\[1994\] 1 FC 580, 1993 CanLII 3005 \(TD\)](#) (to the same effect); *Adbusters Media Foundation v Canadian Broadcasting Corp*, [1995 CanLII 1544, \[1996\] 2 WWR 698 \(BCSC\)](#) (Charter not applicable to CBC's policy on advocacy advertising).

As we shall see in Section II.B, even when entities such as universities, hospitals, or the CBC are found not to be governmental actors, they may be subject to the Charter when they are implementing specific government policies or programs or exercising statutory powers of compulsion.

8. In a portion of *McKinney* not in the excerpt above, La Forest J referred to US decisions under the state action doctrine. In some cases, US courts have applied the doctrine broadly, with the result that the *Bill of Rights* has been found to apply to private entities that perform a public function or that are connected to the state through funding and lease arrangements. Thus, in *Marsh v Alabama*, a company town was found subject to the First Amendment because it performed the same functions as a state-created municipality. And in *Burton v Wilmington Parking Authority*, 365 US 715, 81 S Ct 856 (1961), a private restaurant that leased premises from a parking authority that was an agency of the state of Delaware was held to be subject to the Fourteenth Amendment because (1) it leased premises in buildings that were owned and maintained by public funds, (2) there was mutual interdependence between the restaurant and the parking authority, and (3) the profits from discrimination contributed to the success of the governmental authority. As Katherine Swinton writes:

Some of the American tests are open to criticism, particularly those which seem to be based on leasing or financial support. Neither factor, alone, should convert private into public activity. If there is discrimination or restraint on freedoms by lessees or grant recipients, human rights codes or other legislation are likely to apply in Canada. Indeed, the state action doctrine developed, in part, because of the absence of comprehensive anti-discrimination legislation in many states and at the federal level, to restrain private action in the United States. It was not until 1964, with the enactment of the *Civil Rights Act*, that private discriminatory activity became subject to effective legislative restraint.

See Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms" in Walter Tarnopolsky & Gérald Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 41.

As Swinton notes, the US state action doctrine is one that proceeds not on the basis of clearly articulated rules, but on a case-by-case balancing of factors. Many of the cases decided since the 1960s have required a significant degree of state involvement in private activity before state action will be found. Thus in *Jackson v Metropolitan Edison Co*, 419 US 345, 95 S Ct 449 (1974), referred to by La Forest J in *McKinney*, a private utility was found not to be a state actor, and hence not subject to the due-process guarantees, despite the fact of state licensing and approval of the company's tariff, its monopoly status, and the nature of the service provided.

2. Entities Exercising Governmental Functions

Even if an entity is not part of the apparatus of either the federal or provincial government, because it is not subject to routine or regular ministerial control, it may nevertheless qualify as government for the purposes of s 32 of the Charter if it is exercising governmental functions. Many bodies exercise governmental functions that are conferred on them by federal or provincial legislation. Prominent examples include municipalities and professional regulatory bodies. How should the courts draw the line between entities that exercise governmental functions and those that do not? What is the difference between the public purpose test rejected by La Forest J in *McKinney* and the governmental function test he put forward in *Godbout*, immediately below? What are the markers of a "governmental" function?

Godbout v Longueuil (City)

[1997] 3 SCR 844, 1997 CanLII 335

[The city of Longueuil adopted a resolution requiring all new permanent employees to reside within its boundaries. As a condition of her employment, the respondent signed a declaration promising that she would establish her principal residence in the city and that she would continue to live there for as long as she remained in the city's employ. The declaration also provided that if she moved out of the city for any reason, she could be terminated without notice. When the respondent moved to a neighbouring municipality, her employment was terminated. The Supreme Court of Canada held unanimously that the city's residence requirement violated the right to respect for private life set out in s 5 of Quebec's *Charter of Human Rights and Freedoms*. Six members of the Court found it unnecessary to consider arguments based on the Canadian Charter. In his concurring opinion, La Forest J concluded that the residence policy also violated the Charter, specifically s 7, an aspect of the judgment that is discussed in Chapter 22, The Right to Life, Liberty, and Security of the Person. Before reaching this conclusion, however, La Forest J held that municipalities are subject to the Charter. His analysis of the application issue is excerpted below.]

LA FOREST J (McLachlin and L'Heureux-Dubé JJ concurring):

[47] ... [Where] entities other than Parliament, the provincial legislatures or the federal or provincial governments ... are, in reality, "governmental" in nature—as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform—they cannot escape *Charter* scrutiny. ... This is not to say, of course, that the *Charter* applies only to those entities (other than Parliament, the provincial legislatures and the federal and provincial governments) that are, by their nature, governmental. Indeed, it may be that particular entities will be subject to *Charter* scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be

described as "governmental" *per se*; see, e.g., *Re Klein and Law Society of Upper Canada* (1985), 1985 CanLII 3086 (ON SCDC), 50 O.R. (2d) 118 (Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the *Charter* in performing what amount to governmental functions. Rather, it is simply to say that where an entity can accurately be described as "governmental in nature," it will be subject in its activities to *Charter* review. Thus, the *Charter* applied to Douglas College (in *Douglas*) and to the Council of Regents (in *Lavigne*) because those bodies were wholly controlled by government and were, in essence, emanations of the provincial legislatures that created them. Since the same could not be said of the institutions under examination in *McKinney*, *Harrison*, and *Stoffman* (and since none of those institutions was implementing a specific government policy or programme in adopting its mandatory retirement regulations), the *Charter* did not apply in those cases.

[48] The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are—as a simple matter of fact—governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, ... [they] could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.

[49] I pause here to reiterate an important observation made in the cases discussed earlier concerning how the notion of "government" is to be understood. The mere fact that an entity performs what may loosely be termed a "public function" will not by itself mean that the body under examination is "governmental" in nature. ... In order for the Canadian *Charter* to apply ..., an entity must truly be acting in what can accurately be described as a "governmental"—as opposed to a merely "public"—capacity. The factors that might serve to ground a finding that an institution is performing "governmental functions" do not readily admit of any *a priori* elucidation. Nevertheless, and as I stated further on in *McKinney* (at p. 269), "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32."

[50] Having set out what I take to be the guiding principles, I turn now to examine directly the *Charter* application issues in this appeal. The main issue concerns whether the Canadian *Charter* applies to municipalities—like the appellant—at all. To my mind, the analysis I have undertaken thus far leads inexorably to the conclusion that it does. While this Court has never before expressly endorsed that proposition, we have done so inferentially, inasmuch as we have already applied the *Charter* to municipal by-laws without specifically engaging in an analysis of the application issue; see *Ramsden v. Peterborough (City)*, 1993, CanLII 60 (SCC), [1993] 2 S.C.R. 1084.

Moreover, the view that municipalities are subject to the *Charter* is not only sound, but also wholly consistent with the case law I have been discussing. Indeed, municipalities—though institutionally distinct from the provincial governments that create them—cannot but be described as “governmental entities.” I base this finding on a number of considerations.

[51] First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. To my mind, this itself is a highly significant (although perhaps not a decisive) *indictum* of “government” in the requisite sense. Secondly, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as “government,” is indistinguishable from the taxing powers of Parliament or the provinces. Thirdly, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. ... Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could (in the manner outlined earlier) simply avoid the application of the *Charter* by devolving powers on municipal bodies.

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[54] The approach I have taken to the relation of municipalities to the provinces finds further support, I think, in the reasoning underlying this Court’s decision in *Slaight Communications Inc. v. Davidson* There, we had to decide, *inter alia*, whether the Canadian *Charter* applied to the discretionary orders of a statutorily appointed arbitrator. Speaking for the Court on this issue, Lamer J. (as he then was) stated, at pp. 1077-78:

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. ... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter* [Emphasis added.]

While the application issues in *Slaight* and those in the present case are by no means identical, they can profitably be understood to share at least one salient feature; viz., both labour arbitrators (such as the one in *Slaight* itself) and municipalities (such as the appellant) exercise governmental powers conferred upon them by the appropriate legislative body. To be sure, the nature and scope of those powers is different. As regards the arbitrator in *Slaight*, the delegated power consisted in the discretion to make orders in the settlement of particular labour disputes. As regards municipalities, it consists in the much broader discretion to adopt and enforce coercive laws binding on a defined territory. In both cases, however, the ultimate source of authority is government *per se* and, consequently, the entity under scrutiny will be kept in check

through the application of the *Charter*, just as government itself would be were it performing the functions conferred.

[55] For all these reasons, then, I am firmly of the opinion that the Canadian *Charter* applies to municipalities. But what of the appellant's submission that the *Charter* should not apply because the activity in question—i.e., the imposition of the residence requirement—is a "private" as opposed to a "governmental" act? As I have already suggested, I cannot accept this distinction. The particular modality a municipality chooses to adopt in advancing its policies cannot shield its activities from *Charter* scrutiny. All the municipality's powers are derived from statute and all are of a governmental character; see the cited passage from *Slaight, supra*. An act performed by an entity that is governmental in nature is, to my mind, necessarily "governmental" and cannot properly be viewed as "private" at all. [Emphasis in original.]

NOTES

1. Justice La Forest's (three-person) minority opinion in *Godbout* was the only one to address the application of the *Charter*. Six of the judges resolved the case on the basis of the Quebec *Charter of Human Rights and Freedoms* and therefore did not need to address whether the Canadian *Charter* applied. As La Forest J noted, in a number of rulings involving challenges to municipal by-laws, the Court has assumed without discussion that the *Charter* applies to municipalities. But in those cases, the challenges were to municipal by-laws, a form of delegated legislation. Recall that in *Dolphin Delivery*, McIntyre J seemed to have little difficulty recognizing that the *Charter* would apply to delegated legislation:

[39] It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures.

Justice La Forest's ruling in *Godbout* went further and found that municipalities were governmental in nature and that all of their actions were therefore subject to the *Charter*. In *Greater Vancouver Transportation Authority v Canadian Federation of Students*, discussed above in Section II.A.1, the Supreme Court relied on *Godbout* to find that the Greater Vancouver Regional District was a "local government entity" bound by the *Charter*, and that the public transit authority controlled by it was also part of government (at para 21).

2. Are the territorial governments of the Yukon and the Northwest Territories subject to the *Charter*? On what basis? Is the government of Nunavut in the same position?

3. Are Indigenous governments subject to the *Charter*? Section 32 does not mention Indigenous governments; it refers to all matters within the authority of the federal and provincial governments. The issue is complicated by the different sources of Indigenous governmental powers: they arise from inherent rights to self-government; treaty rights; and, in the case of band councils, the provisions of the *Indian Act*, RSC 1985, c I-5. In *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30](#), the Supreme Court of Canada assumed that First Nations' band councils established under the *Indian Act* were government entities subject to the *Charter*. The terms of a treaty may also subject the exercise of Indigenous governmental powers to *Charter* constraints: see, for example, the Nisga'a Final Agreement (1998), as discussed in Section IX of Chapter 14, Distribution of Legislative Authority, which provides that the *Charter* applies to the Nisga'a government in respect of all matters within its authority.

4. Does the *Charter* apply to professional bodies endowed with statutory powers of regulation? In *Re Klein and Law Society of Upper Canada*, [1985 CanLII 3086, 50 OR \(2d\) 118 \(H Ct J \(Div Ct\)\)](#) the Law Society of Upper Canada's (now the Law Society of Ontario's) rules with respect to lawyers' advertising were found to be subject to the *Charter*. The application of the

Charter to law society rules was assumed without discussion by the Supreme Court in *Black v Law Society of Alberta*, [1989] 1 SCR 591, 1989 CanLII 132 (law society rule prohibiting partnerships with non-resident lawyers violating the mobility rights in s 6 of the Charter). As with municipal by-laws, the application of the Charter to these exercises of delegated law-making power would appear to be relatively uncontentious. As well, as discussed below in Section II.B.2, the Charter is applicable when professional bodies are exercising discretion pursuant to statutory authority, although the analysis of whether proportionate weight has been given to Charter rights and values is now to be conducted under the framework set out in *Doré v Barreau du Québec*, 2012 SCC 12; see *Dore* itself (Charter applicable to disciplinary ruling of law society); and *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 (Charter applicable to law society decision about accreditation of a law school). (Both cases are discussed below, in Section IV.C.) Will the Charter apply to professional regulatory bodies in all of their activities, or only when they are exercising statutory powers of compulsion that are governmental in nature? Are they to be considered governmental actors or non-governmental actors exercising some governmental powers?

5. Does the Charter apply to human rights commissions? In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, discussed below, in Section II.B.2, the Supreme Court of Canada found that the Ontario Human Rights Commission, although not part of government and not controlled by government, was subject to the Charter because it was a body created by statute to implement a government objective and all of its actions were pursuant to statutory authority. Does this reasoning suggest that the commission as a whole was "governmental in nature," like the municipalities in *Godbout*, or only that it was a non-governmental entity implementing a government policy and exercising statutory powers of compulsion, and hence bound by the Charter under the principles of *Eldridge*, below, with respect to specific actions? Does the latter characterization make sense when you are dealing with an entity created by statute, whose every action is pursuant to statutory authority?

B. GOVERNMENTAL ACTS

1. Non-Governmental Entities Implementing Government Programs

Eldridge v British Columbia (AG)

[1997] 3 SCR 624, 1997 CanLII 327

[Three individuals who were born deaf and whose preferred means of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s 15 of the Charter. According to the *Medical and Health Care Services Act*, SB 1992, c 76, the power to decide whether a service is "medically required" and hence a "benefit" under the Act is delegated to the Medical Services Commission. In the case of the *Hospital Insurance Act*, RSBC 1979, c 180, hospitals were given discretion to determine which services should be provided free of charge. The commission and the hospitals did not make sign language interpretation available as an insured service. Justice La Forest's analysis of the application issue follows. The portion of the decision dealing with the s 15 equality issue is found in Chapter 23, Equality Rights.]

LA FOREST J (Lamer CJ and L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ concurring):

Application of the Charter

[19] There are two distinct *Charter* “application” issues in this case. The first is to identify the precise source of the alleged s. 15(1) violations. As I will develop later, in my view it is not the impugned legislation that potentially infringes the *Charter*. Rather, it is the actions of particular entities—hospitals and the Medical Services Commission—exercising discretion conferred by that legislation that does so. The second question is whether the *Charter* applies to those entities. In my view, the *Charter* applies to both in so far as they act pursuant to the powers granted to them by the statutes. I deal with each of these questions in turn.

The Sources of the Alleged Charter Violations

[20] ... There is no question, of course, that the *Charter* applies to provincial legislation; see *RWDSU v. Dolphin Delivery Ltd.*, ... [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

[21] The s. 32 jurisprudence of this Court has for the most part focused on the first type of *Charter* violation. There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. ...

[22] The question in the present case, then, is whether the alleged breach of s. 15(1) arises from the impugned legislation itself or from the actions of entities exercising decision-making authority pursuant to that legislation. The proper framework for determining this question was set out by Lamer J. (as he then was) and approved by a majority of this Court in *Slaight Communications Inc. v. Davidson*, ... [1989] 1 S.C.R. 1038. ...

[Justice La Forest concluded that the source of the violation of s 15 in this case was not the legislation, but the actions of the Medical Services Commission and the hospitals, the entities exercising statutory decision-making authority pursuant to that legislation.]

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[35] Having identified the sources of the alleged s. 15(1) violations, it remains to be considered whether the *Charter* actually applies to them. At first blush, this may seem to be a curious question. As I have discussed, it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so; *Slaight, supra*. It is possible, however, for a legislature to give authority to a body that is not subject to the *Charter*. Perhaps the clearest example of this is the power of incorporation. Private corporations are entirely creatures of statute; they have no power or authority that does not derive from the legislation that created them. The *Charter* does not apply to them, however, because legislatures have not entrusted them to implement specific governmental policies. Of course, governments may desire corporations to serve certain social and economic purposes, and may adjust the terms of their existence to accord with those goals. Once brought into being, however, they are completely autonomous from government; they are empowered to exercise only the same contractual and proprietary powers as are possessed by natural persons. As a result,

while the legislation creating corporations is subject to the *Charter*, corporations themselves are not part of "government" for the purposes of s. 32 of the *Charter*.

[36] Legislatures have created many other statutory entities, however, that are not as clearly autonomous from government. There are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the *Charter*, it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the *Charter*.

[Justice La Forest's review of the case law has been omitted.]

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[40] In *Douglas and Lavigne*, the argument was made that even if the entities in question were generally part of "government" for the purposes of s. 32, the *Charter* should not apply to the "private" or "commercial" arrangements they engage in. In each case, the Court rejected this contention, holding that when an entity is determined to be part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as "private." The rationale for this principle is obvious: governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements. . . .

[41] While it is well established that the *Charter* applies to all the activities of government, whether or not those activities may be otherwise characterized as "private," this Court has also recognized that the *Charter* may apply to non-governmental entities in certain circumstances . . . It has been suggested, for example, that the *Charter* will apply to a private entity when engaged in activities that can in some way be attributed to government. . . .

[42] It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. . . .

[43] Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a "public function," or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*. . . In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. . . .

[44] The second important point concerns the precise manner in which the *Charter* may be held to apply to a private entity. As the case law discussed above makes clear, the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity . . . can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be

characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private." Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature—for example, the implementation of a specific statutory scheme or a government program—the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

[45] In the present case, the controversy over the *Charter's* application centres on the question of hospitals. The respondents argue that if the failure to provide sign language interpreters does not flow from the Act but rather from the discretion of individual hospitals, then s. 15(1) is not engaged because the *Charter* does not apply to hospitals. Hospitals, they say, are not "government" for the purposes of s. 32 of the *Charter*. In their view, this result flows from a straightforward application of this Court's decision in *Stoffman*

[46] The foregoing analysis, however, establishes that it is not enough for the respondents to say that hospitals are not "government" for the purposes of s. 32 of the *Charter*. In *Stoffman*, the Court found that the Vancouver General Hospital was not part of the apparatus of government and that its adoption of a mandatory retirement policy did not implement a government policy. *Stoffman* made it clear that, as presently constituted, hospitals in British Columbia are non-governmental entities whose private activities are not subject to the *Charter*. It remains to be seen, however, whether hospitals effectively implement governmental policy in providing medical services under the *Hospital Insurance Act*.

[47] There is language in *Stoffman* that could be read as precluding the application of the *Charter* in the circumstances of the present case. There, I wrote, at p. 516, that "there can be no question of the Vancouver General's being held subject to the *Charter* on the ground that it performs a governmental function, for ... the provision of a public service, even if it is one as important as health care, is not the kind of function which qualifies as a governmental function under s. 32." That statement, however, must be read in the context of the entire judgment. I determined only that the fact that an entity performs a "public function" in the broad sense does not render it "government" for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances. ...

[48] [In *Stoffman*] the hospital's mandatory retirement policy, which was embodied in Medical Staff Regulation 5.04, was a matter of internal hospital management. ... It was not instigated by the government and did not reflect its mandatory retirement policy. Hospitals in British Columbia, moreover, exhibited great variety in their approaches to retirement. That each of these policies obtained ministerial approval reflected the large measure of managerial autonomy accorded to hospitals in this area.

[49] The situation in the present appeal is very different. The purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are delivered and administered through private institutions—hospitals—it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it. ...

[50] The structure of the *Hospital Insurance Act* reveals, therefore, that in providing medically necessary services, hospitals carry out a specific governmental objective. The Act is not, as the respondents contend, simply a mechanism to prevent

hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program. It is true that hospitals existed long before the statute, and have historically provided a full range of medical services. In recent decades, however, health care, including that generally provided by hospitals, has become a keystone tenet of governmental policy. The interlocking federal-provincial medicare system ... entitles all Canadians to essential medical services without charge. Although this system has retained some of the trappings of the private insurance model from which it derived, it has come to resemble more closely a government service than an insurance scheme

[51] Unlike *Stoffman*, then, in the present case there is a "direct and ... precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination—the failure to provide sign language interpretation—is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

[52] The case of the Medical Services Commission is more straightforward. It was not contested that the *Charter* applies to the Commission in exercising its power to determine whether a service is a benefit pursuant to s. 4(1) of the *Medical and Health Care Services Act*. It is plain that in so doing, the Commission implements a government policy, namely, to ensure that all residents receive medically required services without charge. In lieu of setting out a comprehensive list of insured services in legislation, the government has delegated to the Commission the power to determine what constitutes a "medically required" service. There is no doubt, therefore, that in exercising this discretion the Commission acts in governmental capacity and is thus subject to the *Charter*. As there is no need to do so, I refrain from commenting on whether the Commission might be considered part of government for other purposes.

[Justice La Forest went on to find that the failure to provide funding for sign language interpretation violated the applicants' equality rights. For this portion of the ruling, see Chapter 23.]

NOTES AND QUESTIONS

1. As noted above, in *Greater Vancouver Transportation Authority v Canadian Federation of Students*, Deschamps J, writing for a unanimous court, found that two BC public transit authorities, TransLink and BC Transit, were bound by the *Charter*. One reason Deschamps J gave for finding that Translink was bound by the *Charter* was because it was under the control of a local government—the Greater Vancouver Regional District. However, applying *Eldridge*, she went on to add another reason—that the GVRD and, hence, Translink were implementing the government's public transit policy:

[22] The conclusion that TransLink is a government entity is also supported by the principle enunciated by La Forest J. in *Eldridge* (at para. 42) and *Godbout* (at para. 48) that a government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity. The creation of TransLink by statute in 1998 and the partial vesting by

the province of control over the region's public transit system in the GVRD was not a move towards the privatization of transit services, but an administrative restructuring designed to place more power in the hands of local governments . . . The devolution of provincial responsibilities for public transit to the GVRD cannot therefore be viewed as having created a "Charter-free" zone for the public transit system in Greater Vancouver.

As discussed in Chapter 20, Freedom of Expression, Deschamps J went on to find that the public transit authorities' policy of not accepting political advertisements infringed s 2(b) and was not a minimal impairment of freedom of expression.

2. Just as hospitals in British Columbia are not part of the apparatus of government (*Stoffman*) but are subject to the Charter when delivering public health care services (*Eldridge*), might universities be subject to the Charter when making decisions related to the delivery of post-secondary education services to students? The answer from lower courts has been mixed. Courts have rejected attempts to apply the reasoning in *Eldridge* to universities in *BC Civil Liberties Association v University of Victoria*, [2016 BCCA 162](#); *Lobo v Carleton University*, [2012 ONCA 498](#); *Telfer v The University of Western Ontario*, [2012 ONSC 1287](#); and *AlGhaithy v University of Ottawa*, [2012 ONSC 142](#). In several other rulings, however, judges have relied on *Eldridge* to find that universities were bound to comply with the Charter when engaged in activities related to the implementation of specific post-secondary education programs: *R v Whatcott*, [2011 ABPC 336](#), aff'd [2012 ABQB 231](#); *Pridgen v University of Calgary*, [2010 ABQB 644](#), aff'd on other grounds, [2012 ABCA 139](#). (As discussed in Section II.B.2, below, it may also be possible to characterize some actions of universities as exercises of statutory powers of compulsion and hence subject to the Charter.)

More recently, the Alberta CA in *UAlberta Pro-Life v Governors of the University of Alberta*, [2020 ABCA 1](#), held that the university's regulation of student expression on campus amounted to government action subject to the Charter because the university's purpose, established by statute, was to educate students and this was achieved "largely by means of free expression" (at para 148). In 2018, the Ontario government required all universities to establish free speech policies that conformed with the "Chicago Principles." Does this now mean that the decisions of Ontario universities concerning student speech on campus will be subject to Charter review? Does it matter that most Ontario universities already had some form of free speech protection written into their policies or by-laws?

3. As noted earlier, attempts to apply the "implementing a specific governmental policy or program" test to other non-governmental actors failed in *Canadian Blood Services v Freeman*; *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, and *R v Booyink*. See also *Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform*, [2014 ABQB 493](#).

2. Entities Exercising Statutory Powers of Compulsion

In addition to government actors, and non-governmental actors implementing specific government programs, the Charter applies to non-governmental actors exercising coercive statutory powers. This was recognized by La Forest J in *Eldridge*, above, in paras 20 and 21.

Thus, in *Slaight*, the Charter was held to apply to the order of an adjudicator acting pursuant to the *Canada Labour Code*, RSC 1970, c L-1 because the adjudicator was exercising powers conferred by legislation. Justice Lamer, who wrote for the majority on the issue, reasoned as follows:

The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation

conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. ... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis in original.]

On the facts of *Slaight*, the adjudicator's order requiring an employer who had wrongfully dismissed an employee to write a specific letter of reference for his employee was found to constitute a violation of freedom of expression, but one that could be upheld as a reasonable limit under s 1. (The treatment of this issue is discussed further in Chapter 20, Section III.)

NOTES AND QUESTIONS

1. The *Eldridge* and *Slaight* rulings were followed in *Blencoe v British Columbia (Human Rights Commission)*, which concerned whether the lengthy delays in processing a sexual harassment complaint had violated the respondent's rights under s 7 of the Charter. It was argued that the commission's independence from government rendered the Charter inapplicable to its actions. Justice Bastarache, writing for the majority, rejected this argument. He held that even though the commission was not part of the apparatus of government or controlled by the government, its acts could be subject to the Charter. First, like the Medical Services Commission and hospitals in *Eldridge*, the Human Rights Commission was charged with implementing a specific government policy or program. Second, the commission exercised statutory powers of compulsion:

[35] Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. ...

[36] One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P.W. Hogg, *Constitutional Law of Canada* ... at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents.

For these two reasons, the Charter applied to the commission's acts in processing the complaint, although Bastarache J went on to find no violation of Blencoe's Charter rights. That aspect of the judgment is discussed in Chapter 22.

2. The result of the decisions in *Slaight* and *Blencoe* is that some adjudicative bodies, such as administrative tribunals and labour adjudicators, are bound by the Charter, while courts, following *Dolphin Delivery*, are not, at least insofar as their orders are at the request of private litigants relying on the common law. However, as we will see below in Section IV, two developments have significantly narrowed the gap in the Charter's role in common law adjudication and administrative decision-making that resulted from *Dolphin Delivery* and *Slaight* and *Blencoe*. First, a number of rulings have given effect to McIntyre J's dicta in *Dolphin Delivery* that the courts must develop the common law in accordance with Charter values. Second, the Supreme Court of Canada has reframed the role of the Charter in discretionary decision-making by administrative bodies exercising statutory powers, such as the arbitrator in *Slaight* and the Human Rights Commission in *Blencoe*: see *Doré v Barreau du Québec* and *Loyola High School v Québec (AG)*, [2015 SCC 12](#). According to *Doré* and *Loyola*, the exercise of statutory discretion by administrative decision-makers must reflect a proportionate or reasonable balancing of Charter rights and values with legislative objectives.

3. Should the Charter apply to protect actions committed by private security guards, such as arbitrary detentions, unreasonable searches, denials of the right to counsel, or other rights violations? In *R v Buhay*, [2003 SCC 30](#), the issue arose in the context of a seizure of marijuana from a rented locker in a Winnipeg bus depot. The Court found that the Charter did not apply to the private security guards who conducted the initial search. Citing *R v Broyles*, [\[1991\] 3 SCR 595, 1991 CanLII 15](#) (police informer not acting as state agent) and *R v M (MR)*, (school vice-principal not acting as state agent when searching student), Arbour J held that the question is whether the security guards were acting as state agents when searching the locker. In this case, the security guards had acted totally independently of the police in their initial search:

[28] Nothing in the evidence allows a conclusion that the security guards or the agency by which they were employed can be assimilated to the government itself, nor can their activities be ascribed to those of the government. Private security guards are neither government agents nor employees, and apart from a loose framework of statutory regulation, they are not subject to government control. Their work may overlap with the government's interest in preventing and investigating crime, but it cannot be said that the security guards were acting as delegates of the government carrying out its policies or programs. Even if one concedes that the protection of the public is a public purpose which is the responsibility of the state, this is not sufficient to qualify the functions of the security guards as governmental in nature.

Does the analysis in *Buhay* change if a private security guard or other non-governmental actor is exercising a power of "citizen's arrest" pursuant to s 494 of the *Criminal Code*? The issue is unresolved—some courts have decided that the Charter does apply to a citizen's arrest; others have concluded that it does not. Which view is more consistent with *Slaight*, *Blencoe*, or the overall purposes of the Charter? The Alberta Court of Appeal has found that the Charter applies on the ground that a citizen conducting an arrest is exercising a delegated government function: see *R v Lerke*, [1986 ABCA 15](#); *R v Dell*, [2005 ABCA 246](#). In *R v Skeir*, [2005 NSCA 86](#) (leave to appeal to the SCC denied), the Nova Scotia Court of Appeal considered and rejected the Alberta Court of Appeal's approach in *Lerke*. In the Court's view, s 494 of the *Criminal Code* does not amount to "an express delegation nor an abandonment in whole or part, of the police arrest power to private security officers" (at para 21). Moreover, the Supreme Court of Canada's approach in *Buhay*, above, was found to lend support to the view that a "private security guard's arrest function may be subject to the *Charter* only if, after a case specific analysis, it is determined that he acted as a state or police agent" (at para 18).

III. GOVERNMENT INACTION AND GOVERNMENT RESPONSIBILITY

Section 32 provides that the Charter applies to all matters within the authority of the federal and provincial governments. If a Charter right or freedom requires the fulfillment of a positive obligation, the Charter will apply to inaction on the part of the government with jurisdiction to meet that obligation. Thus, for example, if a province fails to fund minority language educational facilities in accordance with its obligations pursuant to s 23 of the Charter, its inaction will be subject to the Charter: see *Arsenault-Cameron v Prince Edward Island*, [2000 SCC 1](#); *Mahe v Alberta*, [\[1990\] 1 SCR 342, 1990 CanLII 133](#), found in Chapter 24, Language Rights. Since most Charter provisions impose a mix of positive and negative obligations on government, inaction may be the subject of Charter scrutiny in a variety of contexts.

Sometimes the state may be seen as responsible for, or implicated, in private wrongs to such an extent that it is considered itself to have breached a Charter right. The *Vriend* case, which follows, contains a discussion of the issue in the context of equality rights.

Vriend v Alberta

[1998] 1 SCR 493, 1998 CanLII 816

[This case involved a challenge to the omission of sexual orientation from Alberta's *Individual's Rights Protection Act* (IRPA). The general scheme of the IRPA, like similar legislation in all other provinces, was to prohibit discrimination in public life, and to establish a commission for enforcement. More particularly, it prohibited discrimination in public notices, public services, rentals, and employment or trade union membership on the basis of race, religious beliefs, colour, sex, marital status, age, and ancestry or place of origin. Sexual orientation was not included among the prohibited grounds, and the legislative history demonstrated clearly that the omission was deliberate.]

Vriend was an employee of King's College, a Christian educational institution. His employers asked him about his sexual orientation and dismissed him after he affirmed that he was gay. His attempt to file a complaint under the Act was rejected because of the omission. He then brought this action for a declaration that the omission offended the Charter, and he was joined by several supporting groups. The Supreme Court found that the omission violated Vriend's equality rights and held that the words "sexual orientation" should be read into the relevant provisions of the Act. Below are excerpts from Cory J's discussion of why the Charter applies to the legislative omission at issue. Further discussion of the *Vriend* ruling can be found in Chapter 23 and Chapter 25, Enforcement of Rights.]

CORY J (Lamer CJ and Gonthier, McLachlin, Iacobucci, and Bastarache JJ concurring):

[50] Does s. 32 of the *Charter* prohibit consideration of a s. 15 violation when that issue arises from a legislative omission?

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[52] This issue is resolved simply by determining whether the subject of the challenge in this case is one to which the *Charter* applies pursuant to s. 32. Questions relating to the nature of the legislature's decision, its effect, and whether it is neutral, are relevant instead to the s. 15 analysis. The threshold test demands only that there is some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis. ...

[53] Further confusion results when arguments concerning the respective roles of the legislature and the judiciary are introduced into the s. 32 analysis. These arguments put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of *Charter* review should be restricted so that such decisions will be unchallenged. I cannot accept this position. Apart from the very problematic distinction it draws between legislative action and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in *Charter* analysis. The deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a *Charter* breach. ...

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[59] The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny. This submission should not be accepted. They assert that there must be some "exercise" of "s. 32 authority" to bring the decision of the legislature within the purview of the *Charter*. Yet there is nothing either in the text of s. 32 or in the jurisprudence concerned

with the application of the *Charter* which requires such a narrow view of the *Charter's* application.

[60] The relevant subsection, s. 32(1)(b), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province." There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" ("The Sounds of Silence: *Charter* Application When the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.

[61] The *IRPA* is being challenged as unconstitutional because of its failure to protect *Charter* rights, that is to say its underinclusiveness. The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the *Charter* inapplicable. If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*.

[62] It might also be possible to say in this case that the deliberate decision to omit sexual orientation from the provisions of the *IRPA* is an "act" of the Legislature to which the *Charter* should apply. This argument is strengthened and given a sense of urgency by the considered and specific positive actions taken by the government to ensure that those discriminated against on the grounds of sexual orientation were excluded from the protective procedures of the Human Rights Commission. However, it is not necessary to rely on this position in order to find that the *Charter* is applicable.

[63] It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner. It has been held that certain provisions of the *Charter*, for example those dealing with minority language rights (s. 23), do indeed require a government to take positive actions to ensure that those rights are respected . . . [Emphasis in original.]

NOTES AND QUESTIONS

1. The Court apparently felt able to treat the omission as a state act first because the inclusion of sexual orientation had become the norm in human rights codes, and second, because the legislative record showed that the government had specifically decided not to include this ground—in other words, the omission was not simply an oversight. But what if the Alberta government had decided to include only some grounds of discrimination, such as race and religion, but not others? What if it had decided to repeal the Act entirely? At what point can we say that the failure to prohibit private sector discrimination is an act of the state contrary to s 15?

Richard Moon, in "Discrimination and Its Justification: Coping with Equality Rights Under the Charter" (1988) 26:4 Osgoode Hall LJ 673, points out that the state action doctrine does not apply easily to s 15, when the right is understood as ban on effects discrimination (at 703):

Even if the issue of constructive discrimination arises in the context of a legal action which involves a limited number of parties and focuses on the legitimacy of a particular law, the investigation of the court inevitably takes it beyond a simple examination of the provisions of the particular law and the effect of that law on the particular parties. The courts must assess the position of the group in society: is the group "discrete and insular" or generally in a disadvantaged position in relation to the rest of the community? A decision on this will require the courts to examine the wider social system and the overall distribution of social benefits. A particular law triggers review, but judicial consideration must extend to the general system of laws.

For further discussion, see the treatment of adverse impact discrimination in Chapter 23.

2. The courts have held on a number of occasions that once government has decided to implement a policy or program, it must do so in a non-discriminatory manner. Thus *Vriend* can be seen as simply confirming the view that "underinclusive" government laws or programs can be subject to Charter review: see, for example, *Schachter v Canada*, [1992] 2 SCR 679, 1992 CanLII 74; *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 1991 CanLII 12; *Eldridge*. There is, by contrast, little judicial support for the view that s 15 imposes positive obligations on governments to *initiate* action against inequalities.

3. The courts have typically characterized the fundamental freedoms in s 2 of the Charter as being purely negative in character, imposing no positive obligations on the state. For example, the traditional view of freedom of expression is that it "prohibits gags, but does not compel the distribution of megaphones" (*Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1035, 1993 CanLII 58 per L'Heureux-Dubé J). In some situations, however, exclusion from an established government program that supports expression may be experienced as censorship. Imagine a situation in which a private citizen physically interferes with a street corner speaker because they disagree with the speaker's views, and a police officer witnesses this but declines to intervene because they also oppose the speaker's views. Would we say that the failure by the police officer to protect the expression rights (and physical welfare) of the speaker counts as a breach of freedom of expression, even though the officer has taken no action?

However, in *Dunmore v Ontario (AG)*, 2001 SCC 94, found in Chapter 21, the Supreme Court departed to some degree from this traditional view. The Court suggested that governments may have positive obligations to protect the freedom of association of vulnerable groups. At issue in *Dunmore* was labour legislation that excluded agricultural workers from the right to form a trade union and bargain collectively with their employers. The Court found that the exclusion violated freedom of association. Justice Bastarache, writing for the majority, asked whether the vulnerability of workers meant:

[20] ... in order to make the freedom to organize meaningful, s. 2(d) of the Charter imposes a positive obligation on the state to extend protective legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.

He went on to reject the argument that the state has no obligation to facilitate the exercise of associational freedoms:

[26] ... In this case, it is said that the inability to form an association is the result of private action and that mandating inclusion in a statutory regime would run counter to this Court's

decision in *Dolphin Delivery* However, it should be noted that this Court's understanding of "state action" has matured since the *Dolphin Delivery* case and may mature further in light of evolving Charter values. For example, this Court has repeatedly held that the contribution of private actors to a violation of fundamental freedoms does not immunize the state from Charter review; rather, such contributions should be considered part of the factual context in which legislation is reviewed. . . . Moreover, this Court has repeatedly held in the s. 15(1) context that the Charter may oblige the state to extend underinclusive statutes to the extent underinclusion licenses private actors to violate basic rights and freedoms Finally, there has been some suggestion that the Charter should apply to legislation which "permits" private actors to interfere with protected s. 2 activity, as in some contexts mere permission may function to encourage or support the act which is called into question. . . . If we apply these general principles to s. 2(d), it is not a quantum leap to suggest that a failure to include someone in a protective regime may affirmatively permit restraints on the activity the regime is designed to protect. The rationale behind this is that underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms. [Emphasis in original.]

Justice Bastarache was quick to add that his comments should not be taken as suggesting that the state is obliged to act where it has not already legislated:

[29] . . . One must always guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place. By the same token, it must be remembered why the Charter applies to legislation that is underinclusive. Once the state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to Charter review.

Is the distinction Bastarache J draws between legislative silence and underinclusive legislation persuasive? If underinclusive legislation can substantially interfere with the freedom to organize of excluded groups, as Bastarache J held in *Dunmore*, why would a complete failure to recognize associational freedom be less damaging?

IV. APPLICATION OF THE CHARTER TO COURTS, THE COMMON LAW, AND THE EXERCISE OF ADMINISTRATIVE DISCRETION

In *Dolphin Delivery*, the Supreme Court stated that the courts were not part of government for the purposes of s 32(1) of the Charter. This proposition makes little sense and has since been generally ignored. If the Charter did not apply to the courts, a number of the Charter's provisions, like the right to a fair trial within a reasonable time, would be impossible to enforce.

Dolphin Delivery also stands for the proposition that the Charter does not apply to the common law when relied on by private litigants, nor does it apply to a court order issued at the conclusion of litigation between private parties resolved on the basis of the common law. These aspects of the ruling have been followed. Their significance, however, appears to be dwindling as the courts become more comfortable with the notion, also emanating from *Dolphin Delivery*, that the common law needs to be applied and developed in a manner consistent with Charter values.

A. THE APPLICATION OF THE CHARTER ON THE COMMON LAW

In *Dolphin Delivery*, not only did the Court decide that the Charter did not apply to private action (as noted earlier), it also held that the Charter did not apply to the common law rules when relied on by a private litigant.

RWDSU v Dolphin Delivery Ltd

[\[1986\] 2 SCR 573, 1986 CanLII 5](#)

[At issue was the validity of a court order restraining the appellant union from picketing the premises of the respondent company, Dolphin Delivery. Union members were engaged in a labour dispute with their employer, Purolator, and they wished to picket Dolphin Delivery's premises on the grounds that the company was related to Purolator and was performing work for Purolator during the strike. Because the applicable labour legislation, the *Canada Labour Code*, did not regulate "secondary picketing," the legality of the proposed picketing fell to be determined by the common law. Relying on the common law tort of inducing breach of contract, a BC court issued an injunction to restrain the picketing. On appeal, the union sought to have the injunction overturned on the ground that it violated its members' freedom of expression. The BC Court of Appeal dismissed the appeal and the union appealed to the Supreme Court of Canada.]

Writing for the majority, McIntyre J held that peaceful picketing enjoyed protection pursuant to s 2(b). He went on to conclude that Dolphin Delivery was not related to Purolator, and therefore an injunction to restrain the union from picketing Dolphin Delivery's premises was a reasonable limit on expressive freedoms that could be justified pursuant to s 1. These aspects of the decision are dealt with further in Chapter 20. While the conclusion on infringement of freedom of expression was sufficient to dismiss the appeal, McIntyre J went on to discuss whether the Charter even applied to the dispute in the first place.

He began by asking whether the Charter applied to the common law. Relying on the text of s 52 of the *Constitution Act, 1982*, he gave this question an affirmative response (at para 25):

In my view, there can be no doubt that it does apply. ... The English text [of s 52] provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit.*" (Emphasis added.) To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

He then asked whether the Charter applied to litigation between private parties. After quoting from a number of commentators, and relying on the text of s 32, he concluded in the excerpts below that it did not.]

McINTYRE J (Dickson CJ and Estey, Chouinard, and Le Dain JJ concurring):

[33] I am in agreement with the view that the *Charter* does not apply to private litigation. It is evident from the authorities and articles cited above that that approach has been adopted by most judges and commentators who have dealt with

this question. In my view, s. 32 of the *Charter*, specifically dealing with the question of *Charter* application, is conclusive on this issue. ... Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word "government" is used in s. 32 it refers not to government in its generic sense—meaning the whole of the governmental apparatus of the state—but to a branch of government. The word "government," following as it does the words "Parliament" and "Legislature," must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word "government" is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the Provinces. This is the sense in which the words "Government of Canada" are ordinarily employed in other sections of the *Constitution Act, 1867*. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words "Government of Canada," particularly where they follow a reference to the word "Parliament," almost always refer to the executive government.

[34] It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. In this way the *Charter* will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

[35] The element of governmental intervention necessary to make the *Charter* applicable in an otherwise private action is difficult to define. We have concluded that the *Charter* applies to the common law but not between private parties. The problem here is that this is an action between private parties in which the appellant resists the common law claim of the respondent on the basis of a *Charter* infringement. The argument is made that the common law, which is itself subject to the *Charter*, creates the tort of civil conspiracy and that of inducing a breach of contract. The respondent has sued and has procured the injunction which has enjoined the picketing on the basis of the commission of these torts. The appellants say the injunction infringes their *Charter* right of freedom of expression under s. 2(b). ...

[36] I find the position [that the *Charter* applies to any court order based on the common law] troublesome and, in my view, it should not be accepted as an approach to this problem. While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the

Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the *Charter* applies.

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[38] ... [I]t is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the *Charter* by private litigants in private litigation. ...

[39] It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.

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[41] In the case at bar ... we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have found, the *Charter* applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the *Charter*. It follows then that the appeal must fail. ...

[Justices Wilson and Beetz each wrote concurring judgments in which they agreed with McIntrye J's treatment of the application issue, but disagreed with his reasoning on freedom of expression. Justice Beetz would have found that the picketing in issue was not a form of expression and that no question of an infringement of s 2(b) could arise. Justice Wilson would have reached a different result on the s 1 analysis.]

Appeal dismissed.

NOTES AND QUESTIONS

1. The decision in *Dolphin Delivery* has spawned a great deal of criticism. While many commentators support the basic premise of the decision—that is, that constitutions are intended to bind governments and that the *Charter* applies only to governmental action—they are critical of the way in which the Court drew the line between governmental and

non-governmental action. Some of the criticism has focused on the anomalies created by the decision's ruling that common law rules, when relied on by private litigants, are not subject to the Charter, whereas statutory rules governing private relationships are. The ruling creates the possibility of provincial variation in the application of the Charter depending on whether a province has codified a particular area of law—for example, libel law—or simply left the rules in common law form. As well, it raises the possibility of a significantly greater scope for the application of the Charter in Quebec than in the common law provinces, given that in Quebec the rules governing private relations are based on statute—the *Civil Code of Quebec*, CQLR c CCQ-1991. Numerous commentators have also pointed out the difficulty of maintaining that the courts are not bound by the Charter in the face of specific Charter guarantees that appear to be directed at courts. Others have argued that by leaving powerful private actors unchecked, the Charter cannot deliver on its promise of securing basic rights and liberties: see David Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37:2 UTLJ 183; Brian Slattery, "The Charter's Relevance to Private Litigation: Does *Dolphin Delivery*?" (1987) 32:4 McGill LJ 905; Allan C Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38:3 UTLJ 278; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

2. Peter Hogg, in "The *Dolphin Delivery* Case: The Application of the Charter to Private Action" (1987) 51 Sask L Rev 273, argues that, although it was correct in holding that purely private action should be unconstrained by the Charter, the Supreme Court drew the line in the wrong place and should have subjected the common law to the Charter to the extent that the common law has "crystallized" into a rule that can be enforced by the courts (at 279). This is the approach taken in some US cases. US courts have interpreted their *Bill of Rights* as applying only when there has been "state action," but in some cases have found state action when a judicial order is sought that would support the infringement of rights. Thus, in *Shelley v Kraemer*, the Court refused to enforce a racially discriminatory private agreement on the ground that a judicial remedy to aid private discrimination would be state action in violation of the equal protection guarantee found in the Fourteenth Amendment. In *New York Times Co v Sullivan*, 376 US 254, 84 S Ct 710 (1964), the common law of defamation was found to violate the First Amendment's guarantee of freedom of expression. Would this approach have been preferable to that adopted in *Dolphin Delivery*?

3. Is McIntyre J's narrow approach to the interpretation of s 32 consistent with the "large and liberal" interpretive principle the Court has applied to the rights-conferring provisions of the Charter? If not, what explains the difference in approach?

The significance of McIntyre J's ruling that the Charter does not apply directly to judges when developing and applying the common law in litigation between private parties has been significantly attenuated by subsequent rulings. In particular, the courts have followed McIntyre J's suggestion in *Dolphin Delivery* that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (at para 39). This statement, though, raised many questions, including whether the courts' scrutiny/development of common law rules should be as rigorous as its review of statutory provisions.

B. RELIANCE BY GOVERNMENT ON COMMON LAW

The Charter will apply to the common law when it is relied on in litigation involving a government party or in proceedings initiated for a public purpose. In *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214, 1988 CanLII 3, for example, the Chief Justice of the Supreme Court of British Columbia, on his own motion, issued a temporary injunction restraining government

employees on lawful strike from picketing a courthouse, on the ground that this interference with access to the courts constituted a contempt of Court. The union challenged the injunction as a violation of their Charter rights of freedom of expression. Chief Justice Dickson, writing for a majority of the Court, concluded at para 56 that the Charter applied to the Chief Justice's order:

As a preliminary matter, one must consider whether the order issued by McEachern C.J.S.C. is, or is not, subject to *Charter* scrutiny. ... *Dolphin Delivery* ... holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private." The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.

The Court concluded that the injunction did not violate the Charter.

Where a common law rule is relied on by the Crown in criminal proceedings, the Charter applies because state prosecution provides the requisite element of governmental action: see *R v Swain*, [1991] 1 SCR 933, 1991 CanLII 104 (common law rule permitting the Crown to raise the insanity defence over the objections of the accused found to violate the Charter); *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 1994 CanLII 39 (common law rules regarding publication bans reformulated to better protect freedom of expression).

In both *Swain* and *Dagenais*, the Court did not hesitate to reformulate the common law rules at issue to bring them into conformity with the Charter. As Lamer CJ wrote for the majority in *Swain*:

Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

When same-sex couples across the country initiated s 15 Charter challenges to the refusal of government officials to issue them marriage licences, the courts had no difficulty finding that the Charter applied to the common law rule relied on by government officials—the rule that defined marriage as the union of a man and a woman. In the landmark ruling of the Ontario Court of Appeal in *Halpern v Canada (AG)*, 2003 CanLII 26403, 65 OR (3d) 161 (CA), the Court found that the common law definition violated the equality rights of same-sex couples and went on to fashion a new common law definition of marriage as the "the voluntary union for life of two persons to the exclusion of all others" (at para 148). (The federal government did not seek leave to appeal this decision, or the similar decisions of several other courts of appeal, to the Supreme Court of Canada. Parliament subsequently enacted the *Civil Marriage Act*, SC 2005, c 33, which defines marriage, for civil purposes, as "the lawful union of two persons to the exclusion of all others." This advisory opinion is also discussed in Chapter 13, The Role of the Judiciary.)

C. RELIANCE ON COMMON LAW IN PRIVATE LITIGATION

The Supreme Court of Canada's first sustained discussion of the relevance of the Charter values to the development of the common law in private litigation is found in *Hill*, immediately below. As the notes that follow *Hill* show, the Court has since become comfortable with a somewhat bolder approach to applying Charter values to the common law.

Hill v Church of Scientology of Toronto

[1995] 2 SCR 1130, 1995 CanLII 59

[This case arose as a libel action brought by Crown attorney Casey Hill against the Church of Scientology and its lawyer, Morris Manning. The action was brought in response to a press conference held by Church representatives and Manning to publicize criminal contempt proceedings, which they planned to commence against Hill. Their allegation was that Hill misled a judge of the Supreme Court of Ontario and breached orders sealing documents belonging to the Church of Scientology. These allegations were found to be untrue in the subsequent contempt proceedings.

In the libel action, Manning and Scientology were found liable at trial. Their appeal from this judgment was dismissed by a unanimous Court of Appeal, and the Supreme Court of Canada dismissed a further appeal. One of the main issues before the Supreme Court of Canada was whether the common law of defamation was inconsistent with the Charter guarantee of freedom of expression. Only the portions of the judgment dealing with the application of the Charter to libel law are included in the following extract.]

CORY J (La Forest, Gonthier, McLachlin, Iacobucci, and Major JJ concurring):

[65] The appellants have not challenged the constitutionality of any of the provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The question, then, is whether the common law of defamation can be subject to *Charter* scrutiny. . . .

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[91] It is clear from *Dolphin Delivery* . . . that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. . . .

[92] Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

[93] When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

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[95] Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values. [Emphasis in original.]

[96] Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking *Charter* values into account. Far-reaching changes to the common law must be left to the legislature.

[97] When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the *Charter* "challenge" in a case involving private litigants does not allege the violation of a *Charter* right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.

[98] Finally, the division of onus which normally operates in a *Charter* challenge to government action should not be applicable in a private litigation *Charter* "challenge" to the common law. This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.

[Justice Cory went on to discuss the importance of freedom of expression, and the protection of the reputation of the individual. He concluded that the common law of defamation reflected an appropriate balance between these competing interests. Therefore, it was consistent with the underlying values of the *Charter* and there was no need to amend or alter it.]

Appeal dismissed.

NOTES

1. In *R v Salituro*, [1991] 3 SCR 654, 1991 CanLII 17, the Court considered a common law rule that prevented the spouse of an accused from testifying against them in criminal proceedings. The common law recognized no exception to the rule of spousal testimonial incompetence even in circumstances where the spouses are irreconcilably separated and the witness spouse wishes to testify. The issue was whether the rule needed to be revised to conform to *Charter* values. Justice Iacobucci, writing for the Court, stated: "The *Charter* has played and will continue to play a central role in defining the legal and social fabric of this country ... even in the absence of legislation or government action." Courts, he wrote, should scrutinize common law rules closely to ensure that they are not out of step with the values enshrined in the *Charter*. At the same time, he expressed concern that the courts restrict themselves to incremental changes in the law; substantial exercises in law reform ought to

be the prerogative of the legislative branch. He stated: "If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed." He concluded that the spousal incompetence rule was contrary to the dignity of witnesses who wished to testify, and that it was necessary to abrogate the rule where spouses are irreconcilably separated to better reflect Charter values.

2. In *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, [2002 SCC 8](#), the Supreme Court applied the methodology set out in *Hill*, above, to boldly revise the common law rules regarding secondary picketing. The respondent union was engaged in a lawful strike against Pepsi-Cola, and its picketing activities had spread to "secondary" locations, including retail outlets that sold Pepsi products and the residences of Pepsi management personnel. As in *Dolphin Delivery*, above, the validity of the secondary picketing fell to be determined by the common law. Chief Justice McLachlin and LeBel J, in their joint judgment for the Court, began by affirming the importance of ensuring that the development of the common law is influenced by Charter values:

[18] ... The *Charter* constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. *Charter* rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The *Charter* must thus be viewed as one of the guiding instruments in the development of Canadian law.

They then considered which approach to the regulation of secondary picketing would be consistent with the Charter value of freedom of expression. They rejected an approach that presumed that secondary picketing is illegal and adopted instead a "wrongful action" model that treated secondary picketing as lawful unless it involves harmful conduct that amounts to a tort or a crime. Applying these new common law rules to the secondary picketing in this case, they concluded that the secondary picketing of retail outlets was lawful. The picketing of the homes of management personnel, on the other hand, was properly restrained, because the evidence showed that it amounted to the torts of intimidation and private nuisance.

Recall from *Dolphin Delivery* that McIntyre J found that the proposed picketing of secondary sites by the union would be illegal and an order restraining such picketing would not violate the Charter. Chief Justice McLachlin and LeBel J distinguished the *Dolphin Delivery* ruling on the grounds that McIntyre J in that case had assumed that the proposed picketing would be tortious. In *Pepsi-Cola*, the Supreme Court refused to make any such presumption, insisting instead that Charter values required proof of tortious or criminal conduct before secondary picketing could be restricted. Compared to *Dolphin Delivery*, *Pepsi-Cola* takes a much more robust approach to protecting freedom of expression in labour disputes and to bringing the common law into line with Charter values. *Pepsi-Cola* is discussed further in Chapter 20, Section II.

3. The Court revisited the interaction of the Charter and the common law of defamation in *Grant v Torstar Corp*, [2009 SCC 61](#), excerpted in Chapter 20. In a marked shift from the tone of Cory J's opinion in *Hill*, the Court in *Grant v Torstar* undertook an extended critical evaluation of the common law of defamation and found that it gave insufficient protection to freedom of expression. The Court found that communications on matters of public interest, even if defamatory, are essential to proper functioning of democratic society and the search for truth. According to McLachlin CJ:

[57] The statement in *Hill* (at para. 106) that "defamatory statements are very tenuously related to the core values which underlie s. 2(b)" must be read in the context of that case. It is simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth.

To better align the common law with the constitutional value of free expression, the Court fashioned a new common law defence of responsible communication on matters of public interest.

D. ADMINISTRATIVE DISCRETION

As we saw in Section II.B.2 above, in *Slaight Communications Inc v Davidson*, the Court found that the order of a labour adjudicator was subject to the Charter since the adjudicator was exercising statutory powers. Similarly, in *Blencoe v British Columbia (Human Rights Commission)*, one of the reasons the Court gave for finding decisions taken by the Human Rights Commission to be subject to the Charter was that it was exercising a statutory power of compulsion not possessed by private individuals. In *Slaight* and *Blencoe*, the Court asked whether the challenged administrative decision infringed a Charter right or freedom, and, if so, whether it could be justified under s 1 pursuant to the *Oakes* test.

The Court has consistently affirmed the application of the Charter to administrative decision-making, but different approaches emerged. One was the approach taken in *Slaight* and *Blencoe*, where the Court asked whether the challenged administrative decision violated a Charter right or freedom, and, if it did, went on to conduct a full s 1 analysis. A competing approach was more flexible. It recognized the power of administrative decision-makers to decide Charter questions and showed deference to decisions that fell within their statutory jurisdiction and areas of expertise.

In *Doré v Barreau du Québec*, an excerpt from which can be found in Chapter 17, The Framework of the Charter, the Court came down squarely on the side of the more flexible approach to the role of the Charter in discretionary administrative decision-making. Gilles Doré, a lawyer in Quebec, challenged a decision of the Disciplinary Council to reprimand him for a letter he wrote to a judge that the council found to be rude and insulting. Doré argued that the penalty violated his freedom of expression pursuant to s 2(b) of the Charter. Justice Abella, writing for a unanimous court, did not doubt that administrative decision-makers had a duty to comply with Charter values; the issue, she wrote, was “what framework should be used to scrutinize how [Charter] values were applied” (at para 24). She chose “the more flexible administrative approach to balancing Charter values” (at para 37), one that does not involve a full *Oakes* analysis. On this approach, the question for a court on judicial review is:

[57] ... whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play. ... Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate a “margin of appreciation,” or deference, to administrative and legislative bodies in balancing Charter values against broader objectives.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant Charter value with the statutory objectives, the decision will be found to be reasonable.

Applying this test to the review of the Disciplinary Council’s decision, Abella J found that the council’s decision represented a reasonable balance between Doré’s freedom of expression and the statutory objective of maintaining civility in the legal profession. As a result, she dismissed the application for judicial review of the council’s decision.

The *Doré* ruling was followed by the Court in *Loyola High School v Quebec (AG)*, excerpted in Chapter 19. The case arose from a judicial review application by Loyola High School, a private Catholic school, from a decision of the Minister of Education denying the school an exemption from the required curriculum on Ethics and Religious Culture (ERC). The

ERC program aimed to teach about the world's religions from a neutral perspective. Exemptions could be granted for programs the Minister deemed to be equivalent in content. Loyola High School's program sought to teach the material from a Catholic perspective. The Minister denied Loyola an exemption because its proposal was not equivalent to the ERC. In a 7–0 ruling, the Court found that the Minister's decision was unreasonable and remitted the matter to her for reconsideration.

In her opinion on behalf of four members of the Court, Abella J cited *Doré* as setting out the applicable framework:

[3] ... The result in *Doré* was to eschew a literal s. 1 approach in favour of a robust proportionality analysis consistent with administrative law principles.

[4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the Charter—both the Charter's guarantees and the foundational values they reflect—the discretionary decision-maker is required to proportionately balance the Charter protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue. [Emphasis in original.]

As explained by Abella J, the *Doré* analysis seeks to determine whether an administrative decision is reasonable because it reflects a proportionate balance between the Charter protections at stake and the relevant statutory mandate. The first step is to determine whether the challenged decision engages the Charter by limiting its protections. If it does, the question is whether the decision reflects a proportionate balancing of the Charter protections at play. A proportionate balancing gives as much effect as possible to Charter protections in light of the particular statutory mandate.

Applying this approach to the facts at hand, Abella J found that the Minister's decision to deny an exemption from the ERC engaged Loyola's freedom of religion. While this decision was proportionate for most of the ERC curriculum, Abella J held that it was not proportionate to require Loyola to teach about Catholicism from a neutral perspective. The Minister failed to strike a proportionate balance between freedom of religion and the statutory objectives.

The approach taken in *Doré* and *Loyola* to the application of the Charter in administrative decision-making was confirmed by the Supreme Court of Canada in two cases involving Trinity Western University. TWU is a private Christian university that requires students, staff, and faculty to sign and abide by a Community Covenant. At the relevant time, one clause in the covenant requires community members to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman." When it sought to open a law school, several law societies were unwilling to accredit its program. TWU sought judicial review of the decisions of the law societies of Ontario and British Columbia. The Supreme Court's disposition of these appeals is discussed further in Chapter 19.

NOTES AND QUESTIONS

1. Do you agree with Abella J's statement that the "margin of appreciation" she granted to administrative decisions in *Doré* is similar to the leeway available to legislatures under the minimal impairment branch of the *Oakes* test? Or does her approach give administrative decision-makers too much power to reach decisions that infringe Charter rights or freedoms?

2. In light of the Court's decisions in *Doré* and *Loyola*, and its earlier rulings in *Dolphin Delivery* and *Hill*, does the Charter now play a role in administrative decision-making that is comparable to the role it plays in the development of the common law? If not, how would you describe the differences in the role played by the Charter in those two legal realms?

V. TERRITORIAL LIMITS ON THE APPLICATION OF THE CHARTER

Foreign governments are not bound to comply with the Charter: see *R v Harrer*, [1995] 3 SCR 562, 1995 CanLII 70; *R v Terry*, [1996] 2 SCR 207, 1996 CanLII 199 (US police not subject to the Charter when gathering evidence in the United States later used in Canadian trials). But does the Charter apply to the actions or decisions of Canadian government officials outside Canada? Or does it apply only to decisions taken by Canadian government actors on Canadian territory?

Section 32 of the Charter does not contain a territorial limitation: it simply provides that the Charter applies to "all matters within the authority" of Canadian governments. The courts, though, have placed significant limitations on the application of the Charter to the actions of Canadian government officials outside the country, relying not simply on the text of s 32 but also on the prohibition under international law of the extraterritorial application of domestic laws and the principle of the comity of nations—that is, the deference and respect owed to the actions of a state legitimately taken within its territory.

In *R v Cook*, [1998] 2 SCR 597, 1998 CanLII 802, Cory and Iacobucci JJ, writing for the majority, stated:

[26] ... [T]he scope of *Charter* application beyond Canadian territory cannot be determined merely by reference to s. 32(1). The analysis is further conditioned by the accepted principle of international law that "since states are sovereign and equal, it follows that one state may not exercise jurisdiction in a way that interferes with the rights of other states" (Hugh M. Kindred et al., *International Law: Chiefly as Interpreted and Applied in Canada* (5th ed. 1993), at p. 423). In essence, the principle of the sovereign equality of states generally prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction beyond a state's territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state.

The general rule in public international law is that a state cannot enforce its law beyond its territory. The Charter therefore cannot be used to impose Canadian constitutional standards on foreign officials and procedures. However, the Court in *Cook* applied the Charter to the actions of Canadian detectives in the United States. Cook had been arrested on a warrant issued pursuant to an extradition request made by the Canadian government regarding a murder he was alleged to have committed in Vancouver. When detectives from the Vancouver Police Department interviewed Cook at a prison in New Orleans, they failed to provide him with a timely notification of his right to counsel as required by s 10(b) of the Charter. Justices Cory and Iacobucci held that:

[48] ... the *Charter* applies on foreign territory in circumstances where the impugned act falls within the scope of s. 32(1) of the *Charter* on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state.

Applying this principle, they concluded that the Charter applied:

[49] ... [W]e conclude that the *Charter* applies to the actions of the Vancouver detectives in New Orleans in the present case. First, both the appellant's arrest and detention and subsequent interrogation were actions initiated and carried out by Canadian law enforcement officials. The arrest warrant had been granted in response to an extradition request made by Canada. The interrogation was conducted by Canadian detectives, as opposed to foreign officials, in accordance with their powers of investigation as derived from Canadian

law. Thus, the impugned action falls within the purview of s. 32(1) of the *Charter* and the first criterion is satisfied.

[50] Second, in the particular circumstances of this case, the application of the *Charter* on the jurisdictional basis of nationality to the actions of the Canadian detectives abroad does not result in an interference with the territorial jurisdiction of the foreign state. In reaching this conclusion, we are relying in particular on the following factual elements: although the physical arrest was executed by a US official pursuant to US law, the arrest and the interrogation were initiated by a Canadian extradition request and related exclusively to an offence committed in Canada and to be prosecuted in Canada; the trial judge concluded at para. 15 that the United States Marshal "took great care not to become involved in the Vancouver investigation and impair it in any way [and that h]e had no intention of questioning the accused or advising him in any way"; and the interview was conducted solely by Canadian officers deriving their investigatory powers from Canadian legislation. In these circumstances, Canadian criminal law standards are not being imposed on foreign officials. Further, the application of the *Charter* in the circumstances to the simple questioning of the appellant by Canadian authorities does not implicate or interfere with any criminal procedures engaged by or involving US authorities.

[51] In essence, the principle of state sovereignty is not violated by the application of the *Charter* to the taking of the appellant's statement by Canadian authorities in the United States. In this context, it is reasonable to expect the Canadian officers to comply with *Charter* standards. Furthermore, it is reasonable to permit the appellant, who is being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interview conducted by the Canadian detectives in New Orleans.

More recently, in *R v Hape*, 2007 SCC 26, the Supreme Court of Canada took a narrower approach to the *Charter*'s application abroad. While the Court did not expressly overrule *Cook*, it cast doubt on its precedential value. At issue in *Hape* was whether RCMP officers were subject to the *Charter* when conducting a search and seizure in Turks and Caicos Islands as part of an investigation into suspected money laundering activities of a Canadian businessman. RCMP officers sought permission from the authorities in Turks and Caicos Islands to conduct part of their investigation on the Islands where the accused's investment company was located. The detective with the local police force, who was in charge of criminal investigations on the Islands, agreed to allow the RCMP to continue the investigation on Turks and Caicos territory, with the understanding that he would be in charge and that the RCMP would be working under his authority. In these circumstances, the Court found that the *Charter* did not apply. Justice LeBel, writing for the majority, put significant weight on the principle of comity:

[52] ... Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations.

Justice LeBel undertook a lengthy analysis and critique of the Court's reasoning in *Cook*, which he described as giving rise "to a number of difficulties and criticisms, both practical and theoretical" (at para 83). In his revised approach, the Court will consider two issues: first, whether the conduct of a Canadian state actor is at issue; and second, if so, whether the challenged state action is in respect of a matter falling within the authority of the Canadian government. Because Canadian governments have no authority in a foreign jurisdiction, the *Charter* will generally not apply to their actions outside Canada. Justice LeBel recognized two exceptions to the non-application of the *Charter* to Canadian governments abroad. The first, which he framed tentatively, relates to actions that violate international human rights:

[101] ... [T]here is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.

The second exception is consent of the foreign state to the application of the Charter:

[106] In some cases, the evidence may establish that the foreign state consented to the exercise of Canadian enforcement jurisdiction within its territory. The *Charter* can apply to the activities of Canadian officers in foreign investigations where the host state consents. In such a case, the investigation would be a matter within the authority of Parliament and would fall within the scope of s. 32(1).

Applying this approach to the facts in *Hape*, the Court accepted that the RCMP officers were acting as agents of the Canadian state. However, "since the search was carried out in Turks and Caicos, it is not a matter within the authority of Parliament" (at para 115). In the absence of evidence that Turks and Caicos Islands had consented to the extraterritorial application of Canadian enforcement jurisdiction (and in the absence of a violation of international human rights), LeBel J concluded that the *Charter* did not apply.

In *Canada (Justice) v Khadr*, 2008 SCC 28, the Court gave effect to the international human rights exception to the general principle that the *Charter* does not apply extraterritorially. Canadian officials, including agents of the Canadian Security and Intelligence Service, had interviewed Omar Khadr, a Canadian citizen, while he was detained by US forces at Guantanamo Bay, Cuba. The Canadian officials shared the record of those interviews with US authorities. Khadr, facing murder and terrorism-related charges laid by the US government, sought to rely on the *Charter* to obtain disclosure, for the purposes of his defence, of all relevant documents in the possession of the Canadian Crown. The Canadian government, relying on *Hape*, argued that *Charter* disclosure obligations did not apply extraterritorially. The Court rejected the Canadian government's position and ordered the disclosure of the records of the interviews in the possession of the Crown, as well as the disclosure of any other information given to US authorities that was obtained as a result of the interviews. In a unanimous opinion, the Court wrote:

[18] In *Hape* ... the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape*, at para. 52, *per* LeBel J.; see also paras. 51 and 101). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).

[19] If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and

Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation.

[20] At this point, the question becomes whether the process at Guantanamo Bay at the time that CSIS handed the products of its interviews over to US officials was a process that violated Canada's binding obligations under international law.

[21] Issues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process. We need not resolve those issues in this case. The United States Supreme Court has considered the legality of the conditions under which the Guantanamo detainees were detained and liable to prosecution during the time Canadian officials interviewed Mr. Khadr and gave the information to US authorities, between 2002 and 2004. With the benefit of a full factual record, the United States Supreme Court held that the detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*. Those holdings are based on principles consistent with the *Charter* and Canada's international law obligations. In the present appeal, this is sufficient to establish violations of these international law obligations, to which Canada subscribes.

[The Court's summary of the US Supreme Court rulings in *Rasul v Bush*, 542 US 466, 124 S Ct 2686 (2004) and *Hamdan v Rumsfeld*, 548 US 557, 126 S Ct 2749 (2006) has been omitted.]

• • •

[24] The violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law.

[25] Canada is a signatory of the four *Geneva Conventions* of 1949, which it ratified in 1965 (Can. T.S. 1965 No. 20) and has incorporated into Canadian law with the *Geneva Conventions Act*, R.S.C. 1985, c. G-3. The right to challenge the legality of detention by *habeas corpus* is a fundamental right protected both by the *Charter* and by international treaties. It follows that participation in the Guantanamo Bay process which violates these international instruments would be contrary to Canada's binding international obligations.

[26] We conclude that the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to US authorities at Guantanamo Bay. Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both US and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to US authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations.

See also *Canada (Prime Minister) v Khadr*, [2010 SCC 3](#), in which the Court applied the rationale from *Khadr* 2008 to conclude that the actions of Canadian officials at Guantanamo Bay were subject to the *Charter*.

In *Amnesty International Canada v Canada (Chief of the Defence Staff)*, [2008 FCA 401](#), leave to appeal to SCC refused, [2009] SCCA No 63 (QL) (21 May 2009), the Federal Court of Appeal considered the principles set out in *Hape* and *Khadr*. Amnesty International Canada and the BC Civil Liberties Association brought an application for judicial review with respect to Afghan detainees held by the Canadian Forces in Afghanistan and the transfer of these

individuals to Afghan authorities. The applicants alleged that formal arrangements between Canada and Afghanistan did not adequately safeguard detainees from a substantial risk of torture, and sought various forms of relief, including a declaration that ss 7, 10, and 12 of the Charter apply to the detainees.

Justice Desjardins, writing for a unanimous court, concluded that the Charter was not applicable to the Afghan detainees. In her view, the situation in *Khadr*, where a Canadian citizen was claiming access to all documents in the possession of Canadian authorities that were relevant to his defence in proceedings before a US military tribunal, "is miles apart from the situation where foreigners, with no attachment whatsoever to Canada or its laws, are held in Canadian Forces detention facilities in Afghanistan" (at para 14). While she acknowledged that the Supreme Court stated in *Hape* and *Khadr* that "deference and comity end where clear violations of international law and fundamental human rights begin" (at para 20),

[t]his does not mean that the Charter then applies as a consequence of these violations.

Even though section 7 of the Charter applies to "[e]veryone" (compare with the words "[e]very citizen" in section 6 of the Charter), all the circumstances in a given situation must be examined before it can be said that the Charter applies.

After finding that the Afghan government had not agreed to the application of Canadian law to its nationals, and that the Canadian Forces were not in effective control of the detention facilities, Desjardins JA concluded that the Charter did not apply to the Afghan detainees. This did not leave Afghan detainees in a legal vacuum, she noted, since "the applicable law is international humanitarian law" (at para 36).

Do you find the Federal Court of Appeal's ruling in *Amnesty International* persuasive? Or, following *Khadr*, would you have concluded that the Canadian Forces should be bound by the Charter extraterritorially if they are participating in processes that violate Canada's binding international law obligations? See also *Slahi v Canada (Justice)*, [2009 FCA 259](#) (Charter does not entitle non-citizens to disclosure of records of their interviews by Canadian government officials at Guantanamo Bay). Following *Hape*, *Khadr*, *Amnesty International*, and *Slahi*, how would you summarize the principles regarding the extraterritorial application of the Charter?

VI. WHO IS PROTECTED BY THE CHARTER?

This chapter has focused on the issue of who is bound by the Charter—that is to say, who is obligated to conform to the norms of the Charter. This final section deals briefly with the other side of the application issue—that is, who may claim the protection of the Charter. Does a corporation, for example, have rights under the Charter? The issue has been resolved on a right-by-right basis having regard to the wording of the specific Charter provision and the nature of the right in issue. Thus, s 2 of the Charter, which in guaranteeing the fundamental freedoms speaks of "everyone," has been interpreted as extending to corporations, but s 15, the equality rights provision, which refers to "every individual," has been restricted to natural persons. Even some of the rights that are framed in terms of "everyone" have been held, because of their nature, to be inapplicable to corporations. In *Quebec (AG) v 9147-0732 Québec inc*, [2020 SCC 32](#) (discussed in Chapter 17), the Supreme Court held that the protection in s 12 against "cruel and unusual punishment or treatment" does not extend to corporations. The Supreme Court of Canada in *Loyola High School v Quebec* considered but did not finally decide whether a religious organization has standing in its own right to bring a s 2(a) freedom of religion claim. (This case is further examined in Chapter 19.) Similarly, while some Charter rights are expressly conferred on "citizens" (s 3, voting rights; s 6, mobility rights; and s 23, minority language education rights), non-citizens may claim the benefit of other rights and freedoms conferred on "everyone," "every individual," or "any person." These aspects of the application of the Charter are dealt with as each of the rights is examined in turn in the chapters that follow.

Note also that the rules of standing will in some circumstances allow a person (whether artificial or natural) whose rights have not been infringed to raise a Charter challenge to legislation based on the infringement of someone else's rights. Thus, a corporation, in defending a criminal charge, may base a Charter challenge to the legislation under which it is charged on rights that it is incapable of enjoying, such as freedom of religion or loss of liberty. The rules of standing in Charter litigation are discussed in Chapter 13.

CHAPTER NINETEEN

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I. INTRODUCTION

The early efforts of European colonizers—first, the French, and later, the British—to convert Indigenous peoples to a version of Christianity sometimes involved the active suppression of spiritual practices. Cultural suppression became standard practice with the growth of European settlement and the extension of political control by colonial and Canadian authorities over lands occupied by Indigenous peoples. Notably, in the late 1800s, spiritual practices, such as spirit dancing in the Prairies and the potlatch on the West Coast, were banned by the federal government. But perhaps the most significant programs of cultural suppression was the residential school system, which involved the forcible removal of Indigenous children from their families and communities, placing them in state-sanctioned residential Christian schools where they were prevented from speaking their language and engaging in cultural practices.

Yet the country's early history, as discussed in Chapter 3, *From Contact to Confederation*, was also marked by significant acts of religious tolerance. With the conquest of Quebec by the British in the mid-18th century, a Protestant monarch came to rule over the French Catholic population. However, under the *Treaty of Paris*, 1763, the British government agreed that the French Catholic inhabitants of Canada would retain the right to practise their religion. The *Quebec Act*, 1774 of the British Parliament formally extended to colonists the right to maintain the French language, the civil law system, and the Roman Catholic faith. The British government's motives in this were entirely pragmatic—to ensure stability and loyalty at a time of American revolutionary fervour.

Under the *Constitution Act*, 1867 (originally the *British North America Act*, 1867 [BNA Act]), provincial assemblies were given jurisdiction over culture, family, charitable organizations, and civil obligations, while the federal Parliament was given the power to establish and maintain a general economic infrastructure and to ensure public order and security. In this way, the federal system ensured the continuation and protection of some religious and cultural diversity in the country. The BNA Act also established certain rights for minority religious schools. While s 93 of the BNA Act gave the provinces jurisdiction in relation to education, it

also protected the rights of dissentient schools in Ontario (principally, Roman Catholic schools) and Protestant and Roman Catholic schools in Quebec that existed at the time of Confederation. The recognition of Roman Catholic school rights was one of the terms of entry into the union of Manitoba in 1870 and Saskatchewan and Alberta in 1905.

The political accommodation between Roman Catholic and Protestant communities, while imperfect and precarious, shaped the national response to growing religious plurality in the late 19th and early 20th centuries. This response protected individual liberty in religious practice, but also the pragmatic accommodation of certain non-denominational Christian practices. In the late 1800s and early 1900s, the government of Canada, seeking to attract settlers to the western part of the country, agreed to exempt certain religious groups from public obligations that were inconsistent with the group's practices. For example, Anabaptist groups such as the Mennonites and the Hutterites were exempted from compulsory military service and standard schooling requirements. Yet despite the country's general commitment to religious liberty, the first half of the 20th century was marred by significant and traumatic acts of religious oppression by the state. The resulting judicial decisions helped to create a public and principled conception of religious freedom. Perhaps the most politically salient instance of religious oppression was the suppression by the province of Quebec of the Jehovah's Witness community in the 1950s.

While much of Canada's early commitment to religious freedom was simply a pragmatic compromise to ensure social peace and political stability, the Supreme Court of Canada in the post-war period, and in particular in the 1950s, sought to articulate a principled account of religious freedom. In *Saumur v City of Quebec*, [1953] 2 SCR 299, 1953 CanLII 3, the Supreme Court of Canada struck down a by-law that required the police to consent before distributing literature in the streets of Quebec City—obviously intended to limit proselytizing by Jehovah's Witnesses. After setting out some of the history of religious tolerance in Canada, Rand J observed in *Saumur* (at 327):

From 1760, therefore, to the present[,] ... religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

Justice Rand went on to hold that the provinces lacked the authority, under the constitutional division of powers, to restrict religious freedom and other fundamental rights (at 329):

[L]egislation "in relation" to religion and its profession is not a local or private matter ... : the dimensions of this interest are nationwide; ... it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other

Justice Rand described (at 329) religious freedom as one of the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."

In *Chaput v Romain*, [1955] SCR 834, 1955 CanLII 74, the Quebec provincial police "broke up," without a warrant, a religious meeting in a private home, seizing bibles and other religious literature. The Supreme Court of Canada found that the police action breached a criminal prohibition against obstructing a minister conducting a religious meeting. In reaching this conclusion, Taschereau J declared that in Canada there is no state religion and that all denominations enjoy the same freedom of speech and thought: for more on the history of religious freedom in Canada, see Richard Moon, "Introduction" in *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014).

Although religious tolerance in Canada may initially have been based on pragmatic considerations, and conceived to ensure social peace or stability, the protection of freedom of

conscience and religion in the Charter is now understood as a principled right—an aspect of the individual's basic liberty and, more particularly, the right to hold and live in accordance with fundamental spiritual or moral commitments. As you read the cases in this chapter, be alert to the extent to which religious freedom is grounded on both practical and principled concerns and requires pragmatic and context-based trade-offs between spiritual claims and civic interests. The same concerns about social peace that lay behind the earlier extension of religious tolerance in Canada may continue to play an important contemporary role.

A. A JUSTIFICATION FOR RELIGIOUS FREEDOM

The story of religious freedom in the West begins with the religious wars that disrupted Europe in the 16th and early 17th centuries. It was in this context that writers such as John Locke sought to develop a principled argument for religious tolerance. They argued not just that religious tolerance (rather than state-enforced religious conformity) was the better route to social peace, but also that it was morally required. At the centre of their principled defence of religious tolerance was the claim that spiritual matters lay within the sphere of individual conscience—the individual's divinely endowed capacity to recognize spiritual truth.

John Locke's *Four Letters Concerning Toleration* (1685) is regarded as the foundational defence of religious tolerance and freedom in the West. As you will see in the materials that follow, the Supreme Court of Canada referred to Locke's central arguments, and partly relied on them, in *R v Big M Drug Mart*, [1985] 1 SCR 295, 1985 CanLII 69, the Court's first religious freedom decision under the Charter—a decision in which the Court sought to articulate the theoretical basis for the freedom. Locke argued that it was essential "to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other." He insisted that the state should concern itself only with "civil interests" such as life, liberty, health, and property. The authority of the state, argued Locke, did not extend to spiritual matters—"the salvation of the soul"—that lay within the exclusive domain of the individual. This was so for several related reasons. The government, said Locke, ought not to concern itself with the individual's spiritual welfare because it had not been given authority in this matter. The individual was responsible for their own spiritual welfare and could not delegate this responsibility to anyone else because religious belief depended on "inner persuasion":

[N]o man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing.

Locke observed that the power of government was exercised through coercion. But coercive power, he noted, was ineffective in spiritual matters. A government could require its citizens to conform to certain standards in their outward behaviour, but it could not compel them to embrace spiritual truth—to sincerely believe. According to Locke: "It is only light and evidence that can work a change in men's opinions." Locke added that it might be an offence to God when individuals worshiped him in the correct form without "inward sincerity."

Locke supplemented this argument about the nature of religious commitment with other practical considerations. He noted, for example, that even if the government could change people's minds through coercion, there was no reason to think that the faith it was imposing was the true one. While "princes" might have particular skill or knowledge in civil matters, their spiritual judgment was not superior to that of other people. After all, there were many different "princes" (or governments) in Europe, and each seemed to hold a different view about the true faith. They could not all be right. Moreover, said Locke, although governments

might often be able to correct their mistakes in civil matters, they did not have the power to correct their spiritual mistakes. If the government forced the wrong religion on its citizens, the otherworldly consequences of its error would be borne exclusively by its citizens and the government could do nothing to mitigate their spiritual loss or injury.

B. RELIGIOUS FREEDOM UNDER THE CHARTER

The Canadian courts initially described the s 2(a) guarantee of freedom of conscience and religion as entailing the liberty to hold, and live in accordance with, spiritual or other fundamental beliefs without state interference. Freedom of religion, understood as a liberty, precludes the state from compelling an individual to engage in a religious practice and from restricting their religious practice without a legitimate public reason. Religious freedom then has two dimensions—the freedom to practise religion without interference by the state (the freedom to religion), and the freedom from state compulsion to follow a religious practice (the freedom from religion). At an earlier time, when most individuals adhered to a particular religious belief system, these two dimensions were closely tied. In seeking to advance its conception of religious truth or to ensure social stability through religious conformity, a state might both compel the “correct” or dominant religious practice and prohibit “erroneous” practices. However, the tie between these two dimensions of the freedom has been loosened with the expansion of non-religious or agnostic perspectives in the community. Indeed, as we shall see, most of the recent challenges against state support for a religious practice have been brought by non-believers who object not to the preference of one religion over another, but to any form of state support for religion.

In later court judgments, however, there has been a shift in the way courts describe the interest protected by religious freedom. The courts have said that the freedom does not simply protect against state coercion in matters of religion or conscience; it also requires that the state treat religious belief systems or communities in an equal or even-handed manner. The state must not support or prefer the practices and beliefs of one religious group over those of another. The requirement of state neutrality was most clearly affirmed in the unanimous judgment of the Supreme Court of Canada in *Mouvement laïque québécois v Saguenay (City)*, [2015 SCC 16](#): “[A] duty of religious neutrality on the state ... results from an evolving interpretation of freedom of conscience and religion” (at para 71). On this account, freedom of religion may be viewed as an equality right—a right to equal treatment or equal respect by the state without discrimination based on religious belief or association.

The courts’ initial account of religious freedom, as a ban on state coercion in religious matters, put the focus on the freedom or liberty of the individual. Does the introduction of a neutrality requirement—and an emphasis on inclusion and equal treatment—reflect a greater concern about the treatment and status of religious groups and associations? What does it mean for the state to be neutral in religious matters? As you read the cases that follow, consider whether the state has remained (or can remain) neutral in such matters. The most obvious difficulty with the requirement of state neutrality is that religious belief systems often have public or civic implications—they often say something about the way we should treat others and about the kind of society we should work to create. When religious belief addresses civic matters, should it be excluded (or protected) from political decision-making—that is, confined to the private sphere? What is the relationship between s 15 of the Charter (the equality guarantee that prohibits religious discrimination) and s 2(a), if the latter requires the state to remain neutral in religious matters? If s 2(a) simply protects the equality rights of religious believers, is it redundant? Or does s 2(a) protect something that s 15 does not protect; or protect the same interest, but in a different way?

C. FREEDOM OF CONSCIENCE

Section 2(a) protects freedom of conscience and religion. The term “freedom of conscience” was once used interchangeably with “freedom of religion” to refer to the individual’s freedom to hold beliefs that are spiritual or moral in character. At this earlier time, the moral beliefs of most individuals were almost invariably rooted in a religious system. However, freedom of conscience is now viewed as separate from religious freedom. While freedom of religion protects fundamental religious beliefs, freedom of conscience extends protection to fundamental beliefs that are not part of a religious belief system—to secular morality. Together, freedom of conscience and religion protect the expression of the individual’s most fundamental moral beliefs. Yet despite the courts’ formal definition of the scope of freedom of conscience and religion as encompassing both religious and non-religious beliefs, religious beliefs have been at the centre of the s 2(a) jurisprudence. Although the courts have said that freedom of conscience may be breached when the state restricts a non-religious practice, it is difficult to find cases in which s 2(a) has been successfully used to protect such a practice from state interference. Why might this be so? Non-religious conscientious belief has most often been referred to in contexts involving state support for religion, where the courts have said that both believers and non-believers should be protected from state-compelled religious practices.

One of the only reported cases in Canada in which freedom of conscience under s 2(a) was found to have been breached involved a refusal by the federal prison authorities to provide an inmate with vegetarian meals. In *Maurice v Canada (AG)*, 2002 FCT 69, an inmate, as a member of the Hare Krishna community, had previously received vegetarian meals on religious grounds. After he disassociated himself from that community, he asked that he continue to receive vegetarian meals in the prison for moral rather than religious reasons. The prison authorities claimed that they were only obligated to provide vegetarian meals for religious reasons. The Federal Court, however, rejected this argument, noting that s 2(a) protects both religious and non-religious beliefs and practices. In the Court’s view, the prison could accommodate the inmate’s vegetarianism without difficulty, particularly since it was already providing vegetarian meals to inmates on religious grounds. The inmate’s claim was helped by the similarity of his particular practice, vegetarianism, to a recognized religious practice and indeed by the fact that he had previously been provided with vegetarian meals on religious grounds. Given the prison context, the Court may also have been willing to protect a moral practice that in ordinary circumstances is simply a private matter. Outside the prison context, vegetarianism is a practice in which the individual is free to engage and that has no obvious impact on the rights or interests of others. The state ordinarily has no direct involvement in the individual’s dietary choices. Within the prison, however, all aspects of an inmate’s life are controlled by the prison authorities. The inmate can do nothing without the support or cooperation of the state.

II. SUNDAY OBSERVANCE AND THE SCOPE OF SECTION 2(A)

The earliest s 2(a) cases to reach the Supreme Court of Canada involved challenges to federal and provincial Sunday closing laws. Sunday closing laws were initially enacted to support a religious obligation to refrain from work on the Sabbath (Sunday), the day of rest devoted to spiritual reflection and worship.

In *R v Big M Drug Mart Ltd* (excerpted immediately below), decided in 1985, the Supreme Court of Canada struck down the federal *Lord’s Day Act*, RSC 1970, c L-13 on the grounds that it interfered with freedom of conscience and religion under s 2(a) of the Charter, and that this interference could not be justified under s 1. The Act made it an offence, punishable on summary conviction, for anyone to engage in or carry on business on Sunday.

R v Big M Drug Mart Ltd[1985] 1 SCR 295, 1985 CanLII 69

DICKSON CJ (Beetz, McIntyre, Chouinard, and Lamer JJ concurring):

Big M Drug Mart Ltd. was charged with unlawfully carrying on the sale of goods, on Sunday, May 30, 1982 in the City of Calgary, Alberta, contrary to the *Lord's Day Act*, R.S.C. 1970, c. L-13.

Big M has challenged the constitutionality of the *Lord's Day Act*, both in terms of the division of powers and the *Canadian Charter of Rights and Freedoms*. Such challenge places in issue before this Court, for the first time, one of the fundamental freedoms protected by the *Charter*, the guarantee of "freedom of conscience and religion" entrenched in s. 2.

The constitutional validity of Sunday observance legislation has in the past been tested largely through the division of powers provided in ss. 91 and 92 of the *Constitution Act, 1867*. Freedom of religion has been seen to be a matter falling within federal legislative competence. Today, following the advent of the *Constitution Act, 1982*, we must address squarely the fundamental issues raised by individual rights and freedoms enshrined in the *Charter*, as well as those concerned with legislative powers.

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An understanding of the scheme of [the *Lord's Day Act*] and its basic purpose and effect is integral to any analysis of its constitutional validity. Section 2 defines, *inter alia*, the Lord's Day:

2. ... "Lord's Day" means the period of time that begins at midnight on Saturday night and ends at midnight on the following night; ...

Section 4 contains the basic prohibition against any work or commercial activity upon the Lord's Day:

4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law in force on or after the 1st day of March 1907, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

Section 5 provides that any worker, required to work by an employer operating on Sunday in conformity with the Act, be given a substitute day of rest; s. 6 prohibits any games or performances where an admission fee is charged; s. 7 prohibits any transportation operated for pleasure where a fee is charged; s. 8 prohibits any advertisement of anything prohibited by the Act; s. 9 prohibits any shooting of firearms; s. 10 prohibits any sale or distribution of a foreign newspaper.

It is important to note that any person may be exempted from the operation of ss. 4, 6, and 7 by provincial legislation or municipal charter. The following exemptions are also contained in the legislation: s. 3—the railways may be operated for passenger traffic; s. 11—any person may do any work of necessity or mercy which covers a broad range of activities listed in subss. (a) to (x).

The Act makes it an offence punishable on summary conviction for: any person to violate the Act (s. 12); any employer to direct any violation of the Act (s. 13); any corporation to authorize, direct or permit any violation of the Act (s. 14).

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The Characterization of the Lord's Day Act

(A) The Problem

There are obviously two possible ways to characterize the purpose of Lord's Day legislation, the one religious, namely securing public observance of the Christian institution of the Sabbath and the other secular, namely providing a uniform day of rest from labour. It is undoubtedly true that both elements may be present in any given enactment, indeed it is almost inevitable that they will be, considering that such laws combine a prohibition of ordinary employment for one day out of seven with a specification that this day of rest shall be the Christian Sabbath—Sunday.

[Chief Justice Dickson observed that the English Sunday observance legislation, which originated in 1677 and provided the model for the federal *Lord's Day Act* in Canada, had a clear religious purpose—to ensure that the fourth commandment was followed: "Remember the Sabbath day, to keep it holy." He also observed that the Canadian courts had previously held that Sunday observance legislation was intended to protect public order and morality and was therefore criminal law falling within the exclusive jurisdiction of the federal government.]

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Purpose and Effect of Legislation

A finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country.

The Attorney General for Alberta concedes that the Act is characterized by this religious purpose. He contends, however, that it is not the purpose but the effects of the Act which are relevant. ... [He submits] that it is effects alone which must be assessed in determining whether legislation violates a constitutional guarantee of freedom of religion.

I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. ...

Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the *Charter*. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of *Charter* rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

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... [T]he legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. ...

... Both Stevenson, Prov. Ct. J., at trial, and the American Supreme Court, in its quartet on Sunday observance legislation [which sustained the legislation, finding no violation of either the free exercise or anti-establishment clauses of the American Constitution], suggest that the purpose of legislation may shift, or be transformed over time by changing social conditions. ... A number of objections can be advanced to this "shifting purpose" argument.

First, there are the practical difficulties. No legislation would be safe from a revised judicial assessment of purpose. Laws assumed valid on the basis of persuasive and powerful authority could, at any time, be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage re-litigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations. It could effectively end the doctrine of *stare decisis* in division of power cases, ...

Furthermore, the theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of "Parliamentary intention." Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

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While the effect of such legislation as the *Lord's Day Act* may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the *Lord's Day Act* must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance.

Freedom of Religion

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority."

To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and

non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord's day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.

I agree with the submission of the respondent that to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians. To do so is contrary to the expressed provisions of s. 27, which as earlier noted reads:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians ...

If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.

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(iii) The Purpose of Protecting Freedom of Conscience and Religion

This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophical and historical contexts.

With regard to freedom of conscience and religion, the historical context is clear. As they are relevant to the Charter, the origins of the demand for such freedom are to be found in the religious struggles in post-Reformation Europe. The spread of new beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial frontiers led to situations in which large numbers of people—sometimes even the majority in a given territory—found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share.

... Opposition to such laws [in England] was confined at first to those who upheld the prohibited faiths and practices, and was designed primarily to avoid the disabilities and penalties to which these specific adherents were subject. As a consequence, when history or geography put power into the hands of these erstwhile victims of religious oppression the persecuted all too often became the persecutors.

Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendant religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was ... the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience [came together as] the single integrated concept of "freedom of conscience and religion."

What unites [these and related] freedoms ... is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc., supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties." It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental." They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(a) might otherwise prohibit.

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In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.

I would like to stress that nothing in these reasons should be read as suggesting any opposition to Sunday being spent as a religious day; quite the contrary. It is recognized that for a great number of Canadians, Sunday is ... a day which brings a balanced perspective to life, an opportunity for man to be in communion with man and with God. In my view, however, as I read the *Charter*, it mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.

In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the *Charter*, it is no longer legitimate. With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. The state shall not use the criminal sanctions at its disposal to achieve a religious purpose, namely, the uniform observance of the day chosen by the Christian religion as its day of rest.

On the authorities and for the reasons outlined, the true purpose of the *Lord's Day Act* is to compel the observance of the Christian Sabbath and I find the Act, and especially s. 4 thereof, infringes upon the freedom of conscience and religion guaranteed in s. 2(a) of the *Charter*. ...

Section 1 of the Charter

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At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable—a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

Two reasons have been advanced to justify the legislation here in issue as a reasonable limit. It can be urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s. 2(a).

The other more plausible argument is that everyone accepts the need and value of a universal day of rest from all work, business and labour and it may as well be the day traditionally observed in our society. I accept the secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America. The first and fatal difficulty with this argument is, as I have said, that it asserts an objective which has never been found by this Court to be the motivation for the legislation. It seems disingenuous to say that

the legislation is valid criminal law and offends s. 2(a) because it compels the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend. ...

The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced.

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Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under s. 92(13), property and civil rights in the province, and, hence, fall under provincial rather than federal competence. ...

[The *Lord's Day Act* was declared to be of no force or effect under s 52 of the *Constitution Act, 1982*. Justice Wilson's separate concurring judgment has been omitted.] [Emphasis in original.]

Appeal dismissed.

NOTES AND QUESTIONS

1. *The Lord's Day Act* prohibited individuals from working on Sunday, but did it compel them to follow a religious practice? Was the principal objection to the law that it had a religious purpose or that, in the words of Dickson CJ, it "creates a climate hostile to, and gives the appearance of discrimination against, non-Christians" (at para 97)? For a discussion, see Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms" (2003) 41 *Brandeis L Rev* 563.

2. In *Big M*, the Attorney General of Alberta argued that Big M did not have standing to challenge the law on freedom of religion grounds because a corporation, as a statutory creation, did not have a conscience and could not hold religious beliefs. Chief Justice Dickson replied to this argument in the following way (at paras 39-41):

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is arguing that the law under which it has been charged is inconsistent with section 2(a) of the *Charter* and ... is of no force and effect.

Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. [Big M] is arguing that the legislation is constitutionally invalid because it impairs freedom of religion—if the law impairs freedom of religion it does not matter whether the company can possess religious belief. ...

The argument that [Big M], by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter*. ... It is the nature of the law, not the status of the accused, that is in issue.

3. In *Loyola High School v Quebec (AG)*, [2015 SCC 12](#), an excerpt from which appears later in this chapter, the Supreme Court of Canada considered whether a religious organization could make a s 2(a) claim on its own behalf.

4. Other cases involving state-compelled religious practice are found below, in Section III, "Government Support for Religion."

Edwards Books and Art Ltd., excerpted immediately below, was decided by the Supreme Court of Canada a year after *Big M*. The case involved a challenge to the Ontario *Retail Business Holidays Act*, RSO 1980, c 435, a provincial law that established a common day of rest for retail workers.

R v Edwards Books and Art Ltd

[1986] 2 SCR 713, 1986 CanLII 12

DICKSON CJ (Chouinard and Le Dain JJ concurring):

In this appeal the Court is called upon to consider the constitutional validity of Sunday closing legislation enacted by the Province of Ontario *sub nom. Retail Business Holidays Act*, R.S.O. 1980, c. 453. ...

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The Legislation

The scheme of the *Retail Business Holidays Act* is simple. Section 1 defines "holiday" to include Sundays and various other days, including some days which are of special significance to Christian denominations, and some which are clearly secular in nature [the other days include New Year's Day, Good Friday, Victoria Day, Dominion Day, Labour Day, Thanksgiving Day, Christmas Day, and Boxing Day.] ...

Sections 2 and 7 make it an offence to carry on a retail business on a holiday, punishable by a maximum fine of \$10,000. ...

Sections 3 and 4 contain a diverse array of exceptions. Most "corner store" operations are exempted by s. 3(1). Pharmacies, gas stations, flower stores, and, during the summer months, fresh fruit and vegetable stores or stands are excluded by s. 3(2) and (3). Section 3(6) exempts educational, recreational or amusement services. Prepared meals, laundromat services, boat and vehicle rentals and service are permitted under s. 3(7). Section 3(8) and s. 4 allow a municipality to create its own scheme of exemptions where necessary for the promotion of the tourist industry.

A particularly controversial exemption is contained in s. 3(4). It applies to businesses which, on Sundays, have seven or fewer employees engaged in the service of the public and less than 5,000 square feet used for such service. Its effect is to exempt these businesses from having to close on Sunday if they closed on the previous Saturday.

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I agree with Tarnopolsky JA that the *Retail Business Holidays Act* was enacted with the intent of providing uniform holidays to retail workers. I am unable to conclude that the Act was a surreptitious attempt to encourage religious worship. ...

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Freedom of Conscience and Religion Under Section 2(a)

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... The Act has a secular purpose which is not offensive to the *Charter* guarantee of freedom of conscience and religion.

... Even if a law has a valid purpose, it is still open to a litigant to argue that it interferes by its effects with a right or freedom guaranteed by the *Charter*. It will therefore be necessary to consider in some detail the impact of the *Retail Business Holidays Act*. ...

A. The Constitutional Protection from State-Imposed Burdens on Religious Practices and Religious Non-Conformity

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The Court was concerned in *[Big M]* with a direct command, on pain of sanction, to conform to a particular religious precept. The appeals with which we are now concerned are alleged to involve two forms of coercion. First, it is argued that the *Retail Business Holidays Act* makes it more expensive for retailers and consumers who observe a weekly day of rest other than Sunday to practise their religious tenets. In this manner, it is said, the Act indirectly coerces these persons to forego the practice of a religious belief. Second, it is submitted that the Act has the direct effect of compelling non-believers to conform to majoritarian religious dogma, by requiring retailers to close their stores on Sunday.

The first question is whether indirect burdens on religious practice are prohibited by the constitutional guarantee of freedom of religion. In my opinion [it is]. The Court said as much in the *Big M Drug Mart Ltd.* case and any more restrictive interpretation would, in my opinion, be inconsistent with the Court's obligation under s. 27 to preserve and enhance the multicultural heritage of Canadians. ... It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a).

This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. It means only that indirect or unintentional burdens will not be held to be outside the scope of *Charter* protection on that account alone. Section 2(a) does not require the legislatures to eliminate every minuscule state-imposed cost associated with the practice of religion. Otherwise the *Charter* would offer protection from innocuous secular legislation such as ... a modest sales tax extending to all products, including those used in the course of religious worship. In my opinion, it is unnecessary to turn to s. 1 in order to justify legislation of that sort. ... The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial

I propose, shortly, to apply the above principles to the legislation under review. First, however, I wish to consider the second form of religious coercion ... [which] involves not the freedom affirmatively to practise one's religious beliefs, but rather the freedom to abstain from the religious practices of others. The *Retail Business Holidays Act* prevents some retailers from selling their products on Sundays. Longo Brothers [one of the appellants] submits that these effects are identical to those which flow from any other form of Sunday closing legislation, including the *Lord's Day Act*, and submits that the Act thereby requires retailers to conform to the religious practices of dominant Christian sects.

In *Big M Drug Mart Ltd.* this Court acknowledged that freedom of conscience and religion included the freedom to express and manifest religious non-belief and the freedom to refuse to participate in religious practice These freedoms ... from conformity to religious dogma, are governed by somewhat different considerations Religious freedom is inevitably abridged by legislation which has the effect of impeding conduct integral to the practice of a person's religion. But it is not necessarily impaired by legislation which requires conduct consistent with the religious beliefs of another person. One is not being compelled to engage in religious practices

merely because a statutory obligation coincides with the dictates of a particular religion. I cannot accept, for example, that a legislative prohibition of criminal conduct such as theft and murder is a state-enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill. Reasonable citizens do not perceive the legislation as requiring them to pay homage to religious doctrine. ...

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In my view, legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because statutory provisions coincide with the tenets of a religion. I leave open the possibility, however, that such legislation might limit the freedom of conscience and religion of persons whose conduct is governed by an intention to express or manifest his or her non-conformity with religious doctrine. ... The second form of coercion allegedly flowing from the *Retail Business Holidays Act* has not been established in these appeals.

It therefore remains only to consider the impact of the Act with a view to determining whether it significantly impinges on the freedom to manifest or practise religious beliefs.

B. The Impact of the *Retail Business Holidays Act*

The Act has a different impact on persons with different religious beliefs. Four classes of persons might be differently affected: those not observing any religious day of rest, those observing Sundays, those observing Saturdays and those observing some other day of the week.

(i) Non-Observers

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The Act prevents non-observing retailers who cannot fit themselves within one of the statutory exemptions from doing business on Sundays. In the absence of the Act, these retailers would be able to transact business on seven days of the week, and they would have a competitive advantage in this respect relative to [religiously observant] retailers[.] ...

... [T]he effects of the Act on non-observing retailers are generally secular in nature and do not impair or abridge their freedom of conscience or religion

(ii) Sunday Observers

The Act has a favourable impact on Sunday observers ... [who] are relieved of a loss of market share to retailers who would have been open for business on Sunday in the absence of the Act. ...

(iii) Saturday Observers

... [A number of] faiths may also observe Saturday as a religious day of rest, but for the purposes of the present appeals it is the effects on Jews and Seventh-day Adventists that will be considered.

The Attorney-General of Ontario submits that any disability suffered by Saturday-observing retailers is a consequence of their religious beliefs, and not of the Act. Even in the absence of the Act, devout Jews and Seventh-day Adventists would close on Saturdays. ... Consequently, it is argued, there is no nexus between the impugned law and the freedom of Saturday observers to exercise their religious beliefs. ... [The true effect of the Act, it is argued, is only to confer a benefit on Sunday observers.]

In view of the characteristics of the retail industry described in the [Ontario Law Reform Commission] *Report on Sunday Observance Legislation*, [1970] I find myself

unable to draw such a neat distinction between benefits ... and burdens The Report refers on numerous occasions to the highly competitive nature of the retail industry, such that an increase in sales by one individual retailer occasioned by that retailer's marketing practices tends to result in significant decreases in the sales of other retailers. It follows that if the Act confers an advantage on Sunday-observing retailers relative to Saturday-observing retailers, the latter are burdened by the legislation.

A careful comparison of the effects of Sunday closing legislation on different religious groups clearly demonstrates the manner in which the burden flows from the legislation. In the absence of legislative intervention, the Saturday observer and the Sunday observer ... [b]oth might operate for a maximum of six days each week. Both would be disadvantaged relative to non-observing retailers who would have the option of a seven-day week. On this account, however, they would have no complaint cognizable in law since the disability would be one flowing exclusively from their religious tenets: I agree ... that the state is normally under no duty under s. 2(a) to take affirmative action to eliminate the natural costs of religious practices. But, exemptions aside, the *Retail Business Holidays Act* has the effect of leaving the Saturday observer at the same natural disadvantage relative to the non-observer and adding the new, purely statutory disadvantage of being closed an extra day relative to the Sunday observer. Just as the Act makes it less costly for Sunday observers to practise their religious beliefs, it thereby makes it more expensive for some Jewish and Seventh-day Adventist retailers to practise theirs.

... [I] do not think that the competitive pressure on non-exempt retailers to abandon the observance of a Saturday Sabbath can be characterized as insubstantial or trivial. It follows that their freedom of religion is abridged by the Act.

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Finally, I note that the Act also imposes a burden on Saturday-observing consumers. For [many persons], the weekend is a time to do the things one did not have time to do during the week. The Act does not impair the ability of Sunday observers to go shopping or seek professional services on Saturdays, but it does circumscribe that of the Saturday observer on Sundays. Although there is no evidence before the Court of the degree to which shopping variety is restricted on Sundays, I am prepared to assume for the purposes of these appeals that the burden on Saturday-observing consumers is substantial and constitutes an abridgment of their religious freedom. ...

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Section 1 of the Charter

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... I regard as self-evident the desirability of [a common pause day]. ... A family visit to an uncle or a grandmother, the attendance of a parent at a child's sports tournament, a picnic, a swim, or a hike in the park on a summer day, or a family expedition to a zoo, circus, or exhibition—these, and hundreds of other leisure activities are amongst the simplest but most profound joys that any of us can know. The aim of protecting workers, families and communities from a diminution of opportunity to experience the fulfilment offered by [family] activities, and from the alienation of the individual from his or her closest social bonds, is not one which I regard as unimportant or trivial. ... I am satisfied that the Act is aimed at a pressing and substantial concern. ...

The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose. In the context of the *Retail Business Holidays Act* two questions are raised. First, is it acceptable for the legislature

to have focused exclusively on the retail industry? Second, is the scheme of exemptions within the Act, as between types of retail business, justifiable?

... [T]he [Ontario] Law Reform Commission ... told of competitive pressures forcing individual operators to extend their hours of business, largely against their wishes. [Its r]eport also documented the characteristics of the retail trade's labour force, including its low level of unionization, its high proportion of women, and its generally heterogeneous composition: p. 103. The Commission's conclusion that this labour force was especially vulnerable to subtle and overt pressure from its employers amply justified on the evidence the legislature's decision to single out the retail industry for special and immediate attention.

The exemptions for various types of business are also justifiable. ...

... [I]n regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. ...

A more difficult question—and one which goes to the heart of this litigation—is whether the *Retail Business Holidays Act* abridges the freedom of religion of Saturday observers as little as is reasonably possible. Section 3(4) [was intended to] very substantially reduc[e] the impact of the Act on those religious groups for whom Saturday is a Sabbath. What must be decided, however, is whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom.

One suggestion was that the objective of protecting workers from involuntary Sunday labour could be achieved by ... conferring on workers a right to refuse Sunday work. But such a scheme would in my view fall far short of achieving the objectives of the *Retail Business Holidays Act*. It would fail to recognize the subtle coercive pressure which an employer can exert on an employee. The vulnerability of retail employees makes them an improbable group to resist such pressures. ...

The other alternative would be to ... replace s. 3(4) with a complete exemption from s. 2 for those retailers who have a sincerely held religious belief requiring them to close their stores on a day other than Sunday. ...

... I am unable to say whether one scheme results in a greater availability of Sunday shopping services to the Jewish or Seventh-day Adventist consumer than the other. In this context, I note that the *Report on Sunday Observance Legislation* (1970) at p. 98, Table V, discloses that only 8.1 percent of retail stores had 10 or more employees at the time of the previous census in 1961. Since, subject to the square footage requirement, the exemption in s. 3(4) is available to any store provided that at any given time on Sunday the number of persons engaged in serving the public is fewer than eight, it appears that a very substantial variety of products, including specialty products such as Kosher foods, is available to Sunday shoppers, even if the proportion of large stores were to have doubled since 1961.

The most difficult questions stem from the different impacts of these exemptions on Saturday-observing retailers. ...

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[I]t is legitimate for legislatures to be concerned with minimizing the disruptive effect of any exemption on the scope and quality of the pause day, and ... it would be highly undesirable [to condition the] exemption on the hiring by retailers of co-religionists. Because of their substantial share of total sales volume ... and their numerous employees, the operation of large retail outlets on Sundays would entail a substantial disruption of the quality of the pause day. It is, however, not so much the disruption of the quality of the pause day in terms of commercial activity that concerns me. What concerns me, rather, is the limitation of its scope in terms of the employees who would be denied the benefits which the Act was designed to provide them.

What cannot be forgotten is that the object of the legislation is to benefit retail employees by making available to them a weekly holiday which coincides with that enjoyed by most of the community. These employees do not constitute a powerful group in society. ...

The economic position of these employees affords them few choices in respect of their conditions of employment. It would ignore the realities faced by these workers to suggest that they stand up to their employer or seek a job elsewhere if they wish to enjoy a common day of rest with their families and friends. ... [I]t must also be recognized that larger retailers have available to them options flowing from the resources at their disposal which are foreclosed to their employees. It is, perhaps, worth stating the obvious: a store with eight or more employees serving the public at any one time or with 5,000 square feet of retail space indeed constitutes a substantial retail operation. Such a store is not, by any stretch, a mere corner store staffed by the family. In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the legislature for determining that the protection of the employees ought to prevail. This is not to say that the legislature is constitutionally obligated to give effect to employee interests in preference to the interests of the store owner for large retail operations, but only that it may do so if it wishes.

I turn now to the second factor which, in my opinion, contributes to the justification of the legislation under review. ... The striking advantage of the Ontario Act is that it makes available an exemption to the small and mid-size retailer without the indignity of having to submit to ... an inquiry [into religious belief]. In my view, state-sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The inquiry is all the worse when it is demanded only of members of a non-majoritarian faith, who may have good reason for reluctance about so exposing and articulating their non-conformity.

I do not mean to suggest that a judicial inquiry into the sincerity of religious beliefs is unconstitutional. ... Judicial inquiries into religious beliefs are largely unavoidable if the constitutional freedoms guaranteed by s. 2(a) are to be asserted before the courts. ... Inquiries which are genuinely designed as a means of giving effect to religious freedoms will not therefore generally be unconstitutional. There will, however, be occasions when a substantial measure of religious freedom can be achieved without mandating a state-conducted inquiry into personal religious convictions and the legislatures ought to be encouraged to do so, if a fair balance is struck.

... In my view, there exists to some degree a trade-off between a scheme which provides complete relief ... to most Saturday-observing retailers by avoiding a distasteful inquiry, and, on the other hand, an alternative scheme which provides substantial relief from burdens on religious freedom to all Saturday-observing retailers. Both schemes provide incomplete relief for the class of Saturday-observing retailers as a whole, but the incompleteness is a necessary consequence of ensuring that as many employees as possible will realize the benefits of the common pause day legislation. Both schemes represent genuine and serious attempts to minimize the adverse effects of pause day legislation on Saturday observers. It is far from clear that one scheme is intrinsically better than the other.

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... In my view, the balancing of the interests of more than seven employees to a common pause day against the freedom of religion of those affected constitutes justification for the exemption scheme selected by the Province of Ontario, at least in a context wherein any satisfactory alternative scheme involves an inquiry into religious beliefs.

I might add that I do not believe there is any magic in the number seven A "reasonable limit" is one which, having regard to the principles enunciated in [R v Oakes, [1986] 1 SCR 103, 1987 CanLII 46], it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

Having said this, however, I do not share the views of the majority of the United States Supreme Court that no legislative effort need be made to accommodate the interests of any Saturday-observing retailers. In particular, I would be hard pressed to conceive of any justification for insisting that a small, family store which operates without any employees remain closed on Sundays when the tenets of the retailer's religion requires closing on Saturdays. In my view, the principles articulated in Oakes make it incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers. The exemption in s. 3(4) of the Act under review in these appeals represents a satisfactory effort on the part of the legislature of Ontario to that end and is, accordingly, permissible.

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In view of the extent and quality of the abridgment of rights flowing from the legislation, I have little difficulty in applying the third element of the proportionality test. The infringement is not disproportionate to the legislative objectives. A serious effort has been made to accommodate the freedom of religion of Saturday observers, in so far as that is possible without undue damage to the scope and quality of the pause day objective. It follows that I would uphold the Act under s. 1.

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BEETZ J (McIntyre J concurring):

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... [I]n my respectful opinion, the impugned legislation does not violate the freedom of conscience and religion guaranteed by s. 2(a) of the *Charter* and, accordingly, is of full force and effect without any need to rely on s. 1 of the *Charter*.

• • •

In my respectful opinion [the reasoning in Dickson CJ's judgment] is flawed as it postulates that the economic burden imposed upon Saturday observers is the effect of the impugned legislation. That this is not the case is made clear when one looks at the situation which would prevail should all Sunday observance laws be repealed. A devout Saturday observer would close shop on Saturdays whereas most of his competitors would remain open all week. ... [I]n the absence of any Sunday observance law[,] he would have to choose between the observance of his religion and the opening of his business in order to meet competition.

The economic harm suffered by a Saturday observer who closes shop on Saturdays is not caused by the *Retail Business Holidays Act*. ... It results from the deliberate choice of a tradesman who gives priority to the tenets of his religion over his financial benefit. It is accordingly erroneous to suggest that the effect of the Act is to induce a Saturday observer to choose between his religion and the requirements of business competition. ...

... [T]his Court has made it clear that in order to constitute a violation of the freedom of conscience and religion guaranteed by the *Charter*, the coercion must come from the state. ...

It may well be that the true reason why the constitutionality of the *Retail Business Holidays Act* was challenged is the apparent advantage that it may confer upon Sunday observers whose Sabbath coincides with the common pause day prescribed by the Act. If this be the case, the challenge would then be based on s. 15 of the *Charter* and not on s. 2. ... But, as I have already indicated, s. 15 did not have effect at the relevant time and I abstain from expressing any view on the merits of a challenge based on this provision.

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WILSON J (dissenting in part):

... [I] agree with the Chief Justice that s. 2 of the statute infringes the freedom of religion of those who close on Saturdays for religious reasons because it attaches an economic penalty to their religious observance. It requires them to be closed two days in the week instead of one.

I part company with the Chief Justice, however, on the application of s. 1 of the *Charter* to the "Saturday exemption" contained in s. 3(4) of the Act. It seems to me that once it is accepted that s. 2 infringes the freedom of religion of those who close on Saturdays for religious reasons, the question becomes whether that infringement can be justified under s. 1 in order that a common pause day be established for retail workers. The Chief Justice finds that it can be justified in the case of large retailers but not in the case of small. He does so, as I understand his reasons, by reference to the number of persons the larger retailer employs, on the basis that a decision made by that retailer to stay open on Sundays would deprive a larger number of employees of their common pause day than would the same decision made by a smaller retailer. The Chief Justice finds that this disparate treatment of the members of the group whose religious freedom has been infringed can be justified on the basis that they are being differentiated on the ground of size which is not a prohibited ground of discrimination.

With respect, I do not think that a limit on freedom of religion which recognizes the freedom of some members of the group but not of other members of the same group can be reasonable and justified in a free and democratic society. The effect of the disparate treatment, characterized by the Chief Justice as being based on size, is that the religious freedom of some is respected by the legislation and the religious freedom of others is not. It is this effect which, in my view, makes the legislation vulnerable to attack on constitutional grounds.

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[T]he legislature must decide whether to subordinate freedom of religion to the objective of a common pause day, one scheme of justice, or subordinate the common pause day to freedom of religion, the competing scheme of justice, and, having decided which scheme of justice to adopt, it must then apply it in all cases. It cannot decide to subordinate the freedom of religion of some members of the group to the objective of a common pause day and subordinate the common pause day to the freedom of religion of other members of the same group. Yet this is the effect of the distinction between the large and small retailer adopted by the legislature in this legislation. It is, in my view, "a compromised scheme of justice." It does not affirm a principle which is applicable to all. It reflects rather a failure on the part of the legislature to make up its mind which scheme of justice to adopt. The result is, in my opinion, what Professor Dworkin refers to as "checkerboard" legislation.

It follows from what I have said that, in my view, s. 3(4) cannot constitute a reasonable limit under s. 1 of the *Charter* or be justified in a free and democratic society. However, if I am wrong in this and disparate treatment of this kind can be justified under s. 1, it would, in my view, require much more compelling evidence The

Crown adduced no evidence to establish that permitting all retailers who close on Saturdays on religious grounds to stay open on Sundays would cause a substantial disruption of the common pause day. Nor was it established that retailers who were not motivated to close on Saturdays by religious considerations would elect under s. 3(4)(a) to close on Saturdays for the sole purpose of being open on Sundays. Economic considerations may well make such a choice unlikely. ...

[Justice Wilson concluded that the fault with the s 3(4) exemption for stores that closed on Sunday was that it did not go far enough: "It [did] not protect the freedom of religion of all those who close on Saturdays for religious reasons" (at para 210). She would have severed those paragraphs that limited the scope of the exemption to smaller retailers.

Justice La Forest wrote a concurring judgment. He would have upheld the Act under s 1 even if it had not contained the s 3(4) exemption for smaller enterprises (at para 183):

In seeking to achieve a goal that is demonstrably justified in a free and democratic society ... a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. ... In a case like the present, it seems to me, the Legislature is caught between having to let the legislation place a burden on people who observe a day of worship other than Sunday or create exemptions which in their practical workings may substantially interfere with the goal the Legislature seeks to advance and which themselves result in imposing burdens on Sunday observers and possibly on others as well. That being so, it seems to me that the choice of having or not having an exemption for those who observe a day other than Sunday must remain, in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that must be made in creating religious exemptions. These choices require an in-depth knowledge of all the circumstances. They are choices a court is not in a position to make.] [Emphasis in original.]

Appeal dismissed. Appeal by Crown allowed and conviction restored.

NOTES AND QUESTIONS

1. The claim that the Sunday-closing law *indirectly* restricted the religious practice of Saturday Sabbatarians raised two issues for the Court. The first concerned the type or degree of burden on religious practice that would breach religious freedom. If a law does not ban a religious practice outright, but simply makes engagement in the practice more difficult, then the impediment or burden could be either minor or substantial. As a practical matter, not every burden on religious practice can be treated as a violation of s 2(a) that the government must justify under s 1. How significant, then, must the burden or impediment be before a court will hold that it breaches s 2(a)? The second and more fundamental question concerned the state's responsibility for the "impact" on the religious practice of a law that advances an otherwise legitimate public purpose. When should the state be seen as responsible for the relative "burden on" a religious practice, and when should the disadvantage be seen simply as a "cost" of the practice, for which the state is not responsible? In deciding that the state was responsible for this burden on religious practice, Dickson CJ emphasized the differential impact of the law on Sunday observers, who were advantaged by this law, in comparison to Saturday observers.

2. The Court accepted that the objective of the legislature was not the enforcement of the Christian Sabbath, but was simply the establishment of a common pause day and that this represented a substantial and pressing purpose under s 1. Did the Christian roots of this

practice, and in particular the choice of Sunday as the pause day, contribute to the majority view that the law interfered with the religious practices of those who wished to keep Saturday as the Sabbath? Was the unequal treatment of different religious practices critical to the finding of a breach of s 2(a)?

3. *Edwards Books* introduced a more deferential, or "reasonableness," standard into the *Oakes* analysis: see Chapter 17, *The Framework of the Charter*. In applying the minimal impairment test, Dickson CJ framed the question as (at para 131) "whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom" (emphasis added). At another point, discussing the cut-off point for the eligibility for the exemption at para 147, he stated: "A 'reasonable' limit is one which ... it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." One of the "contextual" factors triggering the more deferential approach in this case was that the government's objective was the protection of a vulnerable group—retail workers. In a frequently quoted passage, Dickson CJ stated (at para 141):

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of disadvantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on Sunday, I cannot fault the legislature for determining that the protection of employees ought to prevail.

4. Neither *Big M* nor *Edwards Books* explored in any detail the issues of how religion is defined and how religious and conscientious beliefs are distinguished from other beliefs and opinions. These issues are important because s 2(a) protects not only the right to hold and express religious and conscientious beliefs (which even in the absence of s 2(a) would be protected by s 2(b), freedom of expression) but also the right to engage in practices associated with those beliefs. It was not until 2004, in *Syndicat Northcrest v Amselem*, [2004 SCC 47](#), excerpted below in Section IV, "The Restriction and Accommodation of Religious Practice," that the Supreme Court of Canada addressed these issues.

As noted in the introduction to this chapter, freedom of religion, as it emerges from the framework cases of *Big M* and *Edwards Books*, has as its central focus the protection against state "coercion." This freedom from coercion is understood to have two sides: (1) the protection of the individual's freedom *from* religion—that is, the freedom from being compelled by the state to engage in any form of religious practice; and (2) the protection of the individual's freedom *to* religion—that is, the freedom to engage in religious practice without restriction by the state. The materials that follow explore further developments with respect to each of these aspects of religious freedom: first, state support for religion, and second, the restriction and accommodation of religious practice. As you will see, it is sometimes difficult to keep the two aspects of freedom of religion separate—state efforts to accommodate religious practice may in some cases raise issues of state imposition of religion and may be experienced as discrimination and even as disadvantaging non-believers.

III. GOVERNMENT SUPPORT FOR RELIGION

This section explores the imposition or support of religion by the state. As we saw above in *Big M*, the Supreme Court of Canada found that the Sunday closing requirement in the federal *Lord's Day Act* violated s 2(a) because its purpose was to impose observance of the Christian Sabbath.

The Canadian Charter, in contrast to the US *Bill of Rights*, does not include an explicit anti-establishment clause. Nevertheless, as we will see in this section, the Canadian courts have said that s 2(a) precludes the state not just from compelling an individual to engage in a religious practice, but also from supporting or preferring the beliefs and practices of one religion over those of another or preferring religion over non-religion and vice versa.

In two cases dealing with the recitation of the Lord's prayer in a public setting, *Zylberberg v Sudbury Board of Education*, 1988 CanLII 189, 65 OR (2d) 641 (CA) (a public school) and *Freitag v Penetanguishene (Town)*, 1999 CanLII 3786, 47 OR (3d) 301 (CA) (a town council meeting), the Ontario Court of Appeal held that the practice of reciting the prayer amounted to state compulsion—of the students or town residents—to adhere to a religious practice, even though in both cases the affected individuals had the right or opportunity to opt out of the prayer. The Supreme Court of Canada, in its more recent judgment in *Mouvement laïque québécois v Saguenay (City)*, held that the recitation of an ecumenical prayer (with explicitly Christian references made at the beginning and end of the prayer) at a town council meeting breached the state's duty to remain neutral in religious matters.

NOTE: ZYLBERBERG V SUDBURY BOARD OF EDUCATION

In *Zylberberg*, a majority of the Ontario Court of Appeal ruled that a regulation under the province's *Education Act*, RSO 1990, c E.2 mandating the Lord's Prayer in the opening exercises of public schools was contrary to s 2(a) of the Charter and could not be justified under s 1. Students could opt out of the practice by either remaining silent or withdrawing from the classroom during the recitation of the prayer. Nonetheless, the Court found that the purpose of the state action was religious and, following the Supreme Court of Canada in *Big M Drug Mart*, concluded that it breached s 2(a). The Court also found that the effect of the practice was to compel students to participate in a religious practice. The Court recognized that, in the public school context, children would feel pressure from their peers to recite the prayer—that non-participants would feel isolated or stigmatized. In the Court's view, this was enough for the prayer to be regarded as coercive—as state compulsion to engage in a religious practice. Although the children had a formal right to opt out of the prayer, they would feel significant pressure to conform to the school-supported practices of the majority community.

The Court went on to find that because the law had a religious purpose, it could not be a reasonable limit under s 1. Furthermore, the Court said that even if the pressing and substantial purpose of the law was described in more general (non-religious) terms—such as the affirmation of important values in the schools—the law did not interfere with s 2(a) rights as little as was necessary to advance this objective. The schools could advance this objective in ways other than a daily recitation of a Christian prayer. In holding that the law did not represent a minimal impairment of the religious freedom of non-Christians, the Court referred to the practice of the Toronto School Board, which involved daily readings on a rotating basis from a book of materials that drew from a wide range of spiritual and philosophical traditions. The Court did not decide that the Toronto School Board's practice was constitutional, but only that it offered a way to affirm public values in the schools that intruded less on religious freedom than the practice of reciting the Lord's Prayer.

In his dissenting judgment, Lacourcière J disagreed with the majority's application of s 2(a). Noting the omission from the Charter of any provision resembling the anti-establishment clause of the US *Bill of Rights*, he argued that s 2(a) "does not prohibit all governmental aid to or advancement of religion per se." In his view, the prayer was simply a "state-created opportunity to participate in [a] religious activity." Given the broad exemption granted to dissenters, it could not reasonably be said that either the purpose or effect of the regulation was to compel participation in a religious practice.

Justice Lacourcière went on to consider the application of s 15 of the Charter to both the provincial law and the practice of the Sudbury School Board of Education. He found that the provincial regulation, which required that the school day be opened or closed "with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers" did not breach s 15. He could not imagine that the inclusive wording of the Lord's Prayer "could offend any religious group." He added that, even if the prayer (along with the reference to the Scriptures) was understood "to favour the Christian faith," the regulation permitted the use of other "suitable" prayers or readings. However, Lacourcière J did find that the particular *practice* of the Sudbury Board breached s 15. He noted that the board's practice had been to "formally open each school day by the singing of O Canada and the recitation of the Lord's Prayer, often followed by Scripture readings or Biblical stories, in order to encourage respect for the moral principles emphasized within the Judeo-Christian tradition." This practice, he accepted, breached s 15 because "it gives preference to that tradition at the expense of all non-Christians," and could not be justified under s 1 because "there are other ways, which are less intrusive on the equality rights of religious minorities, to implement religious exercises which encourage respect for moral principles."

NOTES AND QUESTIONS

1. In *Zylberberg*, the Court took a broad view of coercive pressure. Even though children could opt out of the prayer, the Court found that they were under unacceptable pressure to conform. Does this apply only in the case of children? In *Freitag v Penetanguishene (Town)*, the Ontario Court of Appeal held that the mayor's practice of opening town council meetings by inviting councillors (and, indirectly, members of the public) to rise with him and recite the Lord's Prayer violated s 2(a) and could not be justified under s 1. The following excerpt is from the Court's decision:

[24] ... The appellant conceded that he did not feel forced to stand and recite the Lord's Prayer when others did. Others have observed that he does not stand, nor does he recite the prayer. They also note that he participates in meetings and that outwardly he does not appear to be uncomfortable. However, he has deposed, without challenge by cross-examination, that he feels great pressure to stand, and as a non-Christian, he feels intimidated by and uncomfortable with the practice of having the councillors stand and recite the prayer. ...

[25] ... Because the purpose of the practice, to impose a specifically Christian moral tone contravenes s. 2(a) of the Charter, there is no need to examine the effects of the practice. However, even if one does consider the effects, the application judge erred in finding that they are trivial and insubstantial.

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[33] The main factor which distinguishes this case from *Zylberberg* ... is that the person who is seeking the relief ... is an adult citizen attending Town Council meetings, rather than children attending school[.] ... Clearly the nature and potential effect of the coercion are much different for an adult who wishes to attend Town Council meetings than for children who are in the school environment all year with friends and teachers, and are subject to the pressures that those important relationships engender.

[34] However, in my view, the fact that the applicants in *Zylberberg* may be perceived as more vulnerable than the appellant in this case is not determinative of the issue. Just as children are entitled to attend public school and be free from coercion or pressure to conform to the religious practices of the majority, so everyone is entitled to attend public local council meetings and to enjoy the same freedom.

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[36] In this case there is no expert evidence on the effect of peer pressure on adults. There is, however, direct evidence, first from the appellant that he feels intimidation when he attends the meeting of his local Town Council. This does not mean he is so fearful that he does not participate. He does so, but as a citizen who is singled out as being not part of the majority recognized officially in the proceedings. Because of the exclusionary practice of the council, he has also been dissuaded from running for council in an election. Second, there is the evidence from the Town's witnesses that in fact the appellant[s] ... actions are analyzed and made the subject of comment. ... Someone who chooses to object to government action which is inclusive of the majority but forces the religious minority to conform or to accept exclusion, is then subjected to further scrutiny

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[39] The "subtle and constant reminder" of his difference from the majority is what causes the appellant to feel intimidated and uncomfortable at council meetings. It has also deterred him from running for a council which proclaims and identifies itself as it does. In Zylberberg, this court also found an infringement of s. 2(a) in "a broader sense." It held, at p. 655, that the need to seek an exemption from attending the opening exercises "compels students and parents to make a religious statement" ... so that the effect of the exemption provisions was to discriminate against religious minorities by stigmatizing them. The court concluded that the exemption provision, which was invoked to seek to avoid the compulsion of the infringing legislation, failed to mitigate the infringement.

[40] Similarly, the appellant is clearly stigmatized by his decision not to stand and recite the Lord's Prayer, so that the fact that he is not prohibited from making that choice does not save the Town's practice from infringing his Charter right.

[41] In my view, ... this is not a case where the effect of the Charter infringement is either trivial or insubstantial.

2. Despite the determination by Canadian courts that the recitation of Christian prayers in public schools or at municipal meetings breaches s 2(a) of the Charter, the daily session in several provincial legislatures still begins with the Lord's Prayer. The same Freitag brought a complaint under the *Ontario Human Rights Code* against the Ontario legislature, which opens its daily session with the Lord's Prayer. In *Ontario (Speaker of the Legislative Assembly) v Ontario (Human Rights Commission)*, [2001 CanLII 8549, 54 OR \(3d\) 595 \(CA\)](#), the Ontario Court of Appeal held that the opening exercises of the provincial legislature, including the recitation of the prayer, was part of its internal operation and immune from Charter and other forms of external review. It followed then that the Ontario Human Rights Commission had no jurisdiction to consider whether the practice of opening the daily session in the legislature with a recitation of the Lord's Prayer was contrary to the *Human Rights Code*.

In 2008, the Premier of Ontario proposed that the legislature introduce a more inclusive opening to its daily session, involving a rotation of readings and recitations from different religious and other belief systems. The government backed down from this plan, however, following a public outcry. The Lord's Prayer continues to be part of the opening exercises of the Ontario legislature, although it is now supplemented with readings and prayers from other traditions.

Mouvement laïque québécois v Saguenay (City)

2015 SCC 16

[At public meetings of the municipal council of the city of Saguenay, it was the practice of the mayor to begin each meeting by reciting the following prayer:

[TRANSLATION] O God, eternal and almighty, from Whom all power and wisdom flow, we are assembled here in Your presence to ensure the good of our city and its prosperity.

We beseech You to grant us the enlightenment and energy necessary for our deliberations to promote the honour and glory of Your holy name and the spiritual and material [well-being] of our city.

Amen.

Both before and after reciting the prayer, the mayor would make the sign of the cross while saying [TRANSLATION] "[i]n the name of the Father, the Son and the Holy Spirit." Other councillors and municipal officials would cross themselves at the beginning and end of the prayer as well. Mr Simoneau was an interested citizen who regularly attended the municipal council's public meetings. As an atheist, he objected to the practice of reciting the prayer and lodged a complaint with the Quebec Human Rights Tribunal.

In the interim, the city of Saguenay adopted a by-law that established and regulated the recitation of the prayer, made minor changes to the wording of the prayer, and provided for a two-minute delay between the end of the prayer and the official opening of the council meeting. Simoneau, along with the Mouvement laïque québécois, applied to the tribunal for a declaration that the by-law was inoperative. The tribunal granted the application, finding that the prayer was religious in nature and that its recitation, which showed a preference for one religion, was in breach of the state's duty of neutrality. The tribunal also found that the prayer constituted a discriminatory interference with Simoneau's freedom of conscience and religion.

The Quebec Court of Appeal reversed the Tribunal's decision, holding that the prayer expressed universal values that could not be identified with any particular religion, and that it did not amount to a breach of the state's duty of neutrality. In addition, the Quebec Court of Appeal decided that any interference with Simoneau's freedom of conscience and religion was insubstantial.

The Supreme Court of Canada allowed the appeal against the decision of the Quebec Court of Appeal.]

GASCON J (McLachlin CJ and Lebel, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ concurring):

[1] The state is required to act in a manner that is respectful of every person's freedom of conscience and religion. This is a fundamental right that is protected by the Quebec *Charter of human rights and freedoms*, CQLR, c. C-12 ("Quebec Charter"), and the Canadian *Charter of Rights and Freedoms* ("Canadian Charter"). Its corollary is that the state must remain neutral in matters involving this freedom. The interplay between freedom of conscience and religion, on the one hand, and this duty of neutrality, on the other, is sometimes a delicate one.

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[64] In my opinion, the appellants' position must prevail. Sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 17). If the state favours one religion at the expense of others, it imports a disparate impact that is destructive of the religious freedom of the collectivity (*R. v. Big M Drug Mart Ltd.*, ... [1985] 1 S.C.R. 295, at p. 337). In a case such as this, the practice of reciting the prayer and the By-law that regulates it result in the exclusion of Mr. Simoneau on the basis of a listed ground, namely religion. That exclusion impairs his right to full and equal exercise of his freedom of conscience and religion. The discrimination of which he complains relates directly to the determination of whether, on the one hand, the prayer is religious in nature and whether, on the other hand, the City is entitled to have it recited as it did. In my opinion, I must

therefore begin the discussion by establishing the scope of the state's duty of neutrality in the context of freedom of conscience and religion. I will then consider the rules [governing] whether the state has breached its duty of neutrality in adopting a statute, regulations or a practice. Finally, I will apply these rules to the facts

(1) Neutrality of the State as Regards Freedom of Conscience and Religion

[65] Section 3 of the *Quebec Charter* protects the freedom of conscience and religion of every person[.]

[66] Section 10 supplements s. 3 and prohibits discrimination based on various grounds, including religion:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on ... religion

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[67] Section 2(a) of the *Canadian Charter* is the constitutional counterpart of s. 3[.]

[68] Because of the similarity between s. 3 of the *Quebec Charter* and s. 2 of the *Canadian Charter*, it is well established that s. 3 should be interpreted in light of the principles that have been developed in relation to the application of the *Canadian Charter*

[69] ... [F]reedom of conscience and religion protects the right to entertain beliefs, to declare them openly and to manifest them, while at the same time guaranteeing that no person can be compelled to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs

[70] These protections are not limited to religious beliefs. ... For the purposes of the protections afforded by the charters, the concepts of "belief" and "religion" encompass non-belief, atheism and agnosticism.

[71] Neither the *Quebec Charter* nor the *Canadian Charter* expressly imposes a duty of religious neutrality on the state. This duty results from an evolving interpretation of freedom of conscience and religion. ... LeBel J. in [*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, dissenting but not on this point] ... described the evolution of the concept of religious neutrality ... :

... [T]he appearance and growing influence of new ... theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state; Canada's demographic evolution has also had an impact on this process, as have the urbanization and industrialization of the country. Although it has not excluded religions and churches from the realm of public debate, this evolution has led us to consider [religion] to relate more to individuals' private lives or to voluntary associations These societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. ... The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society. [Emphasis added; paras. 66-67.]

[72] ... [N]eutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (S.L., at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.

[73] In "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at p. 507, Professor R. Moon points out that a religious belief is more than an opinion. It is the lens through which people perceive and explain the world in which they live. It defines the moral framework that guides their conduct. Religion is an integral part of each person's identity. When the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubt on the value of those it does not share. It is also ranking the individuals who hold such beliefs:

If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth. [Emphasis added; p. 507.]

[74] By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, ... [t]he neutrality of the public space ... helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the *Canadian Charter*. ...

[75] I would add that ... the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs The state may not ... create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.

[76] When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not ... promote the participation of certain believers or non-believers in public life to the detriment of others. ... Today, the state's duty of neutrality has become a necessary consequence of enshrining the freedom of conscience and religion in the *Canadian Charter* and the *Quebec Charter*.

[77] The Tribunal was therefore correct in holding that the state's duty of neutrality means that a state authority cannot make use of its powers to promote or impose a religious belief (paras. 209-11). As for Gagnon J.A., although he [referred to] these principles ... he found that absolute state neutrality is not possible from a constitutional point of view (para. 68). In his opinion, absolute neutrality is contrary to the state's duty to preserve its history, including its multi-religious heritage (para. 69). A society's cultural reality precludes an excessively radical conception of state neutrality (paras. 70 and 74). He considered the concept of [TRANSLATION] "benevolent neutrality" to be more appropriate to define the state's duty of religious neutrality (para. 76). It follows that the state's duty of neutrality does not go so far as to require complete secularity (para. 79).

[78] With respect, what is in issue here is not complete secularity, but true neutrality on the state's part and the discrimination that results from a violation of that neutrality. In this regard, contrary to what the Court of Appeal suggested, I do not think that the state's duty to remain neutral on questions relating to religion can be reconciled with a benevolence that would allow it to adhere to a religious belief. State

neutrality means—and the Court of Appeal in fact agreed with this (at paras. 76 and 78)—that the state must neither encourage nor discourage any form of religious conviction whatsoever. If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality. If that religious expression also creates a distinction, exclusion or preference that has the effect of nullifying or impairing the right to full and equal recognition and exercise of freedom of conscience and religion, there is discrimination.

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(2) Interference by the State With Freedom of Conscience and Religion

[80] The state might interfere with freedom of conscience and religion by, for example, adopting a statute, regulations or a by-law, or it might do so [through] its officials[.] ...

[81] A [legislative] provision ... will be inoperative if its purpose is religious The legislation, including its preamble, its structure and its evolution, as well as its context and the legislative debate, are all indicators that can be used to delineate the provision's purpose The legislative objective cannot be to impose or favour, or to express or profess, one belief to the exclusion of all others.

[82] ... [T]his appeal does not relate strictly to a legislative provision. The respondents adopted the By-law to regulate the recitation of the prayer, but the complaint filed with the Commission was not limited to this. Moreover, the By-law was adopted after the complaint had been filed. The complaint also concerned a practice ... , namely the recitation of a prayer. [Therefore] ... , the analysis of the provision must also take account of the practice it regulates.

[83] In a case like this one ... , the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others (S.L., at para. 32) and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion

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[87] ... [I]t must be recognized that the Canadian cultural landscape includes many traditional and heritage practices that are religious in nature. Although it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality, there is also no doubt that the state may not consciously ... adopt or favour one religious view at the expense of all others.

[88] Thus, it is essential to review the circumstances carefully. If they reveal an intention to profess, adopt or favour one belief to the exclusion of all others, and if the practice at issue interferes with the freedom of conscience and religion of one or more individuals, ... the state has breached its duty of religious neutrality. This is true regardless of whether the practice has a traditional character.

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(3) Application to the Facts

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[96] On the evidence in the record, I find that it was reasonable for the Tribunal to conclude that the City's prayer is in fact a practice of a religious nature. ... Its decision on this point was supported by reasons that were both extensive and intelligible. The Court of Appeal was required to show deference and could not therefore substitute its own opinion on the facts for that of the expert decision-maker.

[Justice Gascon relied on the following factors: the practice was implemented in 2002 and thus did not reflect long-standing tradition; the original prayer was clearly Catholic in origin; the 2008 by-law did not change the prayer's denominational

nature. While the new by-law included a period between the end of the prayer and the start of the meeting to permit persons who had left the chamber to re-enter, this only highlighted "the exclusive effect of the practice" (at para 101). Finally, the practice involved a clearly religious ritual of entering the chamber, standing for the prayer, and then making the sign of the Cross.]

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(iii) The Alleged Discrimination

[112] In light of the context and evidence discussed above, the Tribunal concluded that there had been discriminatory interference with Mr. Simoneau's freedom of conscience and religion . . . But the Court of Appeal found that Mr. Simoneau had not been treated unfairly in relation to other citizens who attended the council meetings . . . [Justice Gagnon stated that there was no evidence of harm.]

1. Exclusion Based on Religion

[113] The Court of Appeal could not disregard the Tribunal's findings of fact . . . unless they could be held to be unreasonable. The evidence does not support such a result. . . In my opinion, it was open to the Tribunal to conclude that the municipality's practice, given its religious nature, was in breach of the state's duty of neutrality and resulted in an exclusion based on religion. . .

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[115] . . . I note that the Court of Appeal stressed that the state's duty of neutrality does not require the elimination of every allusion to [TRANSLATION] "a society's historical points of reference" (para. 98). It held that neutrality does not preclude "historical manifestations of the religious dimension of Quebec society, which, when viewed with proper perspective, cannot have the effect of undermining the neutrality of the various branches of the State" (para. 104). It considered the prayer to be one of a number of "mere references to religious heritage" (para. 107).

[116] I concede that the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage. But that cannot justify the state engaging in a discriminatory practice for religious purposes, which is what happened in the case of the City's prayer. The mayor's public declarations are revealing of the true function of the council's practice:

[TRANSLATION] I'm in this battle because I worship Christ.

When I get to the hereafter, I'm going to be able to be a little proud. I'll be able to say to Him: "I fought for You; I even went to trial for You." There's no better argument. It's extraordinary.

I'm in this fight because I worship Christ. I want to go to heaven and it is the most noble fight of my entire life. [Emphasis deleted.]

(Tribunal's reasons, at para. 88)

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[118] These comments confirm that the recitation of the prayer at the council's meetings was above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others. . . What the respondents are defending is not a tradition, but the municipality's right to manifest its own faith. . .

[119] I repeat that what is at issue here is the state's adherence, through its officials acting in the performance of their functions, to a religious belief. The state, I should point out, does not have a freedom to believe or to manifest a belief; compliance with its duty of neutrality does not entail a reconciliation of rights. On the other hand, it goes without saying that the same restrictions do not apply to the exercise by state

officials of their own freedom of conscience and religion when they are not acting in an official capacity. Although they are not entitled to use public powers to profess their beliefs, this does not affect their right to exercise this freedom on a personal basis.

2. *The Impairment of Mr. Simoneau's Rights*

[120] The prayer ... turned the meetings into a preferential space for people with theistic beliefs. ... Although non-believers could also participate, the price for doing so was isolation, exclusion and stigmatization. This impaired Mr. Simoneau's right to exercise his freedom of conscience and religion.

[121] In this regard, ... when Mr. Simoneau went to meetings of the municipal council, he had to choose between remaining in the chamber and conforming to the City's religious practice, excluding himself from the practice by refusing to participate in it, and physically excluding himself from the chamber for the duration of the prayer. If he chose to conform to the council's practice, he would be acting in direct contradiction with his atheistic beliefs. ... According to the Tribunal's findings, Mr. Simoneau had experienced a strong feeling of isolation and exclusion (paras. 265-66). This led the Tribunal to conclude that the interference caused by this situation was more than trivial or insubstantial (para. 262). Such interference constitutes an infringement of the complainant's freedom of conscience and religion.

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[124] [The Tribunal's] findings are similar to findings made by other courts in similar circumstances [such as *Zylberberg v Sudbury Board of Education* and *Freitag v Penetanguishene (Town)*]

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[126] In sum, ... the Tribunal's finding in the instant case of discrimination contrary to ss. 3 and 10 of the Quebec Charter was reasonable. ...

[127] In closing, as to the City's by-law regulating the prayer, ... [a] by-law adopted to regulate a discriminatory religious practice that is incompatible with the state's duty of neutrality must also be discriminatory. Even though the By-law's preamble indicates an intention [TRANSLATION] "to ensure decorum and highlight the importance of the work of the councillors," it can be seen from the evidence as a whole that this purpose was secondary. Decorum could have been ensured in many other ways that would not have led the City to adopt a religious belief.

[128] Finally, although the adoption of a by-law normally opens the door to the application of the justificatory provision ... [s 9.1 of the Quebec Charter, the equivalent of s 1 of the Canadian Charter], the onus of justification was on the respondents Since they have advanced no substantive argument in this regard, I will not discuss this further.

(c) Other Submissions of the Respondents

[129] Despite these findings of the Tribunal, the respondents raise four other arguments in favour of finding that the prayer is valid and is not discriminatory, which I will now discuss.

(i) *Absolute Neutrality and True Neutrality*

[130] In the respondents' view, barring the municipal council from reciting the prayer would amount to giving atheism and agnosticism prevalence over religious beliefs. The Court of Appeal advanced this same argument in its reasons (para. 71). Its comments on benevolent neutrality were along the same lines.

[131] This Court has referred in the past to the difficulty the definition of the concept of neutrality seems to cause. In *S.L.*, the Court referred to comments made by Professor R. Moon:

We must recognize that trying to achieve religious neutrality in the public sphere is a major challenge for the state. The author R. Moon has clearly described the difficulty of implementing a legislative policy that will be seen by everyone as neutral and respectful of their freedom of religion:

If secularism or agnosticism constitutes a position, worldview, or cultural identity equivalent to religious adherence, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical religious practices. But by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation of a non-religious or secular perspective

... Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective.

("Government Support for Religious Practice," in *Law and Religious Pluralism in Canada* (2008), 217, at p. 231) [para. 30]

[132] Stressing that absolute state neutrality is impossible to attain, the Court defined its non-absolutist conception of neutrality as follows:

Therefore, following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.

(*S.L.*, at para. 32)

Thus, a neutrality that is non-absolute is nevertheless a true neutrality. But this true neutrality presupposes that the state abstains from taking a position on questions of religion.

[133] Contrary to the respondents' argument, abstaining does not amount to taking a stand in favour of atheism or agnosticism. ... A practice according to which a municipality's officials, rather than reciting a prayer, solemnly declared that the council's deliberations were based on a denial of God would be just as unacceptable. ...

[134] In short, there is a distinction between unbelief and true neutrality. True neutrality presupposes abstention, but it does not amount to a stand favouring one view over another. No such inference can be drawn from the state's silence. ...

(ii) Non-denominational Nature of the Prayer

[135] The respondents stress the non-denominational nature of the prayer I find that this argument must fail for two reasons.

[136] First, it has not been established in this case that the prayer is non-denominational. ... [To the contrary, the tribunal found that the council's practice was strongly associated with Catholicism.]

[137] Second, even if it were accepted that the prayer at issue is *prima facie* a non-denominational practice, it is nonetheless a religious practice, as the respondents

themselves conceded at the hearing in this Court. The respondents argue in this regard that a state that is "somewhat religious" can be tolerated in the context of state neutrality provided that it is inclusive, and that this tolerance can be justified on the basis of historical and traditional values. They add that the separation of church and state does not necessarily mean that the two are totally separate. I find that the respondents are on the wrong track in this respect. True neutrality is concerned not with a strict separation of church and state on questions related to religious thought. The purpose of neutrality is instead to ensure that the state is, and appears to be, open to all points of view regardless of their spiritual basis. Far from requiring separation, true neutrality requires that the state neither favour nor hinder any religion, and that it abstain from taking any position on this subject. Even if a religious practice engaged in by the state is "inclusive," it may nevertheless exclude non-believers; whether it is consistent with the *Quebec Charter* depends not on the extent to which it is inclusive, but on its exclusive nature and its effect on the complainant's ability to act in accordance with his or her beliefs.

• • •

(iii) The Prayer of the House of Commons

[141] The respondents submit that the City's prayer must be valid because it is similar to the one recited by the Speaker of the House of Commons before that body's meetings. Gagnon J.A. also referred to the latter prayer in his reasons (paras. 94-95).

[142] In the specific context of this appeal, this argument must fail for three reasons. First, there is no evidence before us on the purpose of the prayer of the House of Commons. Second, the circumstances of the recitation of the two prayers are different. Third, it is possible that the House's prayer is subject to parliamentary privilege, as certain courts have suggested (*Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), ... 54 O.R. (3d) 595 (C.A.); see also *Renfrew*, at para. 22).

[143] In the absence of detailed evidence on Parliament's practice and the circumstances thereof, and of full argument on this point, it would be inappropriate for the Court to discuss its content or to use it to support a finding that the City's prayer is valid.

(iv) Preamble to the Canadian Charter and the Supremacy of God

[144] Finally, the respondents argue that the reference to the supremacy of God in the preamble to the *Canadian Charter* establishes the moral source of the values that charter protects. In their view, a prayer that refers to that same source cannot, in itself, interfere with anyone's freedom of conscience and religion. ...

[145] The preamble to the *Canadian Charter* reads as follows:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law;

[146] In my opinion, the respondents' argument in this regard truncates the analysis on the issue of freedom of conscience and religion. Contrary to what their argument suggests, that analysis is not limited to a single reference to God in the prayer. ... Rather, the analysis concerns the state's observance of a religious practice ... [which breaches] the state's duty of neutrality.

[147] The reference to the supremacy of God in the preamble to the *Canadian Charter* cannot lead to an interpretation of freedom of conscience and religion that authorizes the state to consciously profess a theistic faith. The preamble, including its reference to God, articulates the "political theory" on which the *Charter*'s protections

are based It must nevertheless be borne in mind that the express provisions of the *Canadian Charter*, such as those regarding freedom of conscience and religion, must be given a generous and expansive interpretation....

[148] ... [T]he reference to God in the preamble cannot be relied on to reduce the scope of a guarantee that is expressly provided for in the charters. Professor L. Sossin explains this as follows in "The 'Supremacy of God,' Human Dignity and the *Charter of Rights and Freedoms*" (2003), 52 *U.N.B.L.J.* 227, at p. 229:

The reference to the supremacy of God in the *Charter* should not be construed so as to suggest one religion is favoured over another in Canada, nor that monotheism is more desirable than polytheism, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be at odds with the purpose and orientation of the *Charter*, as well as with the specific provisions regarding freedom of religion and conscience under s. 2. [Emphasis added.]

[149] This leads me to conclude that the reference to the supremacy of God does not limit the scope of freedom of conscience and religion and does not have the effect of granting a privileged status to theistic religious practices. Contrary to what the respondents suggest, I do not believe that the preamble can be used to interpret this freedom in this way.

(d) Conclusion

[150] ... The Tribunal's findings of fact on the religious and discriminatory nature of the By-law and of the practice were not unreasonable; quite the contrary. The prayer creates a distinction, exclusion and preference based on religion that has the effect of impairing Mr. Simoneau's right to full and equal exercise of his freedom of conscience and religion. The Court of Appeal could not simply substitute its own view for that of the Tribunal without first establishing in what way the Tribunal's findings were unreasonable, which it did not do. This Court must intervene to restore the Tribunal's judgment in this regard [which included a declaration that the by-law was inoperative and an order that the city, the members of the municipal council, and the mayor cease reciting a prayer in the municipal council chamber].

[Justice Abella agreed with the disposition of the appeal, but wrote separate reasons on the applicable standard of review. Justice Gascon had found that the correctness standard applied to the question of law relating to the scope of the state's duty of religious neutrality, with the reasonableness standard applying to the other questions before the Tribunal. Justice Abella disagreed with the practice of applying different standards of review to different aspects of the decision of a specialized tribunal and would have applied the reasonableness standard to all aspects of the tribunal's decision.] [Emphasis in original.]

NOTES AND QUESTIONS

1. In *Saguenay*, the Court stated that when a complaint concerns a "state practice" (rather than a law), the test for determining a breach of s 2(a) has an additional step. The complainant must establish "that the state is professing, adopting or favouring one belief to the exclusion of all others ... and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion" (at para 83). More specifically, it must be shown that the state practice impedes "the individual's ability to act in accordance with his or her beliefs" (at para 85). Is this second step redundant? Why do you think the Court included this step?

2. Are there limits to the neutrality requirement set out in *Saguenay*? According to the Supreme Court of Canada, “the state’s duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage” (at para 116). Yet it may often be difficult to determine when the use of religious symbols or practices by that state is simply an acknowledgment of the country’s religious history, and when it amounts to a present affirmation of the truth of a particular religious belief system. Also, as the Court seemed to recognize in *Edwards Books*, if a large part of the population is Christian (or of Christian background), it is difficult to see how the state could not take the practices of this group into account when, for example, it selects statutory holidays or establishes a “pause day” from work.

3. Is neutrality neutral? The complete removal of religion from the political sphere may be experienced by religious adherents as the exclusion of their world view and the affirmation of a non-religious, agnostic, or atheist perspective—the culture or identity of a particular segment of the community. If the basis for excluding religious practice from the political sphere is that atheists or agnostics represent an identity group that should be treated with equal respect, then excluding religion may be viewed as a preference for the beliefs or world view of the atheist or agnostic community. How does the Court answer this concern?

4. In *Saguenay*, the municipality argued that the reference to God in the preamble to the Charter meant that the invocation of God in the town’s prayer could not be unconstitutional—that is, that the Constitution could not be read as prohibiting any reference to God by the state. Does the Court adequately respond to this argument?

5. One of the decisions that the Court relied on in *Saguenay* is *SL v Commission scolaire des Chênes*, [2012 SCC 7](#). This case is discussed in more detail below, in Section V, “Religious Families, Communities, and Organizations.”

6. For further discussion of the principle of state neutrality, see *Loyola High School v Quebec (AG)*, excerpted below, in Section V.

7. At para 74 of *Saguenay*, there is a reference to *R v NS*, [2012 SCC 72](#), which involved the issue of whether s 2(a) of the Charter would give a witness in a criminal trial the right to wear a niqab when giving evidence. This case is discussed in Section IV.

8. In *Servatius v Alberni School District No 70*, [2020 BCSC 15](#), the BC Supreme Court held that a smudging ceremony conducted in an elementary public school in BC did not breach s 2(a). At para 94, the judge concluded

that these smudging and hoop dancing demonstrations were in no way—either by design or in their execution—an expression of the School District’s beliefs or an expression of religious favouritism. Rather, the organization of these events reflected a gathering momentum to incorporate the teaching of Indigenous worldviews and perspectives. I accept the evidence of Ms. Dyer, the petitioner’s daughter’s teacher, that the smudging or anything that the Elder said could not be construed as trying to make someone else believe what the Elder believed—when the Elder spoke, she used words like “our tradition is” or “we believe.” And, arranging for students to observe hoop dancing, even if the dancing is accompanied by an Indigenous prayer, cannot reasonably be interpreted as the School District professing, adopting, or promoting religious beliefs.

Is this analysis consistent with *Saguenay*? With *Zylberberg*?

Is it a breach of religious freedom for the government to act on the basis of religious values? If so, how do we distinguish between religious and non-religious moral considerations? Is it reasonable to expect a religiously committed politician or voter to make decisions without relying on religious values? It is worth noting that religion has played a significant role in Canadian politics. The Social Gospel movement, for example, played an important role in the enactment of progressive legislation in the first half of the last century. In the United States, religious adherents and organizations played a central role in the civil rights movement. The Supreme Court of Canada grappled with these issues in *Chamberlain v Surrey School District*

No 36, discussed in the note immediately below. Although *Chamberlain* was not decided on Charter grounds, and, on the facts, a school board's decision was quashed because it was unduly influenced by the religious and moral views of one group of parents, the reasoning suggests that it is permissible for a state actor to act on the basis of religious values.

NOTE: CHAMBERLAIN V SURREY SCHOOL DISTRICT NO 36

In *Chamberlain v Surrey School District No 36*, [2002 SCC 86](#), a local school board rejected a proposal to include three books depicting same-sex parent families on the list of approved teaching resources for the primary grades. The appellants challenged the board's decision ("the resolution") on two grounds, arguing first, that the board had acted outside its mandate under the *School Act* of British Columbia, RSBC 1996, c 412 s 76, which provided that "[a]ll schools ... must be conducted on strictly secular and non-sectarian principles" (at para 18); and second, that the resolution violated the Charter. A majority of the Supreme Court of Canada, in a judgment written by McLachlin CJ, held that the school board "acted outside the mandate of the *School Act* ... and [its] own regulation for approval of supplementary material" (at para 2) when it refused to include these three books on the list of approved teaching resources. Having reached this conclusion, it was unnecessary for the majority to consider whether the resolution breached the Charter.

Chief Justice McLachlin accepted that the secularism requirement in the BC *School Act* did not preclude the board from taking religious values and beliefs into account when making decisions, but that it did prevent the board from supporting or enforcing a religious or moral view that denied respect or recognition to another group or perspective in the community:

[19] The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.

Chief Justice McLachlin found that the board, in acting on the concerns of some parents about the morality of same-sex relationships, had failed to take seriously the rights of same-sex parents, and the children of such relationships, to be equally respected within the public school system. The board in this case had "failed to proceed as required by the secular mandate of the *School Act* by letting the religious views of a certain part of the community trump the need to show equal respect for the values of other members of the community" (at para 71).

Chief Justice McLachlin held that the inclusion of these books as teaching materials did not amount to the affirmation of same-sex relationships and the repudiation of contrary views. What the *School Act* demanded, she said, was tolerance:

[66] ... [T]he demand for tolerance cannot be interpreted as the demand to approve another person's beliefs or practices. When we ask people to be tolerant of others, we don't ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that

others are entitled to equal respect depends, not on the belief that their values are right, but only on the belief that they have a claim to equal respect regardless of whether they are right.

Tolerance requires only that we respect the right of each individual to form their own judgments and, in this case, their choice of intimate partner or family arrangement. Teaching tolerance does not require that public actors, such as the schools, affirm a particular value or viewpoint. More specifically, it does not require that the schools teach or affirm that same-sex and opposite-sex relationships are equally valuable. In the Chief Justice's view, the books would simply "expose" children to non-traditional family forms and encourage them to tolerate these forms. According to McLachlin CJ, the use of the three books in the kindergarten classes would encourage "discussion and understanding of all family groups" (at para 72).

NOTES AND QUESTIONS

1. Chief Justice McLachlin accepted that religious values may play a role in political decision-making; at the same time, however, she seemed to say that the state must remain neutral in matters of basic values. If the "secularism" requirement means that schools should not favour one moral perspective over another in their teaching—that they should remain neutral on moral and religious issues—then religion, and indeed any value system, will have a role in school board (and public) decision-making only when it has no bite. That is, only when it does not involve the repudiation of other values or viewpoints. Moreover, if the board's rejection of the three books for use in the primary grades amounted to the improper exclusion of gay, lesbian, and other perspectives or lifestyles, would not the inclusion of these books, by the same token, amount to the exclusion or rejection of the religious views of those parents who regard homosexuality as sinful? Can schools affirm the equal value of same-sex relationships without, in effect, repudiating the religious belief that homosexuality is immoral or unnatural?

2. The majority in *Chamberlain* based its decision to invalidate the school board's resolution on principles of statutory interpretation—that is, on the wording of the BC School Act and, in particular, the requirement of adherence to strictly secular principles. The majority did not deal with the constitutional challenge to the resolution based on s 2(b). How do you think the majority would have decided the freedom of religion claim apart from the statutory requirement of secularism in the BC School Act? Could the board resolution be considered a coercive state imposition of religion? Under a Charter analysis, could other Charter claims also have come into play—for example, claims by same-sex parents and their children that the resolution violated their equality rights under s 15 of the Charter; or claims by religious parents that the use of the books at issue in the classroom would violate their rights of freedom of religion? Note that Gonthier and Bastarache JJ, who wrote dissenting reasons upholding the resolution, did discuss the Charter values at stake and concluded that the resolution reflected an appropriate balance between the values of equality and freedom of religion.

3. For a critical discussion of *Chamberlain* and the Chief Justice's attempt to adopt a neutral stance, see Richard Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools" in David Rayside & Clyde Wilcox, eds, *Faith, Politics, and Sexual Diversity* (Vancouver: University of British Columbia Press, 2011).

4. In *Chamberlain*, McLachlin CJ did seem to accept that religious values may play a role in political decision-making. She wrote that "[b]ecause religion plays an important role in the life of many communities, these views [of parents and communities] will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door" (at para 19). Has the Supreme Court of Canada thus endorsed the principle that it is permissible for elected officials to draw on their religious values (or the religious values of their constituents) when making political decisions?

NOTE: SECTION 93 OF THE CONSTITUTION ACT, 1867 AND THE PUBLIC FUNDING OF RELIGIOUS SCHOOLS

Section 2(a) of the Charter prohibits state support for the practices or institutions of a particular religion, but does not prevent the state from providing general support for religious practices or institutions. A province, then, may fund religious schools as long as it does so in an even-handed way. There is, however, a constitutional exception to the requirement of equal treatment—s 93 of the *Constitution Act, 1867*, which provides:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Although s 93 gives the provinces general jurisdiction in relation to education, ss 93(2), 93(3), and 93(4) limit that power by guaranteeing the rights and privileges of certain denominational schools.

In the following passage from *Trinity Western University v British Columbia College of Teachers*, [2001 SCC 31](#), the Supreme Court of Canada reiterated the view expressed in previous judgments that the protection of separate religious schools was a compromise or agreement necessary to bring about Confederation:

[34] ... Furthermore, s. 93 of the *Constitution Act, 1867* enshrined religious public education rights into our Constitution, as part of the historic compromise which made Confederation possible. Section 17 of the *Alberta Act* ... and *Saskatchewan Act* ... , s. 22 of the *Manitoba Act, 1870* ... , and Term 17 of the *Terms of Union of Newfoundland with Canada* ... were to the same effect.

The rights of religious schools were altered by constitutional amendment in Newfoundland in 1998 and eliminated in Quebec in 1997. These rights remain in effect in Ontario, Alberta, Saskatchewan, and Manitoba.

In Ontario, at the time of Confederation, a separate Roman Catholic school system was established by law alongside the much larger public system. In the early 1900s, the public system was reorganized and extended to include high school grades or courses. However, the government of Ontario denied funding to the separate Catholic school system for the teaching of high school courses (and it prohibited the separate schools from teaching such courses). A separate school board argued that, under s 93(1), it had a right to teach these

courses and to receive funding in the same manner as a public school board. This argument was rejected in *R v Tiny Township Separate School Trustees*, [1928 CanLII 355, \[1928\] AC 363 \(UKJCPC\)](#), in which the Privy Council ruled that in 1867 the separate schools in Ontario had no existing legal right to funding for high school courses.

In 1986, the government of Ontario decided to extend funding to the separate school system to cover all the high school grades. In *Reference re Bill 30, an Act to Amend the Education Act (Ont)*, [\[1987\] 1 SCR 1148, 1987 CanLII 65](#), the Supreme Court of Canada considered whether this extension of funding to the Catholic schools, but not to other religious schools, violated s 2(a) or s 15 of the Charter. Although s 29 of the Charter provides that “[n]othing in this Charter abrogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools,” those opposing the funding argued that s 29 was not applicable in this case because, as had been established by the *Tiny* case, there was no constitutional right to funding for the later grades of high school. However, a majority of the Court thought that the *Tiny* decision was wrong and that

Roman Catholic separate school supporters had at Confederation a right or privilege, by law, to have their children receive an appropriate education which could include instruction at the secondary school level and that such right or privilege is therefore constitutionally guaranteed under s. 93(1) of the *Constitution Act, 1867*. [at para 58]

Moreover, all the members of the Court agreed that regardless of whether s 93(1) guarantees secondary school funding to the separate schools, s 93(3) specifically empowers the provincial government to grant new rights and privileges to separate or dissentient schools and the exercise of this power could not be seen as a violation of the Charter. Justice Wilson wrote:

[62] ... I have indicated that the rights or privileges protected by s. 93(1) are immune from *Charter* review under s. 29 of the *Charter*. ... What is less clear is whether s. 29 of the *Charter* was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the *Charter* because not available to other schools, is nevertheless not impaired by the *Charter*. It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. Section 29, in my view, is present in the *Charter* only for greater certainty, at least in so far as the Province of Ontario is concerned.

[63] ... The section 93(3) rights and privileges are not guaranteed in the sense that the s. 91(1) rights and privileges are guaranteed, i.e., in the sense that the legislature which gave them cannot later pass laws which prejudicially affect them. But they are insulated from *Charter* attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. ... [T]he province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools. This was the agreement at Confederation and, in my view, it was not displaced by the enactment of the *Constitution Act, 1982*. ...

[64] I would conclude, therefore, that even if Bill 30 is supportable only under the province's plenary power and s. 93(3), it is insulated from *Charter* review.

Justice Estey made the point in this way:

[80] ... The power to establish or add to a system of Roman Catholic separate schools found in s. 93(3) expressly contemplates that the province may legislate with respect to a religion-based school system funded from the public treasury. Although the *Charter* is intended to constrain the exercise of legislative power conferred under the *Constitution Act*,

1867 where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*.

In *Adler v Ontario*, [1996] 3 SCR 609, 1996 CanLII 148, the appellants argued that public funding should be extended to other religious schools in Ontario. In making their case, they did not simply repeat the argument rejected in *Reference re Bill 30*—that is, that funding of Catholic schools but not other religious schools breached ss 2(a) and 15. They also argued that state funding of “secular” public schools but not religious schools breached these rights. The Supreme Court of Canada concluded unanimously that the government’s failure to fund religious schools did not violate s 2(a). A majority of the Court also held that the government’s practice of funding secular public schools but not religious schools did not breach the s 15 guarantee of equality rights. However, two judges, McLachlin and L’Heureux-Dubé JJ, disagreed and found that this practice breached s 15. Justice McLachlin went on to hold that the breach was justified under s 1, while L’Heureux-Dubé J held that the s 15 violation was not justified.

In *Waldman v Canada* (1999), Communication No 694/1996, the United Nations Human Rights Committee ruled that the practice in Ontario of funding Catholic schools and not other religious schools was a breach of art 26 of the *International Covenant on Civil and Political Rights*, the right against religious discrimination. The committee observed (at para 10.6) that “the Covenant does not oblige States parties to fund schools that are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.” The committee was clear that simply because “a distinction [is] enshrined in the [Canadian] Constitution does not render it reasonable and objective” (at para 10.4) under the International Covenant. It is important to note, however, that the decisions of the Human Rights Committee are not automatically part of the domestic law of Canada.

Publicly funded Roman Catholic schools in Ontario are subject to the Charter, unless they are exercising a right or privilege granted to them under s 93 of the *Constitution Act, 1867*. In *Hall (Litigation guardian of) v Powers*, 2002 CanLII 49475, 59 OR (3d) 423 (Sup Ct J), a judge found that there was a *prima facie* case that a Roman Catholic school in Ontario breached s 15 of the Charter when it refused to permit a student to bring a same-sex date to the graduation dance, held off school property. The judge issued an interlocutory injunction prohibiting the school from preventing the student’s attendance at the dance with his date.

IV. THE RESTRICTION AND ACCOMMODATION OF RELIGIOUS PRACTICE

As noted above, in *Big M and Edwards Books*, the central focus of s 2(a) seemed to be the protection against state “coercion.” This freedom from coercion was understood to have two sides: (1) the protection of the individual’s freedom *from* religion—that is, the freedom from being compelled by the state to engage in any form of religious practice; and (2) the protection of the individual’s freedom *to* religion—that is, the freedom to engage in religious practice without restriction by the state. In Section III, we addressed the first aspect—state support for religion. This section explores the second aspect—the restriction and accommodation of religious practice. According to the Canadian courts, s 2(a) of the Charter is breached any time the state restricts a religious practice in a non-trivial way. Even when a law advances a legitimate public purpose, such as the prevention of drug use, cruelty to animals, or violence in the schoolyard, the state must justify, under s 1 of the Charter, the law’s nontrivial interference with a religious practice. However, in the cases that follow, the Supreme Court of Canada seems to set the s 1 balance strongly in favour of state restriction and appears willing to uphold a legal restriction if it has a legitimate or serious objective that would be noticeably compromised if an exception was made. A restriction will be found unjustifiable under s 1

only if its purpose is less important or would not be significantly compromised by the particular religious practice.

In *Syndicat Northcrest v Amselem*, an excerpt from which appears immediately below, the Supreme Court of Canada held that a condominium association's refusal to permit Orthodox Jewish unit owners to construct succahs on their balconies as part their celebration of the Jewish festival of Succot breached their freedom of religion under the Quebec Charter of Human Rights and Freedoms, RSQ c C-12. Because the restriction on religious practice was imposed by a non-state actor, the Canadian Charter of Rights and Freedoms was not applicable. However, the majority judgment of Iacobucci J was clear in saying (at para 37) that "the principles ... applicable in cases where an individual alleges that his or her freedom of religion is infringed under the Quebec Charter" are also applicable to a claim under s 2(a) of the Canadian Charter. Note also that this is the first case in which the Supreme Court of Canada attempted to define what constitutes a "religious" belief or practice.

Syndicat Northcrest v Amselem

2004 SCC 47

IACOBUCCI J (McLachlin CJ and Major, Arbour, and Fish JJ concurring):

I. Introduction

[1] An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities: see *Reference re Secession of Quebec*, ... [1998] 2 S.C.R. 217, at paras. 79-81. Indeed, respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy. But respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a matrix of other correspondingly important rights that attach to individuals. Respect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free and democratic society. This appeal requires the Court to deal with the inter-relationship between fundamental rights both at a conceptual level and for a practical outcome.

[2] More specifically, the cases which are the subject of this appeal involve a religious claim by the appellants for the setting up of a "succah" for nine days a year ... on their co-owned property under the Quebec Charter of Human Rights and Freedoms, RSQ, c. C-12 (the "Quebec Charter"). The Quebec courts denied the claim. With respect, I disagree and would allow the appeal.

[3] ... While the respondent has raised rights to enjoy property and personal security as justification for its refusal to allow a succah to be set up, I find that the impairment of the appellants' religious freedom is serious whereas I conclude that the intrusion on the respondent's rights is minimal. As such, I hold that the appellants must be permitted to set up succahs on their balconies, provided that the succahs remain only for the limited time necessary—in this case nine days, allow for an emergency access route, and conform, as much as possible, with the general aesthetics of the property. I also find the argument that the appellants waived their religious rights cannot be maintained under the circumstances, nor did they implicitly agree not to set up succahs on their balconies by signing the declaration of co-ownership.

II. Background

[4] The appellants, all Orthodox Jews, are divided co-owners of residential units in "Place Northcrest," two luxury buildings [in the "Sanctuaire"] ...

[5] In late September 1996, Mr. Amselem, at the time a new resident of the Sanctuaire, set up a "succah" on his balcony ... during the Jewish religious festival of Succot. A succah is a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens Th[e] nine-day festival, which begins in late September or early-to mid-October, commemorates the 40-year period during which, according to Jewish tradition, the Children of Israel wandered in the desert, living in temporary shelters.

[6] Under the Jewish faith, ... Jews are obligated to dwell in these succahs, as their ancestors did in the desert. Orthodox Jews ... [transform] the succah into the practitioner's primary residence for the entire holiday period. ...

[7] Technically, a succah must minimally consist of a three-walled, open-roofed structure which must meet certain size specifications in order to fulfill the biblical commandment of dwelling in it properly according to the requirements of the Jewish faith. ...

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[9] After Mr. Amselem put up his succah in September 1996, the syndicate of co-ownership, Syndicat Northcrest (the "respondent" or "Syndicat"), requested its removal, claiming the succah was in violation of the Sanctuaire's by-laws as stated in the declaration of co-ownership, which *inter alia* prohibited decorations, alterations and constructions on the Sanctuaire's balconies[.] ... None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units.

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[11] ... Mr. Amselem requested permission from the Syndicat to set up a succah on, and thus enclose part of, his balcony to celebrate the same holiday of Succot. The Syndicat refused, invoking the restrictions in the declaration of co-ownership.

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[13] In a letter dated October 10, 1997, the Syndicat proposed to allow ... a communal succah in the Sanctuaire's gardens.

[14] In their October 14, 1997 letter to the Syndicat, the appellants ... explained why a communal succah would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs which, they claimed, called for "their own succah, each on his own balcony."

[Despite the Syndicat's refusal of their request, the appellants each set up their own individual succahs. In response, the Syndicat filed an application for a permanent injunction prohibiting the appellants from setting up the succahs and, if necessary, permitting their demolition.]

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III. Relevant Legislative Provisions

[18] *Charter of Human Rights and Freedoms*, RSQ, c. C-12

1. Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the

citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law. ...

IV. Judicial History

[The trial judge, Rochon J, found that the impugned by-laws were not in violation of the Quebec Charter and issued the injunction requested by the Syndicat. The decision was upheld by the Quebec Court of Appeal.]

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V. Issues

[35] In my view, the key issues before us are: (1) whether the clauses in the by-laws of the declaration of co-ownership, which contained a general prohibition against decorations or constructions on one's balcony, infringe the appellants' freedom of religion protected under the Quebec Charter; (2) if so, whether the refusal by the respondent to permit the setting up of a succah is justified by its reliance on the co-owners' rights to enjoy property under s. 6 of the Quebec Charter and their rights to personal security under s. 1 thereof; and (3) whether the appellants waived their rights to freedom of religion by signing the declaration of co-ownership.

VI. Analysis

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A. Freedom of Religion

[37] The analysis that follows sets out the principles that are applicable in cases where an individual alleges that his or her freedom of religion is infringed under the Quebec Charter or under the Canadian Charter of Rights and Freedoms. ...

(1) Definition of Religious Freedom

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[39] ... Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

[40] What then is the definition and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) Charter? This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom. ...

[Reference was then made to *R v Big M Drug Mart Ltd* and *R v Edwards Books and Art Ltd.*.]

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[42] This understanding is consistent with a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right. ...

[43] The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively

recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*Edwards Books, supra*, at p. 735) and not that a particular belief is "valid."

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[46] To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

[47] But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation," precept, "commandment," custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) Charter. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.

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[49] To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in *Edwards Books, supra*, at p. 759:

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added.]

[50] In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation," precept, "commandment," custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

[51] That said, while a court is not qualified to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue It is important to emphasize, however, that sincerity of belief simply implies an honesty of belief

[52] ... [I]nquiries into a claimant's sincerity must be as limited as possible. ... [T]he court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.

[53] Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony ..., as well as an

analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.

[54] A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.

[55] This approach to freedom of religion effectively avoids the invidious interference of the State and its courts with religious belief. The alternative would undoubtedly result in unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream. As articulated by Professor Tribe [LH Tribe, *American Constitutional Law*, 2nd ed (Mineola, NY: Foundation Press, 1988)], at p. 1244, "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty."

[56] Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

(2) Infringement of Religious Freedom

[57] Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) Charter.

[58] ... Section 2(a) of the Canadian Charter prohibits only burdens or impositions on religious practice that are non-trivial. This position was confirmed and adopted by Dickson C.J. for the majority in *Edwards Books, supra*, at p. 759[.] ...

[59] It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in

accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The question then becomes: what does this mean?

[60] At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial. But it is important to observe what examining that context involves.

[61] In this respect, it should be emphasized that not every action will ... receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute This is so because we live in a society of individuals in which we must always take the rights of others into account.

[62] Freedom of religion, as outlined above, quite appropriately reflects a broad and expansive approach to religious freedom under both the Quebec Charter and the Canadian Charter and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action ..., they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

[63] Indeed, freedom of religion, like all other rights, ... may be made subject to overriding societal concerns. As with other rights, not every interference with religious freedom would be actionable, in accordance with the limitations on the exercise of fundamental rights recognized by the Quebec Charter.

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B. Application to the Facts

(1) Freedom of Religion and Infringement

(a) As Pertaining to Setting Up One's Own Succah

[65] ... At trial, Rochon J., relying primarily on the testimony of Rabbi Levy, whose testimony he found more compelling than that of Rabbi Ohana, found that the impugned clauses in the declaration of co-ownership did not infringe the appellants' rights to freedom of religion since, according to him, Judaism does not require its adherents to build their own succah (at p. 1909):

[TRANSLATION] First of all, the court notes that practising Jews are not under a religious obligation to erect their own succahs. There is no commandment as to where they must be erected.

As a result, Rochon J. believed that freedom of religion was not even triggered. Although Morin J.A., in his concurring opinion, quite properly concluded that this was not the correct approach to take to freedom of religion, the majority of the Court of Appeal seemed to endorse the trial judge's reasoning. With respect, I believe their approach was mistaken.

[66] More particularly, the approach adopted by Rochon J. at trial and Dalphond J. for the majority of the Court of Appeal is inconsistent with the proper approach to freedom of religion. First, the trial judge's methodology was faulty in that he chose between two competing rabbinical authorities on a question of Jewish law. Second, he seems to have based his findings with respect to freedom of religion solely on what he perceived to be the objective obligatory requirements of Judaism. He thus

failed to recognize that freedom of religion under the Quebec (and the Canadian) Charter does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith.

[67] Furthermore, in my opinion, any incorporation of distinctions between "obligation" and "custom" or, as made by the respondent and the courts below, between "objective obligation" and "subjective obligation or belief" within the framework of a religious freedom analysis is dubious, unwarranted and unduly restrictive. In my view, when courts undertake the task of analysing religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious "obligation," as has been suggested in the courts below, they enter forbidden domain. It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.

[68] Similarly, to frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an obligation exists and that the practice is required would lead to arbitrary and hierarchical determinations of religious "obligation," would exclude religious custom from protection, and would disregard the value of non-obligatory religious experiences by excluding those experiences from protection. Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? ... Surely not.

[69] Rather, as I have stated above, regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec Charter or that of s. 2(a) of the Canadian Charter, or both, depending on the context.

[70] On the question of sincerity, the respondent argues that the appellants do not sincerely believe that their religion requires them to build their own individual succahs on their balconies. That said, the trial judge did find that Mr. Amselem, at least, sincerely believed that he was obliged to set up a succah on his own property, thus triggering his freedom of religion protection according to the first step in our analysis.

[71] With respect to the appellants Mr. Klein and Mr. Fonfeder, Rochon J. relied primarily on their past practices to question their sincerity and concluded that they must view the setting up of their own succah as a purely optional practice, which precluded their freedom of religion from being triggered. This conclusion is troublesome for a variety of reasons. First, Rochon J. misconstrued the scope of freedom of religion. Given this mistaken approach, it is somewhat difficult to assess the sincerity of the appellants' religious beliefs regarding the setting up of succahs on their balconies. Second, I do not accept that one may conclude that a person's current religious belief is not sincere simply because he or she previously celebrated a religious holiday differently. Beliefs and observances evolve and change over time. If, as I have underscored, sincerity of belief at the relevant time is the governing standard to ensure that a claim is honest and not an artifice, then a rigorous examination of past conduct cannot be determinative of sincerity of belief.

[72] Furthermore, ... it appears that the trial judge applied the wrong test to the evidence adduced by the appellants in support of their belief. For if freedom of religion encompasses not only what adherents feel sincerely obliged to do, but also includes what an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to engender a connection with the divine ... , then the proper test would be whether the appellants sincerely believe that dwelling in or setting up their own individual succah is of religious significance to them, irrespective of whether they subjectively believe that their religion requires them to This is because it is hard to qualify the value of religious experience. Religious fulfilment is by its very nature subjective and personal. To some, the religious and spiritual significance of building and eating in one's own succah could vastly outweigh the significance of a strict fulfilment of the biblical commandment of "dwelling" in a succah, and that, in and of itself, would suffice in grounding a claim of freedom of religion.

[73] When the appellants adduced Rabbi Ohana's expert testimony, they were submitting evidence of their sincere individual belief as to the inherently personal nature of fulfilling the commandment of dwelling in a succah. As expounded upon by Rabbi Ohana, according to Jewish law the obligation of "dwelling" must be complied with festively and joyously, without causing distress to the individual. Great distress, such as ... the extreme unpleasantness rendered by forced relocation to a communal succah, with all attendant ramifications, for the entire nine-day period would not only preclude the acknowledged obligation of dwelling in a succah but would also render voluntary compliance wrongful and inappropriate, thus necessitating the setting up of a private succah. In light of our test for freedom of religion, such expert testimony, although not required, would in my view certainly support a positive finding of sincerity and honesty of the appellants' belief. As a result, all of the appellants have, in my opinion, successfully implicated freedom of religion.

[74] ... [T]he interference with the right needs to be more than trivial or insubstantial. ... [If] Mr. Amselem sincerely believes that he is obligated by the Jewish religion to set up and dwell in his own succah, then a prohibition against setting up his own succah obliterates the substance of his right, let alone interferes with it in a non-trivial fashion. A communal succah is simply not an option. Thus, his right is definitely infringed.

[With respect to the other appellants, who did not hold a belief that they were *required* to build their own succah, Iacobucci J found that using a communal succah or imposing on friends and family would detract significantly from the joyous celebration of the holiday, which was essential to its proper religious celebration, and would therefore constitute a non-trivial infringement of their freedom of religion.]

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(2) The Alleged Justification for the Limit on the Exercise of Freedom of Religion in This Case

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[84] ... I am of the view that the alleged intrusions or deleterious effects on the respondent's rights or interests under the circumstances are, at best, minimal and thus cannot be reasonably considered as imposing valid limits on the exercise of the appellants' religious freedom.

[85] In practice, to what degree would the respondent be harmed were the appellants allowed to set up a succah for a period of 9 out of 365 days a year? The evidence before us does not provide a satisfactory answer. The respondent has simply not adduced enough evidence Even if I were to consider the possibility that the economic value of the property might decrease ... , any drop in value caused by the

presence of a small number of succahs for a period of nine days each year would undoubtedly be minimal. Consequently, in this case, the exercise of the appellants' freedom of religion, which I have concluded would be significantly impaired, would clearly outweigh the unsubstantiated [property value] concerns

[86] Similarly, protecting the co-owners' enjoyment of the property by preserving the aesthetic appearance of the balconies and thus enhancing the harmonious external appearance of the building cannot be reconciled with a total ban imposed on the appellants' exercise of their religious freedom. Although residing in a building with a year-long uniform and harmonious external appearance might be the co-owners' preference, the potential annoyance caused by a few succahs being set up for a period of nine days each year would undoubtedly be quite trivial.

[87] In a multiethnic and multicultural country such as ours, which ... is in many ways an example thereof for other societies[,] the argument that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others. ...

[88] Finally, the respondent alleges that banning succahs ... ensures that the balconies, as fire escape routes, would remain unobstructed in the case of emergency and, as such, the ban seeks to protect the co-owners' rights to personal security under s. 1 of the Quebec Charter. I agree that security concerns, if soundly established, would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom.

[89] However, in their October 14, 1997 letter to the respondent, the appellants obviated any such concerns by all offering to set up their succahs "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way."

[90] Since the appellants have never claimed that the succah need have any exterior aesthetic religious component, the appellants should set up their succahs in a manner that conforms, as much as possible, with the general aesthetics of the property in order to respect the co-owners' property interests. Counsel for the appellants acknowledged this undertaking in oral argument.

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[104] For the foregoing reasons, I would allow the appeal with costs throughout [Emphasis in original.]

Appeal allowed.

NOTES AND QUESTIONS

1. The dissenting judgment of Bastarache J adopted a much narrower approach to the scope of freedom of religion. He argued that a practice is protected under s 3 of the Quebec Charter and s 2(a) of the Canadian Charter only if it is part of an established religious belief system and only if it is regarded by the individual claimant as a mandatory part of that system. In support of this narrower approach, Bastarache J emphasized that freedom of religion protects not just beliefs but also consequent religious practices:

[137] ... [T]here are in fact two elements to consider in analysing freedom of religion. First, there is the freedom to believe and profess one's beliefs; second, there is the right to manifest one's beliefs, primarily by observing rites, and by sharing one's faith by establishing places of worship and frequenting them. Thus, although private beliefs have a purely personal aspect,

the other dimension of the right has genuine social significance and involves a relationship with others.

Thus, according to Bastarache J, individuals who claim that their *practices* fall within the guarantee of freedom of religion protection must show a "nexus" (at para 135) between their personal beliefs and the precepts of their religion. This connection between personal belief and established religious precepts that "constitute a body of objectively identifiable data" enabled Bastarache J to distinguish between "genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience" (at para 135). At para 137, Bastarache J included the following passage in support of his argument that the right of freedom of religion has "genuine social significance and involves a relationship with others":

Notwithstanding the wide variety of religious experience, no religion is or can be purely individual in its outlook, as ultimate concern is said to be. On the contrary, religions are necessarily collective endeavours. By the same token, no religion is or can be defined purely by an act of personal commitment, as the ultimate concerns of an individual are said to be. Instead, all religions demand a personal act of faith in relation to a set of beliefs that is historically derived and shared by the religious community. It follows that any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.

More fundamentally, while it is possible to understand religion in such a way as to include practices that would conventionally be regarded as secular, it is simply not possible to understand religion in such a way that the distinction between the religious and the secular collapses, for the religious and the secular exist in contradistinction to one another. Yet such a collapse is implicit in the view that the secular becomes religious as and when it becomes a matter of ultimate concern to any individual, for whether a practice is secular or religious would then be a purely subjective question. Any objective distinction between the two would disappear.

(T. Macklem, "Faith as a Secular Value" (2000) 45 *McGill L.J.* 1 at p. 25.)

2. In his judgment, Iacobucci J sought to distinguish religion from other belief systems. Why did he think it necessary to do this? The problem of distinguishing religious beliefs and practices from secular beliefs and practices, which has bedeviled the American courts, was something that Canadian courts and commentators thought s 2(a) had avoided by creating a single right to freedom of conscience and religion. Indeed, in *Big M*, Dickson CJ had said that "freedom of conscience and religion" in s 2(a) of the Charter formed a "single integrated concept" (at para 120). If freedom of conscience and religion are parts of a single, integrated right that protects deeply held commitments or beliefs about right and truth, why was it necessary for the Court to embark on the difficult task of determining when a belief or practice is religious rather than secular?

3. Justice Iacobucci rejected argument that the appellants had waived their freedom of religion rights when they purchased their units and agreed to the by-laws. In his view, even if it were possible for an individual to waive their right to religious freedom, the appellants could not be understood to have done so in this case. Signing the declaration of co-ownership, which included the by-law, did not amount to a waiver of their right to practise their religion. First, the waiver was not unconditional because the prohibition was subject to exemptions. Second, it was not voluntary because the appellants had no choice but to sign the declaration if they wanted to reside in the building. Moreover, they had not read the by-laws and so did not know what they were agreeing to. Third, the waiver was not explicit because it did not make specific reference to the affected Charter right.

Justice Binnie, dissenting, did not think it necessary for the association to establish that the appellants had waived their right to freedom of religion when they formally agreed to the condominium by-laws. In his view, when the appellants agreed to the by-laws, the other unit

owners were entitled to conclude that the practice of their religion was compatible with these rules. He said: "[T]here is a vast difference ... between using freedom of religion as a shield against interference with religious freedoms by the State and as a sword against co-contractors in a private building" (at para 185). In holding the appellants to their agreement, Binnie J stressed the following factors: that the appellants were in the best position to determine, prior to their purchase of a unit in the building, what their religion required; that they could have purchased a unit in another building; that they had chosen not to read the by-laws when they entered into the contract with the other unit owners; and, finally, that they had rejected the accommodation of a communal succah, offered by the association, even though this accommodation was not inconsistent with their religious beliefs. Which of these positions do you find more persuasive?

The minimal impairment analysis in the majority judgment in *Amselem* bears some similarities to the concept of "reasonable accommodation" that has developed in anti-discrimination law under human rights codes. That concept is examined in the following excerpt from the Bouchard-Taylor Report. Note that in *Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37* (excerpted below), McLachlin CJ, writing for a majority of the Court, stated that while the reasonable accommodation analysis may be appropriately applied in cases involving an administrative act that interferes with a religious practice, it should not be applied when the claim is that a statute or regulation has breached s 2(a).

Gérard Bouchard & Charles Taylor, Building the Future: A Time for Reconciliation

Report of the Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles (Government of Quebec, 2008) at 160-62 (emphases in original)

The question of the management of diversity inevitably arises in any society in which two or more cultures meet. Until recently, it was usually resolved in an authoritarian manner: one more powerful culture attempted either to dominate the others by marginalizing them or to eliminate them through assimilation. Even so, practices aimed at relaxation or reconciliation have always existed, even in empires. However, for several decades, above all in the West, attitudes and the law have changed as the democratic nations have ... become more respectful of diversity. This method of managing cohabitation that is taking shape is based on a general ideal of intercultural harmonization.

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At the same time as this change (and perhaps in its wake), a new tradition has taken shape in the realm of law. The traditional conception of equality, which assumed uniform treatment, has given way to a conception that pays closer attention to differences. ... Over the past 25 years, this change has taken concrete form, in particular in the legal tool or provision called reasonable accommodation, which is basically dictated by the general principle of equality and fairness. ... The result is a reconciliation ethic that encompasses all social intervenors and, in particular, public and private managers.

Initially, the objective was to counteract certain forms of discrimination that courts described as indirect, which, without directly or explicitly excluding an individual or a group of people, nonetheless lead to adverse effect discrimination. This

type of discrimination stems from the rigid application of a norm under certain circumstances in the realms of employment, public and private services, housing and so on. Since then, according to certain recent court judgments, some forms of direct discrimination can also lead to solutions that fall under reasonable accommodation. In short, the courts now focus on discriminatory impact, whether it is deliberate (direct) or fortuitous (indirect).

By way of illustration, consider the rule that prohibits students from bringing syringes into the classroom. A diabetic child's life could thus be endangered, which explains the relevance of the relaxation of the rule. Similar concerns guide the adjustment of certain rules in the workplace, e.g., the relaxation of a compulsory dress code for pregnant workers. The same principle applies to parking spaces, toilets and access ramps for the disabled.

In the absence of an adjustment of the rules, all of these individuals could be put at a disadvantage or excluded, which could jeopardize their right to equality. In these situations, *the duty of accommodation created by law does not require that a regulation or a statute be abrogated* but only that its discriminatory effects be mitigated in respect of certain individuals[.] ...

In accordance with the law, the harmonization measures requested or granted for religious reasons spring from the same logic. For example, let us mention the case of Jews or Muslims who have obtained leave to celebrate their religious holidays in the same way as Catholics, who, almost without exception, have always had permission to be absent from work on Sunday, Christmas Day and at Easter. Here, too, it is the rule of equality or fairness that prevails: what is legitimate for one faith is legitimate for the others. ...

... [T]he logic inherent in harmonization [is that ...] a number of apparently neutral or universal norms reproduce in actual fact worldviews, values, and implicit norms specific to the majority culture or population, e.g., restaurant, airline or cafeteria menus, which, in bygone days, did not take into account vegetarians or individuals with food allergies. ... It follows that absolute rigour in the application of legislation and regulations does not always guarantee fairness. ...

We can thus see that equality and freedom of religion do not necessarily have as a corollary uniformity or homogeneity. ... As the experts have expressed it, a treatment can be differential without being preferential.

NOTES AND QUESTIONS

1. The link between the minimal impairment analysis and the concept of reasonable accommodation was made explicit by the Court in another freedom of religion case decided shortly after *Amselem, Multani v Commission scolaire Marguerite-Bourgeoys*, [2006 SCC 6](#). Justice Charron wrote for a majority of the Court:

[53] ... In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar.

Multani involved an orthodox Sikh student who was forbidden by a school board in Quebec from wearing his kirpan, or ceremonial dagger, to school pursuant to a rule forbidding all weapons in the school. The Supreme Court of Canada held that the decision breached s 2(a)

and that a total prohibition on the wearing of the kirpan could not be justified under s 1—some accommodation was required. The school did not dispute that the student had a sincere belief in the spiritual significance of the kirpan, and that he considered himself bound to wear it at all times.

In her reasons for the majority, Charron J noted that it was unrealistic to imagine that the school could ban all safety risks. Pens, scissors, and bats were all permitted despite their potential use as weapons. Justice Charron observed that for Sikhs, the kirpan was a religious symbol rather than a weapon: “[W]hile the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person ... for Orthodox Sikhs [it] is above all a religious symbol” (at para 37). She rejected the school authority’s claim that “kirpans are inherently dangerous” (at para 67) and noted that there were no recorded incidents in Canada of a Sikh student drawing his kirpan in a public school.

Justice Charron further observed that in contrast to an airplane or a court house, where a ban on the kirpan might be justified, the school had an ongoing relationship with its students and so could monitor their actions and assess the risk of violent behaviour. Finally, she thought that if the kirpan was sewn into the student’s clothes (something to which his family and the school administration had previously agreed), there would be little risk of it falling out or being taken by anyone else and used as a weapon. Allowing the kirpan to be worn in this way would be a “reasonable accommodation.” The school context clearly influenced this conclusion, with Charron J emphasizing the importance of creating an educational culture that instills values of tolerance and respect for minorities.

2. In the context of the recent “reasonable accommodation” debate, some Quebec scholars have noted that, due to its peculiar history and exposure to alternative cultural influences, societal attitudes in Quebec about the appropriate relationship between the state and religion tend to incorporate a stronger conception of secularism, and that this difference is reflected in legal conceptions of that relation: see Sébastien Grammond, “Conceptions canadienne et québécoise des droits fondamentaux: convergence ou conflit?” [“Canadian and Quebecois Concepts of Fundamental Rights: Convergence or Conflict?”] (2009) 43:1 RJT 83.

To what extent should particular societal contexts be taken into consideration when adjudicating cases concerning fundamental freedoms? Are all such freedoms to be treated similarly, or is freedom of religion qualitatively different from other fundamental freedoms? How do you reconcile the sometimes significant cultural differences between Canadian provinces and regions in Charter adjudication? Can some degree of asymmetry be reconciled with the implementation of fundamental freedoms?

The case that follows, *Alberta v Hutterian Brethren of Wilson Colony*, is a significant decision not only on the issue of reasonable accommodation of religious minorities, but also on s 1 of the Charter.

Alberta v Hutterian Brethren of Wilson Colony

2009 SCC 37

[Regulations under Alberta’s *Traffic Safety Act*, RSA 2000, c T-6 require that all drivers hold a driver’s licence. Since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photographs taken on religious grounds. At the registrar’s discretion, religious objectors were granted a non-photo licence called a Condition Code G licence. In 2003, the province made the photo requirement universal. The photograph taken at the time of issuance of the licence is placed in the province’s facial recognition data bank. There were about

450 Condition Code G licences in Alberta, 56 percent of which were held by members of Hutterian Brethren colonies. The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They sincerely believe that the second commandment prohibits them from having their photograph willingly taken and thus objected to having their photographs taken on religious grounds. The province proposed two measures to lessen the impact of the universal photo requirement, but because these measures still required that a photograph be taken for placement in the province's facial recognition data bank, the Wilson Colony rejected the measures. Instead, they proposed that no photograph be taken and that they be issued non-photo driver's licences marked: "Not to be used for identification purposes." Unable to reach an agreement with the province, the members of the Wilson Colony alleged an unjustifiable breach of their religious freedom. The claimants asserted that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. The province, for its part, led evidence that the adoption of the universal photo requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences, and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the chambers Judge and the majority of the Court of Appeal held that the infringement of freedom of religion was not justified under s 1 of the Charter.]

McLACHLIN CJ (Binnie, Deschamps, and Rothstein JJ concurring):

(1) The Nature of the Limit on the Section 2(a) Right

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[29] The members of the Colony believe that permitting their photo to be taken violates the Second Commandment: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4). ... The impact of having a photo taken might involve censure, such as being required to stand during religious services.

[30] Given these beliefs, the effect of the universal photo requirement is to place Colony members who wish to obtain driver's licences either in the position of violating their religious commitments, or of forgoing driver's licences. ... The regulation, they argue, forces members to choose between obeying the Second Commandment and adhering to their rural communal lifestyle, thereby limiting their religious freedom and violating s. 2(a) of the *Charter*.

[31] My colleague Abella J. notes at para. 130 that "freedom of religion has 'both individual and collective aspects.'" She asserts that "[b]oth ... are engaged in this case." While I agree that religious freedom has both individual and collective aspects, I think it is important to be clear about the relevance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim—that of the individual claimants for photo-free licences—into an assertion of a group right.

[32] An infringement of s. 2(a) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial[.] ...

[33] The Province concedes the first element of this s. 2(a) test, sincere belief in a belief or practice that has a nexus with religion. ...

[34] The record does not disclose a concession on the second element of the test—whether the universal photo requirement interferes with Colony members' religious freedom in a manner that is more than trivial or insubstantial. ... [H]owever, the courts below seem to have proceeded on the assumption that this requirement was met. Given this assumption, I will proceed to consider whether the limit is a reasonable one, demonstrably justified in a free and democratic society.

(2) Is the Limit on the Section 2(a) Right Justified Under Section 1 of the Charter?

[35] This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. ... The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.

[36] Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs ... to the overall detriment of the community.

[37] If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified." Where a complex regulatory response to a social problem is challenged ... [t]he bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate

[38] With this in mind, I turn to the question of whether the limit on freedom of religion raised in this case has been shown to be justified under s. 1 of the *Charter*.

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(b) Is the Purpose for Which the Limit Is Imposed Pressing and Substantial?

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[42] Maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The purpose of a universal photo requirement is to have a complete digital data bank of facial photos to prevent wrongdoers from using driver's licences as breeder documents for purposes of identity theft. As discussed above (para. 10), the requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence.

[43] The chambers judge found that the universal photo requirement was also aimed at harmonization of international and interprovincial standards for photo identification. The evidence supports [this] contention While the fact that other provinces have not yet moved to this requirement arguably undercuts the position that a universal photo requirement is necessary in Alberta now, governments are entitled to act in the present with a view to future developments. Accordingly, harmonization may be considered as a factor relevant to the Province's goal

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(c) Is the Means by Which the Goal Is Furthered Proportionate?

(i) *Is the Limit Rationally Connected to the Purpose?*

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[49] The government argues that a universal system of photo identification for drivers will be more effective in preventing identity theft than a system that grants exemptions to people who object to photos being taken on religious grounds. The affidavit evidence filed by the government supports this view.

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[52] I conclude that the Province has established that the universal photo requirement is rationally related to its goal of protecting the integrity of the driver's licensing system and preventing it from being used for purposes of identity theft.

(ii) *Does the Limit Minimally Impair the Right?*

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[54] In [RJR-MacDonald Inc v Canada (AG), [1995] 3 SCR 199, 1995 CanLII 64], the minimal impairment analysis was explained as follows, at para. 160:

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal," that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added; citations omitted.]

... As Aharon Barak, former President of the Supreme Court of Israel, puts it, "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it" President Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting proper protection to human rights" (p. 373). The ... minimum impairment test requires only that the government choose the least drastic means of achieving its objective. Less drastic means which do not actually achieve the government's objective are not considered at this stage.

[55] I hasten to add that ... the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. ... [D]eference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. As I will explain, in my view the record in this case discloses no such alternative.

[56] The purpose of the limit in this case, I earlier concluded, is to [minimize] the risk of driver's licences being used for purposes of identity theft, so as to prevent

fraud and various other misuses of the system. The regulation is part of a complex regulatory scheme and is aimed at an emerging and challenging problem. The question, therefore, is whether ... the universal photo requirement for all licensed drivers ... is reasonably tailored to address the problem of identity theft

[57] The Province proposes alternatives which maintain the universal photo requirement, but minimize its impact on Colony members by eliminating or alleviating the need for them to carry photos. ...

[58] However, the Hutterian claimants reject these proposals. For them, the only acceptable measure is one that entirely removes the limit on their s. 2(a) rights. They object to any photo being taken and held in a photo data bank. ...

[59] The problem with the claimants' proposal in the context of the minimum impairment inquiry is that it compromises the Province's goal of minimizing the risk of misuse of driver's licences for identity theft. ... [W]ithout the photo in the bank, the bank is neutralized and the risk that the identity of the holder can be stolen and used for fraudulent purposes is increased. ... The claimants' argument that the reduction in risk would be low, since few people are likely to request exemption from the photo requirement, assumes that some increase in risk and impairment of the government goal may occur, and hence does not assist at the stage of minimal impairment.

[60] The claimants' proposal, instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it. ... Contrary to the suggestion of LeBel J. (para. 201), the evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. In short, the alternative proposed by the claimants would *significantly* compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage.

[61] This is not to suggest the Colony members are acting improperly. Freedom of religion cases may often present this "all or nothing" dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. ... The result may be that the justification of a limit on the right fails to be decided not at the point of minimal impairment, which proceeds on the assumption the state goal is valid, but at the stage of proportionality of effects, which is concerned about balancing the benefits of the measure against its negative effects.

[62] I conclude that the universal photo requirement minimally impairs the s. 2(a) right. ...

[63] Much has been made of the fact that over 700,000 Albertans do not hold driver's licences. The argument is that the risk posed by a few hundred potential religious objectors is minuscule as compared to the much larger group of unlicensed persons. This argument is accepted by the dissent. In my view, it rests on an overly broad view of the objective ... being to eliminate all identity theft in the province. Casting the government objective in these broad terms, my colleague Abella J. argues that the risk posed by a few religious dissenters is minimal But with respect, that is the wrong comparison. We must take the government's goal as it is. It is not the broad goal of eliminating all identity theft, but the more modest goal of maintaining the integrity of [the] driver's licensing system so as to minimize identity theft associated with that system. ...

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[65] The courts below approached minimum impairment in a different fashion. First, they conducted the balancing inquiry at the stage of minimal impairment. Second, drawing on this Court's decision in *Multani*, the courts below applied a reasonable accommodation analysis instead of the *Oakes* test.

[66] In my view, a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1

justification analysis that applies to a claim that a law infringes the *Charter*. Where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis. ...

[67] A different analysis applies where a government action or administrative practice is alleged to violate the claimant's *Charter* rights. If a *Charter* violation is found, the court's remedial jurisdiction lies not under s. 52 of the *Constitution Act, 1982* but under s. 24(1) of the *Charter* ... In such cases, the jurisprudence on the duty to accommodate, which applies to governments and private parties alike, may be helpful "to explain the burden resulting from the minimal impairment test with respect to a particular individual" (emphasis added): *Multani*, at para. 53, *per Charron J.*

[68] Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties—most commonly an employer and employee—adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point [...] of undue hardship for the accommodating party. ...

[69] A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature ... cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. ... While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

[70] Similarly, "undue hardship," a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. ... [I]t is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. ... Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

[71] In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*. ...

(iii) *Is the Law Proportionate in its Effect?*

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[73] [The] final question [is]: are the overall effects of the law on the claimants disproportionate to the government's objective? ...

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[75] Despite the importance Dickson C.J. accorded to this [third and final] stage of the justification analysis, it has not often been used. Indeed, Peter W. Hogg argues that the fourth branch of *Oakes* is actually redundant: *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.12. ...

[76] It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis—pressing goal, rational connection, and minimum impairment—could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity

of the deleterious effects of a measure on individuals or groups." As President Barak explains:

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. ... It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]

In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of Oakes.

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[78] In my view, this is a case where the decisive analysis falls to be done at the final stage of *Oakes*. ...

1. Salutary Effects

[79] ... Three salutary effects of the universal photo requirement were raised on the evidence: (1) enhancing the security of the driver's licensing scheme; (2) assisting in roadside safety and identification; and (3) eventually harmonizing Alberta's licensing scheme with those in other jurisdictions.

[80] The most important of these ... is the enhancement of the security or integrity of the driver's licensing scheme. ... Mandatory photos represent a significant gain to the integrity and usefulness of the computer comparison system. In short, requiring that *all* licence holders are represented by a digital photo in the data bank will accomplish these security-related objectives more effectively than would an exemption for an as yet undetermined number of religious objectors. ... This evidence stands effectively uncontradicted.

[81] Though it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear that the internal integrity of the system would be compromised. In this respect, the present case may be contrasted with previous religious freedom cases where this Court has found that the potential risk was too speculative.

[Reference was then made to *Trinity Western University v British Columbia College of Teachers*, which dealt with the risk of discriminatory conduct, and *Amselem*, which dealt with security concerns.]

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[85] In summary, the salutary effects of the universal photo requirement for driver's licences are sufficient ... to support some restriction of the right. ... Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. If legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer.

2. Deleterious Effects

[86] This brings us to the deleterious effects of the limit . . . Several points call for discussion.

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[89] There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.

[90] ... [I]t is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application. ... In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society ... The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.

[91] The seriousness of a particular limit must be judged on a case-by-case basis. However, guidance can be found in the jurisprudence. Limits that amount to state compulsion on matters of belief are always very serious. ...

[92] Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. [Reference is then made to a series of cases, including *Big M.*] To compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof. Such laws will fail at the first stage of *Oakes* and proportionality will not need to be considered.

[93] ... However, it may be more difficult to measure the seriousness of a limit on freedom of religion where the limit arises not from a direct assault on the right to choose, but as the result of incidental and unintended effects of the law. In many such cases, the limit does not preclude choice as to religious belief or practice, but it does make it more costly.

[94] The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice ... Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law: *Multani*. The absence of a meaningful choice in such cases renders the impact of the limit very serious.

[95] However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice ... The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. ... A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.

[96] This returns us to the task at hand . . . This is not a case like *Edwards Books* or *Multani* where the incidental and unintended effect of the law is to deprive the adherent of a meaningful choice as to the religious practice. The impugned regulation, in attempting to secure a social good for the whole of society—the regulation of driver's licences in a way that minimizes fraud—imposes a cost on those who choose not to have their photos taken: the cost of not being able to drive on the highway. But on the evidence before us, that cost does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values.

[97] The Hutterian claimants argue that the limit presents them with an invidious choice: ... violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand. However, the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life. The claimants' affidavit says that it is necessary for at least some members to be able to drive from the Colony to nearby towns and back. It does not explain, however, why it would not be possible to hire people with driver's licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor. Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive. Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive.

[98] On the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank. Driving automobiles on highways is not a right, but a privilege. While most adult citizens hold driver's licences, many do not, for a variety of reasons.

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3. Weighing the Salutary and Deleterious Effects

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[101] The law has an important social goal ... that should [not] lightly be sacrificed. The evidence supports the conclusion that the universal photo requirement addresses a pressing problem and will reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions.

[102] Against this important public benefit must be weighed the impact of the limit on the claimants' religious rights. While the limit imposes costs . . . , it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale.

[103] Balancing the salutary and deleterious effects of the law, I conclude that the impact of the limit on religious practice associated with the universal photo requirement for obtaining a driver's licence, is proportionate.

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ABELLA J (dissenting):

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[130] ... [I]t is important to recognize that freedom of religion has "both individual and collective aspects" (*Edwards Books*, at p. 781, *per* Dickson C.J.). ... Both the individual and group aspects are engaged in this case.

[After further discussion of the nature of the religious rights asserted, Abella J moved on to s 1.]

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Minimal Impairment

[143] Where I start to part company with the majority, with respect, is at the minimal impairment stage of the analysis. ...

[144] As McLachlin J. wrote in *RJR-MacDonald*, at para. 160, if the option chosen by the government "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement." However, "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."

[145] ... To be characterized as minimal, the impairment must be "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald*, at para. 160).

[146] In assessing whether Alberta's regulation satisfies the minimal impairment stage, the majority rejects the Colony's alternative proposal of a photoless licence stamped with an indication that it not be used for identification purposes, on the grounds that "[t]he only way to reduce that risk [of misusing driver's licences for identity theft] as much as possible is through a universal photo requirement" and "the alternative proposed by the claimants would significantly compromise the government's objective" (paras. 59-60 (emphasis in original)). But as discussed later in these reasons, there is no cogent or persuasive evidence [as required in *Oakes*] of any such dramatic interference with the government's objective.

[147] It is not difficult for the state to argue that only the measure it has chosen will maximize the attainment of the objective But at the minimal impairment stage, we do not assess whether the infringing measure fulfills the government's objective more perfectly than any other, but whether the means chosen impair the right no more than necessary to achieve the objective.

[148] In *RJR-MacDonald*, McLachlin J. rejected a complete ban on advertising on the grounds that a full prohibition will only be constitutionally acceptable at the minimal impairment stage of the analysis if the government can show that only a full prohibition will enable it to achieve its goal. In this case, all of the alternatives presented by the government involve the taking of a photograph. ... The requirement therefore completely extinguishes the right, and is, accordingly, analogous to the complete ban in *RJR-MacDonald*. It is therefore difficult to conclude that it minimally impairs the Hutterites' religious rights.

[149] The minimal impairment stage should not, however, be seen to routinely end the s. 1 analysis. It is possible, for example, to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional. In my view, most of the heavy conceptual lifting and balancing ought to be done at the final step—proportionality. Proportionality is, after all, what s. 1 is about.

Proportionality

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[154] Turning to the salutary effects in this case, in my view, the government has not discharged its evidentiary burden or demonstrated that the salutary effects in these circumstances are anything more than a web of speculation (Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1" (2006), 34 S.C.L.R. (2d) 501, at pp. 503-4).

[155] The positive impact of the mandatory photo requirement and the use of facial recognition technology is that it is a way to help ensure that individuals will not be able to commit identity theft. But the facial recognition technology is hardly fool-proof. [Here Abella J cited affidavit evidence that facial recognition software cannot perfectly determine whether two photographs are of the same person.] ...

[156] There is, in fact, no evidence from the government to suggest that the Condition Code G licences, in place for 29 years ... , caused any harm at all to the integrity of the licensing system. ...

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[158] Seven hundred thousand Albertans are without a driver's licence. That means that 700,000 Albertans have no photograph in the system that can be checked by facial recognition technology. While adding approximately 250 licence holders to the database will reduce some opportunity for identity theft, it is hard to see how it will make a significant impact on preventing it when there are already several hundred thousand unlicensed and therefore unphotographed Albertans. ... [T]he benefit of adding the photographs of the few Hutterites who wish to drive, would be marginal.

[159] It is worth noting too that in Alberta, numerous documents are used for identity purposes, including birth certificates, social insurance cards and health cards—not all of which include a photograph. ... This suggests that the risk is not sufficiently compelling to justify universality.

[160] The fact that Alberta is seemingly unengaged by the impact on identity theft of over 700,000 Albertans being without a driver's licence, makes it difficult to understand why it feels that the system cannot tolerate 250 or so more exemptions.

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[162] The salutary effects of the infringing measure are, therefore, slight and largely hypothetical. The addition of the unphotographed Hutterite licence holders to the system seems only marginally useful to the prevention of identity theft.

[163] On the other hand, the harm to the religious rights of the Hutterites weighs more heavily. The majority assesses the Wilson Colony members' freedom of religion as being a choice between having their picture taken or not having a driver's licence which may have collateral effects on their way of life. This, with respect, is not a meaningful choice for the Hutterites.

[164] The chambers judge found that the mandatory photo requirement threatened the autonomous ability of the respondents to maintain their communal way of life, Conrad J.A. of the Alberta Court of Appeal similarly wrote that the "evidence shows that although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to ... facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs" (para. 6).

[165] ... [I]n *Hofer v. Hofer*, ... [1970] S.C.R. 958, ... [Ritchie J observed:] "To a Hutterian the whole life is the Church. ... The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming—it is the type of livelihood that allows the greatest assurance of independence from the surrounding world" (p. 968). Justice Ritchie further noted that to the colonies, "the activities of the community were evidence of the living church" (p. 969).

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[170] The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their

community ... that has historically preserved its religious autonomy through its communal independence.

[171] I also have some discomfort with the majority's approach to assessing the seriousness of a religious infringement. It appears to suggest that there is a difference between the constitutional scrutiny of a government program that is "compulsory," and one that is "conditional" or a "privilege." This approach, with great respect, is troubling. It is both novel and inconsistent with the principle enunciated in *Eldridge v. British Columbia (Attorney General)*, ... [1997] 3 S.C.R. 624, that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (para. 73).

[172] The question, it seems to me, is whether the government has acted constitutionally. This should not depend on whether it does so through a law, a regulation, or a licence. Moreover, I have difficulty understanding what is meant by a "privilege" in the context of the provision of government services. As long ago as *Roncarelli v. Duplessis*, ... [1959] S.C.R. 121, this Court recognized the profound significance a licence may have on an individual's life or livelihood and that the government is required to exercise its power in administering the licensing system in a fair and constitutional manner.

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[176] Given the disproportion in this case between the harmful effects of the mandatory photo requirement on religious freedom, compared to the minimal salutary effects of requiring photographs from the Hutterites, the government has not discharged its burden of demonstrating that the infringement is justified under s. 1. ...

[177] I would therefore dismiss the appeal, but would suspend a declaration of invalidity for one year to give Alberta an opportunity to fashion a responsive amendment.

LeBEL J (Fish J concurring) (dissenting):

[Justice LeBel agreed with Abella J that the restriction on the colony's freedom of religion was not justified under s 1. He noted the significant impact of the regulation on the colony's belief system and way of life. He took issue with McLachlin CJ's position that any balancing or trading-off of competing interests should be confined to the final step in the Oakes test, and argued instead that a degree of balancing must occur at the minimal impairment stage of the test.] [Emphasis in original.]

Appeal allowed.

NOTES

1. For a discussion of the *Wilson Colony* case, see Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR 25; Richard Moon, "Accommodation Without Compromise: Comment on *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR 95.

2. In *R v NS*, the Supreme Court of Canada considered whether a witness in a criminal proceeding had a right under s 2(a) to wear a niqab (face covering) when giving evidence. The majority judgment of McLachlin CJ noted that two sets of Charter rights were "potentially engaged" in the case—the witness's freedom of religion and the accused's right to a fair trial. The issue, in her view, could not be resolved by a fixed rule applicable to all cases, but must instead be resolved on a case-by-case basis.

Chief Justice McLachlin set out the general approach that a trial judge should follow. The judge (in this particular case, the preliminary inquiry judge) should take account of the particular circumstances of the case before them and ask the following questions: First, does the witness have a sincere religious belief that would be compromised if she were required to

testify without the niqab? Second, would permitting the witness to wear the niqab while testifying create a serious risk to the fairness of the trial? Chief Justice McLachlin said that the answer to this second question will depend on the nature of the witness's evidence—if, for example, the witness's evidence is uncontested and credibility is not at issue, then wearing a niqab while testifying will not affect the fairness of the trial. Third, if both rights are “engaged,” the judge should consider whether both could be “accommodate[d]” (at para 9) so as to avoid any conflict or trade-off between them. In other words, is there a way in which the witness may be permitted to give evidence while wearing a niqab without putting the fairness of the trial at risk? Finally, if accommodation is not possible, the issue becomes whether “the salutary effects of requiring the witness to remove the niqab … outweigh the deleterious effects of doing so” (at para 8). In answering this final question, the judge should consider the importance of the religious practice to the witness, the degree of state interference with that practice, and the actual situation in the courtroom—most important, who will see the witness’s face if she is not permitted to wear the niqab when giving evidence. The judge should also take into consideration “broader societal harms”—most significantly, whether requiring removal of the niqab will discourage women from reporting offences or otherwise participating in the justice system. On the other side, the judge must consider whether the witness’s evidence is peripheral or central to the case and whether the credibility of the witness is a significant issue in the case. In your view, does the majority’s approach properly balance the competing rights at issue?

3. In 2019, the Quebec legislature passed *An Act Respecting the laicity of the State* SQ 2019, c 12, which prohibits certain civil servants, such as police officers and teachers, from wearing religious symbols “in the exercise of their functions.” A religious symbol was defined as “any object, including clothing, a symbol, jewellery, an adornment, an accessory or head-wear, that (1) is worn in connection with a religious conviction or belief; or (2) is reasonably considered as referring to a religious affiliation.” The consensus among constitutional lawyers and academics is that this law violates religious freedom. However, the law also states that its provisions apply “notwithstanding” s 2 (and 7-15) of the Charter. This use by the legislature of s 33 of the Charter (the notwithstanding clause) would seem to preclude a s 2(a) challenge. Are there other constitutional arguments that can be made against the law’s validity?

4. In *Reference re Same-Sex Marriage*, 2004 SCC 79, the Supreme Court of Canada held that the extension of the right to civil marriage to same-sex couples would not breach the Charter guarantee of freedom of religion. The Court easily dismissed the argument that freedom of religion would be violated because the legalization of same-sex marriage would limit the freedom to hold religious views to the contrary. According to the Court, the purpose of the measure, “far from violating the Charter, flows from it” (at para 43) and that “[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the [Charter] rights of another” (at para 46). The Court went on to acknowledge that although

[52] [I]t[he] right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law Conflicts of rights do not imply conflict with the *Charter*; rather, the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

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[54] ... It has not been shown that impermissible conflicts—conflicts incapable of resolution under s. 2(a)—will arise.

The Court also observed that “the guarantee of religious freedom in s 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs” (at para 60).

5. The more difficult issue, which the Supreme Court of Canada did not address in the *Same-Sex Marriage Reference* (see note 4 above) was the right of a *civil* marriage commissioner

to refuse, for religious reasons, to perform a same-sex marriage. When the definition of civil marriage was changed (first by court order under the Charter and then by legislation), a number of civil marriage commissioners objected on religious grounds to performing such marriages. While some provinces agreed to excuse these commissioners from performing same-sex marriage ceremonies, other provinces, most notably Saskatchewan, were unwilling to do so and instructed their marriage commissioners to perform such marriages or face dismissal.

On three occasions the courts (and human rights tribunals) in Saskatchewan have considered whether marriage commissioners should be excused from performing same-sex marriages when they have religious objections to such relationships. In each case, the right of same-sex couples to be free from discrimination has outweighed the religious freedom of marriage commissioners to be excused from performing same-sex marriages.

In the most significant of the three cases, *Marriage Commissioners Appointed Under the Marriage Act (Re)*, [2011 SKCA 3](#), the Saskatchewan Court of Appeal considered the constitutionality of a legislative proposal that would permit provincially appointed civil marriage commissioners to refuse on religious grounds to perform same-sex marriage ceremonies. The Court found that this arrangement would violate the s 15 equality rights of gays and lesbians and could not be justified under s 1. The majority reasons were written by Richards JA, with concurring reasons by Smith JA.

Under the Saskatchewan civil marriage system, as Richards JA noted, "commissioners are the route—the only route—by which individuals who wish to be married by way of a non-religious ceremony may have their union solemnized" (at para 9). He observed that under the proposed law, a same-sex couple who approached a marriage commissioner could be told that they were being refused because of their sexual orientation. The harm from such a denial would be significant:

[41] ... It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental office "I won't help you because you are black (or Asian or First Nations) but someone else will" or "I won't help you because you are Jewish (or Muslim or Buddhist) but someone else will." Being told "I won't help you because you are gay/lesbian but someone else will" is no different.

Moreover, a significant number of commissioners might decide that they were unable to perform same-sex marriages, and the law provided no assurance that a minimum complement of commissioners would always be available to provide services to same-sex couples. The majority then had no difficulty concluding that the legislative proposal would have "the effect of creating a negative distinction based on sexual orientation" (at para 44) and that given the "historical marginalization and mistreatment of gay and lesbian individuals" (at para 45), the proposal would be discriminatory contrary to s 15 of the Charter.

In its s 1 analysis, the majority accepted that the protection of commissioners' religious freedom represented a substantial and compelling purpose. However, the proposed restriction on the rights of gay and lesbian couples failed both the minimal impairment and proportionality components of the *Oakes* test. The majority said that there were other ways in which the state might protect the commissioners' religious freedom. The majority identified as a less restrictive measure "a 'single entry point' system under which a couple [... would contact a] central office," (at para 85) so that any accommodation of religious beliefs would not be apparent to the couple. No judgment was made about whether a single entry point system would breach the s 15 equality rights of gay and lesbian couples. The majority concluded only that such a system would be "less restrictive" of their equality rights than the proposed law.

The majority also found that the freedom of religion interests accommodated by the proposed law "[did] not lie at the heart of s. 2(a)" because they concerned the ability of the commissioners "to act on their beliefs in the world at large" and not their freedom "to hold the religious beliefs they [chose] or to worship as they wish[ed]" (at para 93). Moreover, the majority stated that "[p]ersons who voluntarily choose to assume an office, like that of marriage

commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs" (at para 97).

In her concurring reasons, Smith JA expressed the view that requiring marriage commissioners to perform same-sex civil marriages might not constitute an interference with their religious beliefs or practices since they were not "compelled to engage in the sexual activity" to which they objected; rather, "[t]heir objection [was] that it is sinful for others to engage in such activity" (at para 148, emphasis in original). Furthermore, it was not at all clear that officiating at a marriage conneded the officiant's approval of that union. Any interference with religious beliefs was trivial or insubstantial in that it did not threaten actual religious beliefs or conduct. In Smith JA's view, then, a refusal by a marriage commissioner fell outside the scope of s 2(a) protection.

6. The term "conscience" is used in two different ways in discussions about religious freedom. Sometimes conscience is contrasted with religion. Freedom of conscience, in contrast to freedom of religion, is concerned with the protection of fundamental beliefs or commitments that are not part of a religious or spiritual system. Other times, though, the term "conscience" refers to a particular kind of accommodation claim. In most religious accommodation cases, an individual (or group) seeks to be exempted from a law that prevents them from engaging in a religious practice—for example, from wearing religious dress or keeping religious holidays. In conscientious objection cases, however, the individual (or group) asks to be exempted from a law that requires them to *perform* an act that they regard as immoral. In many of these cases the claimant asks to be excused from performing an act that is not itself immoral but that supports or facilitates (what they see as) the immoral action of others, and so makes them complicit in this immorality.

7. Many provincial human rights codes provide some sort of exemption from anti-discrimination requirements for religious organizations that are serving a religious community: see below, Section V. But should private actors who provide services to the public also be exempted from non-discrimination requirements when they have religious objections to serving a particular group, or to what in their view amounts to supporting an immoral practice?

In *Brockie v Brillinger (No 2)*, [2002 CanLII 63866, 222 DLR \(4th\) 174 \(Ont Sup Ct J\)](#), the Canadian Lesbian and Gay Archives, a registered charity devoted to preserving information about lesbian and gay persons, ordered letterhead and business cards from a small printing business. The owner of the business, Brockie, refused to do the work based on his religious beliefs. Brockie indicated that he was willing to provide printing services to gay and lesbian customers, but not to an organization that "was involved in furthering and supporting the homosexual 'lifestyle'" (at para 15). The Gay Archives initiated a human rights complaint. The tribunal held that Brockie's refusal to provide printing services (which were otherwise available to the public) to a gay group amounted to discrimination under the Code. The Divisional Court of Ontario upheld the tribunal's decision. The Court rejected as "specious" the distinction proposed by Brockie, "between discrimination because of the presence of or association with a human characteristic referred to in s. 1 [of the Ontario Code] *per se* and discrimination because a person engages in the political act of promoting the causes of those who have such characteristics" (at para 29). The Court said that even if Brockie's objection was to "the Archives' objects and political purposes" rather than to "its mere association with people who bear such characteristics," the purpose of the Code is to create "a climate of understanding and mutual respect" (at para 29). In the Court's view, "efforts to promote an understanding and respect for those possessing any specified characteristic should not be regarded as separate from the characteristic itself" (at para 31). The Court found that although the tribunal's order breached Brockie's s 2(a) rights, it was nevertheless justified under s 1. According to the Court, claims to religious freedom "in the commercial marketplaces" are "at the fringes" of s 2(a) (at para 54).

Yet, in its s 1 analysis, the Court said that if the tribunal's order was read as requiring Brockie to print not just the archive's letterhead and business cards but also "brochures or

posters with editorial content espousing causes or activities clearly repugnant to [his] fundamental religious tenets" (at para 49), it would fail the s 1 proportionality requirement. In the Court's view, the Code prohibits only "discrimination arising from denial of services because of certain characteristics of the person requesting the services" (at para 49).

8. In *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, [2018 ONSC 579](#), a group of doctors in Ontario challenged the policy of the provincial College of Physicians and Surgeons that required its members to provide a patient with an "effective referral" to another doctor if they were unwilling or unable on moral grounds to offer a particular medical service such as an abortion or medical assistance in dying (MAiD). The doctors argued that giving an effective referral would make them complicit in acts they regarded as immoral. The doctors' claim was rejected by the Ontario Court of Appeal, which held that the interests of patients (in accessing medical services) outweighed the doctors' freedom of religion claim. For a discussion of the general issue, see Bruce Ryder, "Physicians' Rights to Conscientious Objection" in B Berger & R Moon, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart, 2016) 127; Richard Moon, "The Conscientious Objection of Medical Practitioners to the CPSO's 'Effective Referral' Requirement" (2020) 29:1 Constitutional Forum 29.

V. RELIGIOUS FAMILIES, COMMUNITIES, AND ORGANIZATIONS

The issue of accommodation becomes more complicated when a religious group is not simply seeking an exemption from a law that interferes with a *particular* religious practice but is instead making a larger claim to govern its affairs according to its religious rules or judgments either with state support or, more often, simply without state interference. In Canada, many religious groups seek to regulate their internal affairs on the basis of their understanding of religious law, even when that law is inconsistent with state law or public values. Should the state interfere with the decisions religious parents make about how to educate and rear their children? Should it enforce a contract dealing with a religious subject, such as the obligation under Islamic law of a husband to pay *mahr* (a dowry) to his wife, or enforce arbitration decisions that are based on religious law? Should the state intervene when the husband in a Jewish marriage refuses to give his wife a *get*, a religious divorce, thereby preventing her from remarrying within the faith; or when someone is expelled from a Hutterite community, where all property is collectively held? Can a private religious university claim exemption from anti-discrimination laws and limit admission to those who agree to follow the precepts of the religion? Can a private religious school claim an exemption from a mandatory curricular requirement to teach a course about world religions and ethics from a "neutral and objective" perspective?

A. RELIGIOUS FAMILIES AND COMMUNITIES

We begin by looking at cases dealing with the relationship between secular law and the religious norms that govern family life. As you will see, many of the cases involve parental choices about the religious education of their children. This is not surprising. The parent-child relationship exposes most clearly the tension in our conception of religious belief or commitment. Religious commitment is viewed as both a matter of choice—that is, something the individual chooses or adopts—and identity—that is, something that the individual is socialized into or nurtured within and that forms part of their identity or group membership. Education seems to give rise to some of the most contentious freedom of religion issues. It involves competing private and public interests or claims—on the one hand, the claim of parents to determine the basic upbringing of their children and to transmit their faith to their children and, on the other, a claim of the state, on behalf of the larger community, to teach

children important community values such as tolerance and respect and to encourage children's development as thoughtful and informed citizens. The issues become even more complicated when we begin to think of children as having their own religious freedom claims separate from their parents.

The issue of religion in the schools has several strands, some of which have already been dealt with in other sections of this chapter—for example, the role of religion in the public schools (*Multani*, *Zylberberg*, and *Chamberlain*) and the public funding of religious schools (s 93 of the *Constitution Act, 1867* and the *Reference re Bill 30* and *Adler* cases). The cases here focus on parental choices about the religious education of their children—choices to remove their children from the public school system or shield them from certain components of the state curriculum that clash with the parents' religious precepts.

The issue of state oversight of private education arose in *R v Jones*, [1986] 2 SCR 284, 1986 CanLII 32. In that case, Alberta's *School Act*, RSA 1980, c S-3 allowed children to be exempted from the requirement of compulsory public school attendance if either (1) they were attending a school approved by the provincial department of education or (2) the department or school board certified that the pupil was under "efficient instruction" at home or elsewhere. Jones, a Baptist pastor who was educating his children in a small school in the basement of his church, refused to seek departmental approval of his school or to apply for a certificate that would exempt his children from compulsory public school attendance. He argued that applying to the state for permission to do what he was authorized to do by God violated his religious convictions and thus infringed his s 2(a) right to freedom of religion. The Court dismissed his claim, with the majority finding a justified infringement of freedom of religion and Wilson J, in dissent, being unwilling to find even an infringement of freedom of religion.

Jones leaves many unanswered questions about state control of private education. Should parents be able to prevent their children from being exposed to values such as tolerance by withdrawing them from the public school system and placing them in a private school or schooling them at home? Does freedom of religion give parents the right to insulate their children from competing or critical views? What kind of intervention or supervision of private education by the state is appropriate or practical? Should the state intervene if a private school is teaching racist or homophobic beliefs? Should the state require private schools to teach sex education or evolution? Are the freedom-of-religion claims of children subsumed within those of their parents, or do children have independent rights that allow them, at least at some point in the future, to choose a different religious path from their parents? If so, can the state assert a claim to protect these rights by exposing children to different points of view in the course of their education?

SL v Commission scolaire des Chênes

2012 SCC 7

DESCHAMPS J (McLachlin CJ and Binnie, Abella, Charron, Rothstein, and Cromwell JJ concurring):

[2] The appellants, S.L. and D.J., are parents of school-aged children. They submit that the refusal of the respondent Commission scolaire des Chênes ("school board") to exempt their children from the Ethics and Religious Culture ("ERC") course infringes their freedom of conscience and religion, which is protected by s. 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") and s. 3 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 (the "*Quebec Charter*"). Their arguments cannot succeed. Although the sincerity of a person's belief that a religious practice must be observed is relevant to whether the person's right to freedom of religion is at issue, an infringement of this right cannot be established without

objective proof of an interference with the observance of that practice. In this case, given the trial judge's findings of fact and the evidence in the record concerning the neutrality of the ERC Program, I conclude that the appellants have failed to prove such an interference. There is therefore no basis for declaring that the school board erred in refusing to exempt the appellants' children from the ERC course. As a result, I would dismiss the appeal with costs.

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IV. Background

[10] The place of religion in civil society has been a source of public debate since the dawn of civilization. The gradual separation of church and state in Canada has been part of a broad movement to secularize public institutions in the Western World Religious neutrality is now seen by many Western states as a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights

[11] The religious portrait of our society is a key factor in the adoption of a policy of neutrality, not only in Quebec but also elsewhere in Canada. As a result of globalization of trade and increased individual mobility, the diversity of religious beliefs in Canada has increased sharply over the past decades.

[Justice Deschamps reviewed the history of the secularization of the public education system in Quebec, beginning in 1964 with the creation of a Ministry of Education, followed 30 years later in 1997 by a constitutional amendment that made possible the abolition of the denominational school system and the reorganization of Quebec school boards on the basis of language. With this secularization of the school system, the focus of government became the need to make the adjustments required, in a pluralistic society, to ensure that religious diversity was taken into account in the school curriculum. The result was legislation passed in 2005, introducing the mandatory ERC course, the objective of which was to provide instruction about ethics and world religions. The course would become mandatory in the 2008-9 school year. The appellants made their request for exemptions in May 2008.]

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V. Applicable Principles

[17] The historical, political and social context of the late 20th century, the enactment of the *Quebec* and *Canadian Charters*, and the interpretation of freedom of religion by Canadian courts have played an important role in the Quebec government's decision to remain neutral in religious matters. While it is true that the *Canadian Charter*, unlike the U.S. Constitution, does not explicitly limit the support the state can give to a religion, Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others.

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[21] The concept of state religious neutrality in Canadian case law has developed alongside a growing sensitivity to the multicultural makeup of Canada and the protection of minorities.

[22] ... [I]n *Syndicat Northcrest v. Amselem* ..., Iacobucci J. explained that a person does not have to show that the practice the person sincerely believes he or she must observe or the belief the person endorses corresponds to a religious precept recognized by other followers. If the person believes that he or she has an obligation to act in accordance with a practice or endorses a belief "having a nexus with religion," the court is limited to assessing the sincerity of the person's belief (paras. 39, 43, 46 and 54).

[23] At the stage of establishing an infringement, however, it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. ...

[24] It follows that ... the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

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VI. Application

[26] The appellants sincerely believe that they have an obligation to pass on the precepts of the Catholic religion to their children The sincerity of their belief in this practice is not challenged by the respondents in this case. The only question at issue is whether the appellants' ability to observe the practice has been interfered with.

[27] To discharge their burden at the stage of proving an infringement, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children. This is not the approach they took. Instead, they argued that it was enough for them to say that the program infringed their right Dubois J. of the Superior Court was ... correct in rejecting that interpretation

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[29] The [appellants'] principal argument ... is that the obligation they believe they have, namely to pass on their faith to their children, has been interfered with. In this regard, the freedom of religion asserted by the appellants is their own freedom, not that of the children. The common theme that runs through the appellants' objections is that the ERC Program is not in fact neutral. According to the appellants, students following the ERC course would be exposed to a form of relativism, which would interfere with the appellants' ability to pass their faith on to their children. ... I will discuss this in my analysis of the alleged infringement of the appellants' freedom of religion.

[30] We must recognize that trying to achieve religious neutrality in the public sphere is a major challenge for the state. The author R. Moon has clearly described the difficulty of implementing a legislative policy that will be seen by everyone as neutral and respectful of their freedom of religion[.] [Here Deschamps J cited the same passages from *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 217 at 231 as cited in the Saguenay case excerpted earlier in this chapter.]

[31] We must also accept that, from a philosophical standpoint, absolute neutrality does not exist. Be that as it may, absolutes hardly have any place in the law. ...

[32] Therefore, following a realistic and non-absolutist approach, state neutrality is assured when the state ... shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.

[33] It should be noted that the appellants' criticisms cannot address the way the course was taught to their children, since their children have never followed the course. The trial judge only examined the program.

[34] The ERC Program has two components: instruction in ethics and instruction in religious culture. [Here Deschamps J quoted a government document stressing that the program's purpose was to "[foster] an understanding of several religious traditions whose influence has been felt and is still felt in our society today ... [not] to promote some new common religious doctrine aimed at replacing specific beliefs."] ...

[35] The Ministère's formal purpose thus does not appear to have been to transmit a philosophy based on relativism or to influence young people's specific beliefs.

[36] Regarding the program itself, Dubois J. ... [concluded that making a comprehensive presentation of various religions without forcing the children to join them could not be seen in itself as an indoctrination of students that would interfere with the parents' freedom of religion.]

[37] After reviewing the record, I see no error in the trial judge's assessment. ...

[38] The appellants also maintain that exposing children to various religious facts is confusing for them. The confusion or "vacuum" allegedly results from the fact that different beliefs are presented on an equal footing.

[39] In *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, ... [t]he Chief Justice made the following comments (paras. 65-66):

Children encounter [some cognitive dissonance] every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents' religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.

Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves.

[40] Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. ... Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*.

[41] The appellants have not proven that the ERC Program infringed their freedom of religion. Therefore, the trial judge did not err in holding that the school board's refusal to exempt their children from the ERC course did not violate their constitutional right.

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[In their concurring judgment, LeBel and Fish JJ noted that at the time the complaint was made, the course had not yet been implemented in the schools. They found no breach of s 2(a), but left open the possibility that the course, once in place, might be shown to advance a relativistic view of religion, contrary to the parents' beliefs.]

• • •

Appeal dismissed.

NOTE

Quebec's ERC program was subsequently considered in *Loyola High School v Quebec (AG)*, excerpted below, which dealt with the issue of a private religious school's request for an exemption from the requirement to teach the course.

B (R) v Children's Aid Society of Metropolitan Toronto, discussed immediately below, dealt with parental decision-making about the medical care of children.

NOTE: B (R) V CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO

B (R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315, 1995 CanLII 115 dealt with the issue of the state's ability to interfere with the decisions that religious parents make about the medical care of their children. The case involved a court order for wardship authority granted to the Children's Aid Society under the Ontario *Child Welfare Act*, RSO 1980, c 66. This order enabled the Children's Aid Society to consent to a blood transfusion for a one-month-old baby who was critically ill. The parents, who were Jehovah's Witnesses, had refused for religious reasons to consent to the transfusion. The parents challenged the order under the Charter. The principal argument was that the wardship order violated the parents' right to liberty under s 7. However, the Supreme Court of Canada also addressed the argument that the order violated the parents' religious freedom. Five judges, in reasons written by La Forest J, held that because the law denied the parents the right to choose medical treatment for their infant according to their religious beliefs, their rights under s 2(a) had been breached. However, these five judges went on to find that this breach was justified under s 1, because the state had an interest in protecting children at risk and because the legislative scheme provided full procedural rights for parents wishing to challenge a state claim that their child was in need of protection.

Four judges, in reasons written by Iacobucci and Major JJ, found no breach of the Charter guarantee of freedom of religion. In their view, the internal limits on freedom of religion articulated by Dickson J in *Big M* meant that the parents' freedom of religion would not include any actions that threatened their child's life or health. Justices Iacobucci and Major also considered the religious freedom of the child in their s 2(a) analysis (at 437):

The appellants proceed on the assumption that Sheena is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, Sheena has never expressed any agreement with the Jehovah's Witness faith, nor, for that matter, with any religion, assuming any such agreement would be effective. There is thus an infringement on Sheena's freedom of conscience, which arguably includes the right to live long enough to make her own reasoned choice about the religion she wishes to follow as well as the right not to hold a religious belief. In fact, denying an infant necessary medical care could preclude that child from exercising any of her constitutional rights, because the child, due to parental beliefs, may not live long enough to make choices about the ideas she should like to express, the religion she should like to profess, or the associations she should like to join. "Freedom of religion" should not encompass activity that so categorically negates the "freedom of conscience" of another.

The issue of religiously based decisions about medical care is different when the child is old enough to express a view and indicates their opposition to treatment. Adults have a general right to refuse medical treatment, including life-saving treatment, and are not required to justify their refusal on religious or other grounds. The law in most provinces extends to "mature minors" this right to refuse treatment. In *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, the Supreme Court of Canada considered the constitutionality

of a version of the mature-minor exemption from the state's power to authorize treatment in the best interests of children.

NOTES

1. In *Bruker v Marcovitz*, 2007 SCC 54, a majority of the Supreme Court of Canada, in a judgment written by Abella J, held that Marcovitz's promise to consent to a religious divorce was legally enforceable and that Bruker was entitled to damages for the loss she had suffered as a consequence of her husband's failure to do as he had promised. Justice Abella thought that a contract could have a religious object, provided that object was not "prohibited by law" or "contrary to public order" (at para 59). In her view, the religious character of Marcovitz's undertaking did not "immunize it from judicial scrutiny" (at para 47). The promise by Marcovitz was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. A court, said Abella J, may take jurisdiction so long as the dispute concerns the legal rights of the parties. She observed that in this case, "[w]e are not dealing with judicial review of doctrinal religious principles, such as whether a particular get is valid" (at para 47). Justice Abella noted that Marcovitz had offered no religious reasons for his failure to perform his undertaking and that, in any event, Judaism recognized no reasons to refuse consent. According to Abella J, the enforcement of the undertaking did not breach Marcovitz's religious freedom:

[69] ... [h]is religion does not require him to refuse to give Ms. Bruker a get. ... There is no doubt that at Jewish law he *could* refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits. (Emphasis in original.)

She concluded that the enforcement of his promise was supported by a public policy favouring the removal of such barriers and, more generally, by a public commitment to gender equality and freedom of choice in marriage.

In her dissenting judgment, Deschamps J held that Marcovitz's promise was not legally binding because it lacked a justiciable "object," one of the essential elements of an enforceable agreement at civil law. According to Deschamps J, a contract with an exclusively religious object (or an object that could only be understood in religious terms) was not legally enforceable under the *Civil Code of Quebec*, SQ 1991, c 64. The contractual obligation at issue in the *Bruker* case had no civic consequences; it related to Bruker's position or status within the religious community and not to her legal status or property rights.

Not far in the background of Abella J's judgment is the issue of the constitutionality of s 21.1 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp), an issue that was specifically not pursued in this case, in part because the provision, which was enacted in 1990, was not in force when the parties divorced in 1980. Section 21.1 empowers a judge in a civil divorce case to exert pressure on a spouse who refuses to give their consent to a religious divorce by "dismiss[ing] any application filed by that spouse" and "strik[ing] out any other pleadings and affidavits filed by that spouse": see also the Ontario *Family Law Act*, RSO 1990, c F.3, s 2(5). While Abella J insisted that nothing in her reasons "purports in any way to decide the constitutionality of s 21.1" (at para 35), her finding that Marcovitz's freedom of religion was not breached by the enforcement of his promise would seem to apply equally to this provision of the *Divorce Act*.

2. There are several reasons why the courts may hesitate or refuse to enforce agreements that are based on religious norms or deal with religious matters. First, the interpretation of such an agreement may draw the courts into disputes about the proper understanding of religious doctrine or practice. Second, legal enforcement may be inappropriate given the subject matter of the agreement—matters of faith or deep commitment—and the relationship

between the parties—members of a community bound by a shared commitment to a set of values or practices or to a way of life. Third, agreements between religious community members may be tainted by undue influence or unfair pressure.

3. Polygamy has traditionally been practised or accepted in some religious and cultural groups from Africa, Asia, and the Middle East. The Mormon (LDS) church repudiated the practice of polygamy in the late 19th century; however, a breakaway fundamentalist group continues to follow this practice. In *Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588*, the BC Superior Court was asked by the BC government for its opinion concerning the constitutionality of the *Criminal Code* ban on polygamy. Section 293(1) of the Code provides:

293(1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

(a) practises or enters into or in any manner agrees or consents to practise or enter into any form of polygamy or any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in paragraph (a).

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

After hearing a significant amount of expert evidence concerning the practice of polygamy, the judge held that the ban breached s 2 (a) of the Charter, but was justified under s 1 because Parliament had “a very strong basis for a reasoned apprehension of harm to many in our society inherent in the practice of polygamy” (at para 6), including harm to the women and children in polygamous families and to the “institution of monogamous marriage” (at para 5). For a critique of the Court’s reasoning, see Carissima Mathen, “Reflecting Culture: Polygamy and the Charter,” in B Berger and J Stribopoulos, eds, *Unsettled Legacy: Thirty Years of Criminal Justice Under the Charter* (Toronto: LexisNexis, 2012) 389.

B. RELIGIOUS ORGANIZATIONS AND INSTITUTIONS

Sometimes an accommodation claim is made not by an individual who is seeking exemption for a specific practice, but instead by a religious organization or institution, which is insisting upon significant autonomy in the governance of its internal affairs. In these institutional autonomy cases, the key question for courts is whether the exemption from state law will impact the rights and interests of non-members—of outsiders to the spiritual community. The right of the Catholic Church, for example, to exclude women from the priesthood (to discriminate against women) is not decided by balancing the religious claim or interest against the claim to gender equality. As a private religious organization or institution, the Catholic Church should be free to govern its internal affairs according to its own rules or norms and not be subject to public anti-discrimination requirements. Similarly, a religious school may dismiss a teacher who enters a same-sex relationship contrary to church doctrine, not because the religious interests of the group or school outweigh the public value of sexual orientation equality but simply because the school is understood to be a private religious organization.

The courts have generally treated religious organizations as voluntary associations of individuals pursuing common ends who should be free to operate as they choose. However, the state may sometimes decide to intervene in the affairs of a religious community

characterized by hierarchy and insularity when the prevailing practices in that community are thought to be harmful to some of its members, even though the members have, in at least a formal sense, chosen to participate in those practices. Richard Moon has argued that the deep communal connections that are part of the value of religious life and commitment—a source of meaning and value for adherents—may also be the source of what the courts regard as harm—the lack of meaningful choice or opportunity open to the members of such communities or the oppression of vulnerable group members: see Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014). In most of these institutional autonomy cases, though, the issue is simply do the actions of the organization impact outsiders to the group?—a matter of drawing the line between the civil sphere (of government action) and the private or communal sphere (of religious practice).

In *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, 1992 CanLII 37, Gonthier J noted that the courts will not generally intervene in doctrinal or spiritual matters, but may do so when civil or property rights are involved. According to Gonthier J, once the court assumes jurisdiction over a dispute with religious components, “there is no alternative but to come to the best understanding possible of the applicable tradition and custom.”

In *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, Wall, a member of the Highwood Congregation of Jehovah’s Witnesses, was “disfellowshipped” by the Judicial Committee of elders because he was judged to have engaged in sinful behaviour without being sufficiently repentant. Wall applied for judicial review of the committee’s decision, arguing that the decision should be quashed on the ground that it was procedurally unfair. The Supreme Court of Canada held that the application must fail for several reasons:

First, judicial review is limited to public decision makers, which the Judicial Committee is not. ...

Second, there is no free-standing right to procedural fairness absent an underlying legal right. Courts may only interfere to address procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake and the claim is founded on a valid cause of action, for example, contract, tort or restitution. ... No basis has been shown that W and the Congregation intended to create legal relations. No contractual right exists. The Congregation does not have a written constitution, by-laws or rules to be enforced. ...

Third, even where review is available, the courts will consider only those issues that are justiciable. The ecclesiastical issues raised by W are not justiciable. Justiciability relates to whether the subject matter of a dispute is appropriate for a court to decide. ... Even the procedural rules of a particular religious group may involve the interpretation of religious doctrine, such as in this case. The courts have neither legitimacy nor institutional capacity to deal with contentious matters of religious doctrine.

More recently, in *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22, several members of a church sought a declaration that their expulsion from the congregation violated the principles of natural justice and so was “null and void.” The Supreme Court of Canada held that the courts may review the decision of voluntary associations only when the decision affects a legal right such as “property, contract, tort or unjust enrichment and statutory causes of action.” “The question” said the Court, “is whether the particular relief sought by the plaintiff is the vindication of a legal right. If not, then there is no cause of action or basis for relief.” The Court found, in this case, no evidence of an intention by the members of the church to enter into legal relations. It held that

[b]ecoming a member of a religious voluntary association, and even agreeing to be bound by certain rules, does not, without more, evince an objective intention to enter into a legal

contract enforceable by the courts. ... The absence of any evidence of an objective intention to enter into legal relations is fatal to the expelled members' claim.

Each of the human rights codes in Canada includes an exemption from its ban on employment discrimination for a "bona fide occupational qualification" (BFOQ)—an exemption that has been applied to religion-based requirements for employment at religious organizations. Some of these codes also include more specific exemptions for organizations that serve "the interests of persons identified by their ... creed." Most obviously, a church community will not be found to have breached the ban on religious discrimination in employment when it selects a minister or pastor based on their commitment to a particular religious belief system. A more difficult case arises when an organization requires that all its employees, regardless of the specific tasks they perform, adhere to certain religious practices. For example, in *Caldwell v Stuart*, [1984] 2 SCR 603, 1984 CanLII 128, the Supreme Court of Canada held that a Roman Catholic high school could dismiss a teacher who, although a member of the Church, had married a divorced man in a civil ceremony contrary to church doctrine. The Court found that the school's requirement that all teachers adhere to church doctrine was a BFOQ.

Human rights codes may also have exemptions for "special interest" organizations, allowing religious organizations, among others, to discriminate in providing services to members of their organizations: see, for example, the following provision in the Ontario *Human Rights Code*, RSO 1990, c H-19:

18. The rights under Part I to equal treatment with respect to services and facilities ... are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

Or this provision in the BC *Human Rights Code*, RSBC 1996, c 210:

41(1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

Trinity Western University (TWU) is an evangelical Christian university, located in Langley, British Columbia, that required its students to sign a covenant that prohibited them from engaging in certain behaviours, including same-sex intimacy.

In *Trinity Western University v British Columbia College of Teachers*, the Supreme Court of Canada held that the BCCT acted outside its powers when it refused to accredit a teacher training program at TWU. The BCCT believed that the program would not adequately prepare students to teach in the public school system in BC because it affirmed the view that homosexuality was sinful. In making this decision, the BCCT referred specifically to the Contract of Responsibilities signed by teachers and students that prohibited "homosexual behaviour" and other activities. According to the BCCT, an institution that wishes to train teachers for the public school system must "provide an institutional setting that appropriately prepares future teachers for the public school environment, and in particular for the diversity of public school students" (at para 11), which, because of the contract, this program did not do.

The majority of the Supreme Court of Canada, in a judgment written by Iacobucci and Bastarache JJ, accepted that the denial of accreditation "places a burden on members of a particular religious group ... preventing them from expressing freely their religious beliefs and associating to put them into practice" (at para 32). In the majority's view, the BCCT decision

meant that TWU must abandon its religiously based "community standards" if it is to run a program that trains teachers for the public school system. Graduates of TWU "are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers" (at para 32). Furthermore, "[t]he issue at the heart of this appeal," said the majority, "is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system."

The majority, however, found no reason to deny accreditation to the TWU program. The majority agreed that if a teacher engages in discriminatory conduct, they "can be subject to disciplinary proceedings" (at para 37), but maintained that the right of gays and lesbians to be free from discrimination is not violated simply because a teacher holds discriminatory views. In the majority's view, "the proper place to draw the line in cases like the one at bar is generally between belief and conduct" (at para 36). A teacher may believe that homosexuality is sinful or wrongful, but as long as they do not act on those views when dealing with their students, they will not be found to have breached their right to equality. The majority found no evidence that any TWU graduate had acted in a discriminatory way in the classroom. And so, the limitation on the religious freedom of the staff and graduates of TWU (the denial of accreditation) was imposed in the absence of any evidence that the program had a detrimental impact on the school system. In the absence of "concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C." (at para 36), the BCCT had no grounds to deny accreditation to TWU and interfere with the religious freedom of TWU instructors and students to hold certain beliefs.

In 2010, TWU applied to the various provincial law societies for accreditation of a law program. In Canada, the graduates of an accredited program are eligible to take provincial law society exams, and, if they pass these exams, to be called to the bar in the particular province following a brief articling period. The graduates of an unaccredited program may still be called to the provincial bar but must also satisfy some additional requirements. While many of the provincial law societies were prepared to accredit the TWU program, the law societies of British Columbia (LSBC) and Ontario (LSUC/LSO) declined to do so. The law societies of BC and Ontario were concerned that this covenant would have the effect of excluding gay and lesbian students from the program and, as a consequence, would limit their access to the legal profession.

Law Society of British Columbia v Trinity Western University

2018 SCC 32

[Trinity Western University (TWU), an evangelical Christian postsecondary institution, sought to open a law school that would require its students and faculty to adhere to a religiously based code of conduct prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman" (at para 1). The Law Society of British Columbia (LSBC) regulates the province's legal profession under a statute, the *Legal Profession Act*, SBC 1998, c 9. The LSBC decided not to recognize TWU's proposed law school. While the appeal also raises issues of statutory interpretation and administrative law, the excerpt below is confined to the issue of whether or not the LSBC's decision unreasonably limited rights under s 2(a) of the Charter.]

ABELLA, MOLDAVER, KARAKATSANIS, WAGNER and GASCON JJ:

I. Overview

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[3] In our respectful view, the LSBC's decision not to recognize TWU's proposed law school represents a proportionate balance between the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The LSBC's decision was therefore reasonable.

• • •

(1) Whether Freedom of Religion Is Engaged

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[61] TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC's decision. It is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(a) of the *Charter*.

• • •

[63] Section 2(a) of the *Charter* is limited when the claimant demonstrates two things: first, that he or she sincerely believes in a practice or belief that has a nexus with religion; and second, that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief . . . If, based on this test, s. 2(a) is not engaged, there is nothing to balance.

[64] Although this Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships . . . The protection of individual religious rights under s. 2(a) must therefore account for the socially embedded nature of religious belief, as well as the "deep linkages between this belief and its manifestation through communal institutions and traditions" (*Loyola*, at para. 60). In other words, religious freedom is individual, but also "profoundly communitarian" (*Hutterian Brethren*, at para. 89). The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a).

[65] On the sincerity of the belief, the respondents have articulated the religious interest at stake in various ways. In their factum, they contend that "[t]he sincere beliefs of evangelical Christians include 'the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct'" (para. 96, quoting *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, at para. 235). Elsewhere they argue that evangelicals believe "they should carry their beliefs into educational communities" and in the value of educating the whole person with a Christian ethos (para. 113).

[66] The affidavit evidence from TWU students focusses primarily on the spiritual growth that is engendered by studying law in a religious learning environment.

[67] There is no doubt evangelical Christians believe that studying in a religious environment can help them grow spiritually. Evangelical Christians carry their religious beliefs and values beyond their private lives and into their work, education, and politics.

[68] TWU seeks to foster this spiritual growth. . . TWU seeks to promote "total student development through . . . deepened commitment to Jesus Christ and a Christian way of life" (p. 120).

[69] Several alumni of TWU emphasized the spiritual benefits of receiving an education from a Christian perspective in an environment infused with evangelical Christian values. . .

[70] Because s. 2(a) protects beliefs which are sincerely held by the claimant, the court must "ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice" (*Amselem*, at para. 52; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 35). It is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC's decision.

[71] This belief is, in turn, supported through the universal adoption of the Covenant. ... A core value at TWU is "obeying the authority of Scripture" (R.R., vol. I, at p. 121), and the Covenant promotes this compliance. Specifically, it requires TWU community members to "encourage and support other members of the community in their pursuit of these values and ideals" (A.R., vol. III, at p. 402). Thus, the mandatory Covenant helps create an environment in which TWU students can grow spiritually. ...

[72] Members of the TWU community have noted that the mandatory Covenant "makes it easier" for them to adhere to their faith, and it creates an environment where their moral discipline is not constantly tested. ...

[73] To summarize, it is clear from this evidence that evangelical Christians believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct enhances the spiritual growth of members of that community. And the Covenant supports the practice of studying in an environment infused with evangelical beliefs.

[74] The next question is whether the LSBC's decision not to approve TWU's law school limits the ability of TWU's community members to act in accordance with these beliefs and practices in a manner that is more than trivial or insubstantial (*Amselem*, at para. 74; *Ktunaxa*, at para. 68). ... This is an objective analysis that looks at the impact on the claimants, rather than the impact of the implicated practices or beliefs on others (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at paras. 23-24; *Ktunaxa*, at para. 70).

[75] By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

• • •

(3) Proportionate Balancing

[79] In *Doré* and *Loyola*, this Court held that where an administrative decision engages a Charter protection, the reviewing court should apply "a robust proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach" (*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the Charter protection with the statutory mandate *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a Charter protection with the statutory objectives at stake Consequently, the decision-maker is [best able] to

weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference [by a reviewing court] is warranted . . . *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance . . . As long as the decision “falls within a range of possible, acceptable outcomes,” it will be reasonable (*Doré*, at para. 56). . . .

[80] . . . For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision proportionately balances these factors, that is, that it “gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate” (*Loyola*, at para. 39). Put another way, the *Charter* protection must be “affected as little as reasonably possible” in light of the applicable statutory objectives (*Loyola*, at para. 40). . . . Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

[81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection least. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes This is a highly contextual inquiry.

[82] The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context The *Doré* framework therefore finds “analytical harmony with the final stages of the *Oakes* framework . . . ” (*Loyola*, at para. 40). In working “the same justificatory muscles” as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

[83] We now turn to whether the limitation on the religious freedom of the members of the TWU community is a proportionate one in light of the LSBC’s statutory mandate.

[84] The LSBC was faced with only two options—to approve or reject TWU’s proposed law school. Given the LSBC’s interpretation of its statutory mandate, approving TWU’s proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility

[85] The LSBC’s decision also reasonably balanced the severity of the interference with the *Charter* protection against the benefits to its statutory objectives. To begin, the LSBC’s decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU’s proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would “consider” amendments to its Covenant, TWU expressed no willingness to compromise The decision therefore only prevents TWU’s community members from attending an approved law school at TWU that is governed by a *mandatory* covenant.

[86] The Court of Appeal described the limitation in this case as “severe” because it precludes graduates of TWU’s proposed law school from practising law in British Columbia (para. 168). However, the LSBC’s decision . . . is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

[87] First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required . . . to study law in a

Christian learning environment in which people follow certain religious rules of conduct. The decision ... only prevents prospective students from studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant.

[88] Second, ... the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth. ...

[89] Attending TWU's proposed law school is said to make it "easier" to practise evangelical beliefs. That attending law at TWU, with a mandatory covenant, is a preference is clear from TWU's own affiants who, like Mr. Volkenant, expressed a desire to attend TWU's proposed law school:

I do not know if I would have chosen to attend TWU law school, but I certainly would have appreciated the option. [Emphasis added.]

(R.R., vol. II, at p. 154)

I am familiar with TWU's proposal for its School of Law. Had this option existed when I was considering law schools, I likely would have applied to it. [Emphasis added.]

(R.R., vol. I, at p. 7)

... I am familiar with the proposal put forward by TWU in respect to its School of Law and believe I would have considered attending had this option been available to me. [Emphasis added.]

(R.R., vol. I, at p. 143)

[90] Our point is that, on the record before us, prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court[.] ...

[91] On the other side of the scale is the extent to which the LSBC's decision furthered its statutory objectives. ...

[92] It is clear that the decision not to approve TWU's proposed law school significantly advanced the LSBC's statutory objectives—to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see LPA, ss. 3(a) and 3(b)).

[93] First, the decision advances the LSBC's relevant statutory objectives by maintaining equal access to and diversity in the legal profession. ... As this Court acknowledged in *TWU 2001*, "[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost" (para. 25). It follows that the 60 law school seats created by TWU's proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

[94] TWU submits that ... there are many other options open to LGBTQ people who wish to attend law school (R.F., at para. 175). Even further, TWU asserts that its law school will result in an overall increase in law school seats, which expands choices for all students (para. 138). The British Columbia Court of Appeal accepted this argument

[95] Such arguments fail to recognize that ... an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 more law school

seats per year, whereas those 60 seats remain effectively closed to most LGBTQ people. ... This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities—it prevents “the violation of essential human dignity and freedom” and “eliminate[s] any possibility of a person being treated in substance as ‘less worthy’ than others” (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138). The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

[96] Second, the decision furthers the statutory objective—protecting the public interest in the administration of justice by preserving rights and freedoms—by preventing the risk of significant harm to LGBTQ people who attend TWU’s proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU “they would have to either ‘live a lie to obtain a degree’ ... or face the prospect of disciplinary action including expulsion” (para. 172). ... Attending TWU’s law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., Egale Canada Human Rights Trust (file No. 37318), at para. 14; Start Proud and OUTlaws (file No. 37209), at para. 6).

[97] Despite this, TWU asserts that LGBTQ students will suffer no harm ... because the Covenant requires all members of TWU’s community to “treat all persons with dignity, respect and equality, regardless of personal differences” (R.F., at para. 92). However, as this Court recognized in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, it is not possible “to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood” [pinpoint citation omitted].

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[99] The TWU community has the right to determine the rules of conduct which govern its members. ... Where a religious practice impacts others, however, this can be taken into account at the balancing stage. The Covenant is a commitment to enforcing a religiously based code of conduct, not just in respect of one’s own behaviour, but also in respect of other members of the TWU community (D. Pothier, “An Argument Against Accreditation of Trinity Western University’s Proposed Law School” (2014), 23:1 *Const. Forum Const.* 1, at p. 2). The effect of the mandatory Covenant is to restrict the conduct of others.

[100] The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom “must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs” (*Hutterian Brethren*, at para. 90; see also *Loyola*, at para. 47). Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker’s pursuit of its statutory mandate in a multicultural and democratic society.

[101] In saying this, we do not dispute that “[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society” (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola*, at para. 43). But more is at stake here than simply “disagreement and discomfort” This Court has held that religious freedom can be limited where an individual’s religious

beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M*, at p. 346). ... Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

[102] In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC's decision does not suppress TWU's religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.

[103] The refusal ... means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU's proposed law school prevents concrete, not abstract, harms to LGBTQ people and to the public in general. ... It also maintains public confidence in the legal profession

[104] Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue ... , the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.

[105] In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

V. Disposition

[106] The resolution of the LSBC to declare that TWU's proposed law school not be approved is restored. As a result, the appeal from the Court of Appeal for British Columbia is allowed, with costs.

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CÔTÉ and BROWN JJ (dissenting):

I. Introduction

[260] One way of understanding this appeal and the appeal in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 ... is that they call upon this Court to decide who controls the door to "the public square." In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation—that is, where does that public life—begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?

[261] In our view, fundamental constitutional principles and the statutory jurisdiction of the Law Society of British Columbia ("LSBC"), properly interpreted, lead unavoidably to the legal conclusion that the public regulator controls the door to the public square and owes that obligation. The private denominational university, which is not subject to the *Canadian Charter of Rights and Freedoms* and is exempt from provincial human rights legislation, does not. And, in conditioning access to the public square as it has, the regulator has—on this Court's own jurisprudence—profoundly

interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. ... In our respectful view, this unfortunate state of affairs merits judicial intervention, not affirmation.

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I. The LSBC Benchers' Decision Is an Infringement of TWU's Section 2(a) Charter Rights

[315] We agree with the majority that the LSBC decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community[.] ...

[316] We emphasize, like our colleague McLachlin C.J. (paras. 122 and 124), that freedom of religion under the *Charter*, interpreted broadly and purposively, also captures the freedom of members of the TWU community to express their religious beliefs through the Covenant and to associate with one another in order to study law in an educational community which reflects their religious beliefs. ... Freedom of religion is among the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order" (*Saumur v. City of Quebec*, ... [1953] 2 S.C.R. 299, at p. 329, per Rand J.).

[317] It follows, therefore, that we reject our colleague Rowe J.'s proposed narrowing of the scope of activity protected by the right to freedom of religion (paras. 231-34). In our view, looking only to circumstances in which "the claimant sincerely believes that their religion compels them to act" does not begin to account for the scope of activities identified by this Court in *Big M Drug Mart*, at p. 336. ... Not every adherent will "declare religious beliefs openly" because they feel compelled to do so. Nor will every adherent "teach" or "disseminate" religious belief out of compulsion. Rather, they may freely choose to do so.

[318] We agree ... [that] a s. 2(a) *Charter* infringement is made out where a claimant establishes that impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with a sincere practice or belief that has a nexus with religion

[319] In this case, it is the TWU community's expression of religious belief through the practice of creating and adhering to a biblically grounded Covenant that is at issue. ... Covenanting assists in the creation and strengthening of a religious community which includes all those who study and work at TWU. It fosters their moral and spiritual growth in an academic setting. Members of the TWU community sincerely believe that, as a manifestation of their creed, studying, teaching and working in a post-secondary educational environment where all participants covenant with those around them—regardless of their personal beliefs—subjectively engenders their personal connection with the divine.

[320] ... The denial of the benefit of LSBC approval in this case negatively impacts the TWU community's ability to practise its beliefs through the Covenant at an approved law school. As we explain below, not only was this interference not trivial or insubstantial, it violated the state's duty of neutrality and profoundly interfered with the religious freedom of the TWU community.

J. Proportionality: The Infringement Was Not Proportionate

(1) The LSBC Approval Decision Does Not Balance the TWU Community's Section 2(a) Rights With a Relevant Statutory Objective

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[322] ... We accept that in the administrative law context, judicial review of individualized decisions made pursuant to statutory authority which is not itself challenged may not require the objectives of the legislation to be reviewed at the justification stage (*Multani*, at para. 155, per LeBel J.). [However, and particularly where a decision-maker does not provide any formal reasons,] ... the objectives put forward by the state actor [must] find their source in the actual grant of authority. [Otherwise] a statutory mandate might be invented holus-bolus after an infringement is claimed. This is precisely [what] materialized here: ... the decision-making process adopted by the LSBC did not, at the time of the decision, involve any delineation or articulation of any particular statutory objectives.

[323] ... [T]he LSBC's statutory objective ... is to ensure that individual applicants are fit for licensing. And, as the fitness of future graduates of TWU's proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community's s. 2(a) rights. But ... even if the LSBC's statutory mandate had permitted the consideration of broader "public interest" concerns invoked by the LSBC and the majority, the LSBC's decision would not be justified, since withholding approval substantially interferes with the TWU community's freedom of religion and approving TWU's proposed law school was not against the public interest, so understood.

(2) The LSBC Approval Decision Substantially Interferes with Freedom of Religion

[324] In our view, the LSBC approval decision represents a profound interference with religious freedom: it is a measure that undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community (*Loyola*, at para. 67). ... [I]t is substantively coercive in nature. ... [T]he LSBC approval decision makes state acceptance contingent upon the TWU community manifesting its beliefs *in a particular way*. ... As noted by the British Columbia Court of Appeal, "[t]he Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman'" This is highly intrusive conduct ... [that] contravened the state's duty of religious neutrality ... [and expressed a] religious preference which promotes the participation of non-believers, or believers of a certain kind, to the exclusion of the community of believers found at TWU (*Mouvement laïque*, at paras. 74-78).

[325] ... We agree with the Chief Justice (at paras. 128-32) that the fact the Covenant is not "absolutely required" and "preferred (rather than necessary)" does not diminish the severity of the infringement in this case.

(3) Approving TWU's Proposed Law School Is Not Against the LSBC's Public Interest Mandate

[326] ... [A]pproving TWU's proposed law school would not undermine the statutory objectives which the majority identifies as relevant Accommodating religious diversity is in "the public interest," broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

[327] The majority states that the decision not to approve TWU's proposed law school furthers its public interest objective by "maintaining equal access to and

diversity in the legal profession" (Majority Reasons, at paras. 93-95). We recognize, as this Court has previously recognized, that ... the vast majority of LGBTQ students "would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost[.]" (*TWU 2001*, at para. 25). In our view, however, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.

[328] The rights recognized in the *Charter* and the enshrinement of multiculturalism therein reflect the premise of our constitutional law and history that pluralism is intrinsically valuable. Our colleague McLachlin C.J. notes Canada's long history of religious schools (para. 130). Similarly, and writing extra-judicially, our colleague Karakatsanis J. has observed that, "[i]n a global environment where religious accommodation is sometimes seen as a detriment, Canada has found a way to welcome difference" [citations omitted].

[329] But this generous and historically Canadian posture towards religious accommodation stands in stark contrast to the majority's view of the pursuit of statutory objectives as "unavoidabl[y]" limiting the individual freedoms protected by the *Charter* (Majority Reasons, at para. 100). This view fundamentally misconceives the role of the state in a multicultural and democratic society ... [and that fact that] "if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism" and allow "individuals and communities ... to enjoy what has been called the 'right to be different'" [citations omitted].

[330] We emphasize that it is the state and state actors—not private institutions like TWU—which are constitutionally bound to accommodate difference in order to foster pluralism in public life.

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[333] Simply put, the secular state is a neutral state, which refrains from espousing "values" that undermine or go beyond what is necessary for the civic participation of all. As Iacobucci J. recognized in *Amselem*, at para. 50, "the State is in no position to be, nor should it become, the arbiter of religious dogma." ...

[334] It follows from the foregoing that accommodating diverse beliefs and values is a precondition to secularism and pluralism. ...

[335] The "public interest," broadly understood, is therefore served by accommodating TWU's religious practices, including the Covenant. ...

[336] ... [T]he holding and expression of the moral views of marriage ... have been expressly recognized by Parliament as being not inconsistent with the public interest and worthy of accommodation (*Civil Marriage Act*, S.C. 2005, c. 33, preamble and s. 3.1)[.] ...

[337] That [legislators] have taken this view should not surprise. Pluralism, and the religious accommodation necessary to secure it, is inherently valuable. In a country whose people sometimes harbour conflicting moral values that cannot be reconciled to a single conception of how one should live life, there is wisdom in the idea that the public sphere is for all to share, even where beliefs differ. ...

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[340] ... [B]oth Parliament and British Columbia's Legislature have recognized the so-called "discriminatory" (McLachlin C.J.'s Reasons, at para. 138), "degrading and disrespectful" (Majority Reasons, at para. 101) practices represented by the TWU Covenant as consistent with the public interest, legal and worthy of accommodation. Such legislatively accommodated and *Charter*-protected religious practices, once exercised, cannot be cited by a state-actor as a reason justifying the exclusion of a religious community from public recognition. Approval of TWU's proposed law school would not represent a state preference for evangelical Christianity, but rather

a recognition of the state's duty—which the LSBC failed to observe—to accommodate diverse religious beliefs without scrutinizing their content.

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[342] The appeal should be dismissed. We therefore dissent.

[Chief Justice McLachlin and Rowe J wrote separate concurring reasons. While McLachlin CJ agreed with the majority that the LSBC's decision represented a proportionate balancing of freedom of religion against the LSBC's duty to combat discrimination, she wrote separately so as to clarify, among other things, that if, as in this case, a claimant's constitutional rights have been limited, the state actor (here the LSBC) should bear the onus of demonstrating that the limitation is reasonable and demonstrably justified in a free and democratic society (at para 117). In addition, she disagreed with the majority's characterization of the negative impacts of the decision on religious freedom as "of minor significance," for "[i]f the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices" (at para 145). Nevertheless, McLachlin CJ accepted the LSBC's contention that it could not comply with its duty to combat discrimination while accrediting TWU:

[146] ... [T]here is great force in the LSBC's contention that it cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible ... In the end, after much struggle, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU's claims to freedom of religion.

[147] In a case like *Multani*, the claimant was vindicated because the school board could not show that it would be unable to ensure its mandate of public safety. In *Loyola*, we found that the limitation at issue did nothing to advance the ministerial objectives of instilling understanding and respect for other religions. This case is very different. The LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time.

For this reason, the Chief Justice concluded, the decision was reasonable.

Justice Rowe concurred with the majority that the LSBC's decision should be restored, albeit on the basis that the decision did not infringe the freedom of religion. (It was therefore unnecessary, in his view, to consider whether any such infringement was reasonable.) The essence of the mandatory covenant, according to Rowe J, was to compel observance by non-believers attending TWU. The covenant, therefore, fell outside the protection of s 2(a):

[213] ... [R]eligious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity. ...

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[251] In the end, I agree that "a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice": Canadian Secular Alliance, I.F., at para. 11. This follows if we accept that the freedom of religion guaranteed by the *Charter* is "a function of personal autonomy and choice": *Amselem*, at paras. 42. It is based on the idea "that no one can be forced to adhere to or refrain from a particular set of religious beliefs": *Loyola*, at para. 59. For this reason, it protects against interference with profoundly personal beliefs and

with the voluntary choice to abide by the practices those beliefs require. It does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith. I therefore conclude that what the claimants seek in this appeal falls outside the scope of freedom of religion as guaranteed by the *Charter*. [Emphasis in original]

NOTES AND COMMENTS

1. Richard Moon, in "The Law Society of BC v Trinity Western University: Complicated Answers to a Simple Question" (2019) 94:2 SCLR 335, argues that

the conclusions reached in the majority and dissenting judgments rest on very different assumptions, that are unarticulated and undefended, about the character of TWU (or its proposed law program) as either public or private. But the public/private character of the institution is the very thing that is at issue in the case. The consequence of this—of assuming rather than determining the character of the institution or the law program—is that the two judgments never actually engage with each other.

2. Not long after the Supreme Court of Canada's decision, TWU announced that it would no longer require students to sign the covenant. Does this mean that the law societies must now accredit the TWU program?

In *SL v Commission scolaires des Chênes*, which was examined earlier, the Supreme Court considered a claim by parents of students in the Quebec public school system that their children be exempted from a compulsory Ethics, Religion, and Culture course. In the *Loyola* case, which follows immediately below, the Court considers whether a private Catholic school should be exempted from teaching the course.

Loyola High School v Quebec (AG)

2015 SCC 12

[As part of the process of the progressive secularization of the public school system in Quebec, legislation in effect since 2008 required that every school in the province have a program on ethics and religious culture (ERC) that would provide instruction about the beliefs and ethics of different world religions from a neutral and objective perspective. (This same legislation was at issue in *SL v Commission scolaire des Chênes*, above). Under the relevant legislation, the provincial Minister of Education was empowered to grant private schools an exemption if they offered an alternative that the Minister considered to be "equivalent" to the program. Loyola, a private Catholic school, sought an exemption, which was denied on the basis that its alternative program was to be taught from a Catholic perspective. In the Minister's view, the alternative program had to be completely neutral and objective.

Loyola brought an application for judicial review of the Minister's decision, arguing that requiring Loyola to teach religion through a neutral lens was incompatible with Loyola's character as a Catholic institution. The Superior Court found that the Minister's refusal to grant Loyola an exemption was an unjustifiable infringement of freedom of religion. The Quebec Court of Appeal overturned the decision, concluding that the ERC program did not interfere with religious freedom in any

substantial way and that the Minister had exercised her discretion in a reasonable manner.

On appeal to the Supreme Court of Canada, Loyola altered its position, arguing that it did not object to teaching other religions in a neutral and objective manner, but that it should be allowed to teach Catholic doctrine and ethics, as well as the ethical perspectives of other traditions, from a Catholic perspective. The Supreme Court was unanimous in allowing the appeal, but two sets of reasons were issued—the majority reasons, written by Abella J, were supported by four members of the Court, while McLachlin CJ and Moldaver J wrote a partial concurrence that was supported by three other members of the Court. The two sets of reasons are long and complex and differ on several important points.

First, with respect to the applicable framework, the majority reasons of Abella J applied the *Doré* framework. The majority found that the Minister's decision interfered with religious freedom while doing little to further the objectives of the ERC program. On that basis, the majority held that the ministerial decision did not strike a proportionate balance. Chief Justice McLachlin and Moldaver J, in contrast, did not apply the *Doré* framework, but instead considered the ministerial decision to deny the exemption through the lens of s 1 of the Charter and the *Oakes* test. On that basis, the minority held that Minister's decision breached the appellants' religious freedom under s 2(a) of the Charter and that the breach was not justified under s 1.

The second difference concerned the standing of the institutional claimant. While Abella J, writing for the majority, acknowledged the collective aspects of religion, she avoided the issue of whether corporations could claim a right of freedom of religion under the Charter and instead focused on the religious freedom of the members of the Loyola community. Chief Justice McLachlin and Moldaver J, in contrast, held that Loyola, as a religious institution, was protected under s 2(a) of the Charter.

Third, the judgments differed on which parts of the ERC program unreasonably infringed on freedom of religion. Justice Abella, writing for the majority, concluded that the Minister's decision preventing Loyola from teaching Catholicism from a Catholic perspective did not strike an appropriate balance between Charter protections and statutory objectives. However, she found that the Minister could reasonably require Loyola to teach the ethics of other religions from a neutral perspective. Chief Justice McLachlin and Moldaver J, in contrast, understood Loyola's protected rights to be broader in scope, and found that the Minister's restriction on Loyola's ability to teach the ethics of other religions from a Catholic perspective was not justifiable. In their view, Loyola could not be expected to teach religious doctrines or ethics that were contrary to the Catholic faith in a way that portrayed them as equally credible or worthy of belief.

Finally, the reasons differed in the remedy chosen. Justice Abella, for the majority, set aside the decision to deny the exemption as unreasonable and remitted the matter back to the Minister for reconsideration. Chief Justice McLachlin and Moldaver J, on the other hand, would have crafted a remedy under s 24(1) of the Charter ordering the Minister to grant Loyola's application for an exemption.]

ABELLA J (LeBel, Cromwell, and Karakatsanis JJ concurring):

[4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter*—both the *Charter*'s guarantees and the foundational values they reflect—the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[5] In this case, the Minister's decision reflected the fundamental assumption that any program taught from a religious perspective could not be an alternative to the ERC Program and that the religious school could not teach even its own religion from its own perspective.

[6] For the reasons that follow, in my view prescribing to Loyola how it is to explain Catholicism to its students seriously interferes with freedom of religion, while representing no significant benefit to the ERC Program's objectives. In a context like Quebec's, where private denominational schools are legal, this represents a disproportionate, and therefore unreasonable interference with the values underlying freedom of religion of those individuals who seek to offer and who wish to receive a Catholic education at Loyola. On the other hand, I see no significant impairment of freedom of religion in requiring Loyola to offer a course that explains the beliefs, ethics and practices of other religions in as objective and neutral a way as possible, rather than from the Catholic perspective.

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Analysis

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[33] Loyola, a non-profit corporation ... also argued that its own religious freedom had been violated by the decision. [While] individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice ... I do not believe it is necessary ... to decide whether corporations enjoy religious freedom in their own right under s. 2(a) of the Charter or s. 3 of the ... *Quebec Charter* ... in order to dispose of this appeal.

[34] ... As the subject of the administrative decision, Loyola is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision. In my view, as a result, it is not necessary to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2(a) rights

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[43] The context before us—state regulation of religious schools—poses the question of how to balance robust protection for the values underlying religious freedom with the values of a secular state. Part of secularism, however, is respect for religious differences. A secular state does not—and cannot—interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over those of another: Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498–99. The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.

[44] Through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities. As Prof. Moon noted:

Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious beliefs or commitment as deeply rooted, or commitment as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that

may, in some cases, be described as a "way of life." If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth. [Footnote omitted; p. 507.]

[45] Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism. ...

[46] This does not mean that religious differences trump core national values. On the contrary, as this Court observed in *Bruker v. Marcovitz*, ... [2007] 3 S.C.R. 607:

Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance. [para. 2] ...

[47] These shared values—equality, human rights and democracy—are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences This is what makes pluralism work. ... Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.

[48] The state, therefore, has a legitimate interest in ensuring that students in all schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A pluralist, multicultural democracy depends on the capacity of its citizens "to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by," different religious worldviews and practices: Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2014), 29 C.J.L.S. 103, at p. 115.

[49] With this context in mind, we turn to assessing the Minister's decision in order to determine whether it proportionately balanced religious freedom with the statutory objectives of the ERC Program.

[Justice Abella then examined the statutory objectives and the regulatory context.]

• • •

[53] The power to grant exemptions from the mandatory curriculum in cases where a school offers an "equivalent" program is part of the Minister's broader regulatory role of ensuring that basic educational standards are met by schools and students alike. As a result, in order to be consistent with the scheme as a whole, the Minister's interpretation of which programs are "equivalent" should take into account the objectives each course seeks to meet and the competencies it seeks to inculcate in students.

[54] At the same time, however, there would be little point in offering an exemption if, in order to receive it, the proposed alternative program had to be identical to the mandatory program in every way. ... In order to respect values of religious freedom in this context, as well as to cohere with the larger regulatory scheme, a reasonable interpretation of the process for granting exemptions from the mandatory curriculum would leave at least some room for the religious character of those schools. [Otherwise, the regulation would] prevent what the *Act respecting private education* itself allows—a private school being denominational.

[55] Although it prescribes some course content, the documentation describing the ERC Program does not set out detailed lesson plans that teachers are required to cover. The program is instead structured to be flexible and thematic, providing only a general framework to guide students in developing competencies in ethics, dialogue and religious culture, in service of the two key objectives of the program: the recognition of others and the pursuit of the common good.

[56] Given the highly flexible nature of the ERC Program and its heavy emphasis on these two objectives, as well as the context of the regulatory scheme as a whole, it is unreasonable to interpret equivalence as requiring a strict adherence to specific course content, rather than in terms of the ERC's program objectives generally. ... The Minister's task was therefore to arrive at a decision that proportionately balanced the realization of the ERC Program's objectives of promoting respect for others and openness to diversity, with respect for *Charter*-protected religious freedom in this context.

[57] ... [I]n the Minister's view, a program that departs in any way from the ERC Program's posture of strict neutrality, even partially, cannot achieve the state's objectives of promoting respect for others and openness to diversity. This was also the position that Quebec took before this Court.

[58] The Minister's decision necessarily engages religious freedom. The starting point, and the inspiration for most of this Court's subsequent jurisprudence about religious freedom, is *R. v. Big M Drug Mart Ltd.*, ... [1985] 1 S.C.R. 295

[59] Justice Dickson's formulation of religious freedom is founded on the idea that no one can be forced to adhere to or refrain from a particular set of religious beliefs. This includes both the individual and collective aspects of religious belief In the words of Justice LeBel: "Religion is about religious beliefs, but also about religious relationships" (*Hutterian Brethren*, at para. 182).

[60] Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions To fail to recognize this dimension of religious belief would be to "effectively denigrate those religions in which more emphasis is placed on communal worship or other communal religious activities": Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (2011), at p. 78. ...

[61] These collective aspects of religious freedom—in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school—are a crucial part of Loyola's claim. In [*SL v Commission scolaire des Chênes*] this Court held that the imposition of the ERC Program in public schools did not impose limits on the religious freedom of individual students and parents. This case, however, can be distinguished from *S. L.* because Loyola is a private religious institution created to support the collective practice of Catholicism and the transmission of the Catholic faith. The question is not only how Loyola is required to teach about other religions, but also how it is asked to teach about the very faith that animates its character and the comparative relationship between Catholicism and other faiths. The Minister's decision therefore demonstrably interferes with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2(a) of the *Charter*.

[62] I agree with Loyola that the Minister's decision had a serious impact on religious freedom in this context

[63] ... Although the state's purpose here is secular, requiring Loyola's teachers to take a neutral posture even about Catholicism means that the state is telling them how to teach the very religion that animates Loyola's identity. It amounts to requiring

a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism.

[64] It also interferes with the rights of parents to transmit the Catholic faith to their children, not because it requires neutral discussion of other faiths and ethical systems, but because it prevents a Catholic discussion of Catholicism. . . .

[67] Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.

[68] There is, on the other hand, insufficient demonstrable benefit to the furtherance of the state's objectives in requiring Loyola's teachers to teach Catholicism from a neutral perspective. . . [T]he central [problem] with the Minister's decision [is that] it treats teaching any part of the proposed alternative program from a Catholic perspective as necessarily inimical to the state's core objectives in imposing the ERC Program and it gives no weight to the values of religious freedom engaged by the decision. . . . The result is a disproportionate outcome that does not protect *Charter* values as fully as possible in light of those statutory objectives.

[69] In the Quebec context, where private denominational schools are authorized, forcing a religious school to teach its own religion from a non-religious perspective does not assist in realizing the ERC Program's basic curricular goals of encouraging among students respect for others and openness to others. The Minister's decision suggests that engagement with an individual's own religion on his or her own terms can simply be presumed to impair respect for others. This assumption runs counter to the objectives of the regulatory scheme as a whole and it has a disproportionate impact on the values underlying religious freedom in this context. This necessarily renders the Minister's decision unreasonable.

[70] The disproportionate nature of this decision is reinforced by the fact that . . . preventing Loyola from teaching Catholicism seriously impairs its Catholic identity.

[71] . . . Unlike my colleagues in their concurring opinion, however, I agree with the Court of Appeal that requiring Loyola to teach about the ethics of other religions in a neutral, historical and phenomenological way would not interfere disproportionately with the relevant *Charter* protections implicated by the decision. . . .

[73] I quickly acknowledge that in a religious school, teaching other ethical frameworks in a neutral way may be a delicate exercise. A school like Loyola must be allowed some flexibility as it navigates these difficult moments. Catholicism's answer to ethical questions, for instance, will sometimes conflict with the approach taken by the ethics of other religions. It would be surprising if, in classes discussing other belief systems, students did not ask for comparative explanations, questions Loyola's teachers are clearly free to answer. A comparative approach that explains the Catholic ethical perspective and responds to questions about it is of course legitimate.

[75] The alternative program that Loyola submitted to the Minister would teach other ethical frameworks primarily through the lens of Catholic ethics and morality. Even if Loyola's teachers do so respectfully, this fundamentally transforms the ethics component of the ERC Program from a study of different ethical approaches into a class on Catholicism. The resulting risk is that other religions would necessarily be seen not as differently legitimate belief systems, but as worthy of respect only to the extent that they aligned with the tenets of Catholicism. This contradicts the ERC Program's goal of ensuring respect for those whose religious beliefs are different, a goal no less worthy in a religious school than in a public one.

[76] The key is in how the discussion is framed. An emphasis on objective instruction insofar as possible, and on teaching other ethical positions in their own right, does not mean stifling debate or denying Loyola's Catholic identity. On the contrary, the framework of the discussions would be wider because they are not based solely on a particular religion's perspective. That religion's own ethical framework would necessarily be part of the discussion, but the role will be one of significant participant rather than hegemonic tutor.

[77] There is no doubt that this will not always be easy. The question is, given the undisputed significance of the ERC Program's objectives, can requiring Loyola's teachers to teach and discuss other religions and their ethical positions as objectively as possible really be seen as a serious interference with freedom of religion merely because it may be difficult to execute neatly?

[78] I have difficulty seeing how this can undermine the values of religious freedom. ... [T]eaching about the ethics of other religions is largely a factual exercise. It need not be a clash of values. Nor is asking Loyola's teachers to teach other religions and ethical positions as objectively as possible a requirement that they shed their own beliefs. It is, instead, a pedagogical tool utilized by good teachers for centuries—let the information, not the personal views of the teacher, guide the discussion. The fact that those personal principles are not central when discussing the ethical principles of other religions does not mean that ... Loyola's teachers are foreclosed from explaining the Catholic perspective and its differences from other faiths.

[79] In any event, it is the Minister's decision as a whole that must reflect a proportionate and therefore reasonable balancing of the *Charter* protections and statutory objectives in issue. It does not, in my respectful view, because it rests on the assumption that a confessional program cannot achieve the objectives of the ERC Program. ...

[80] This is not to suggest, however, that in a religious school, the Minister is required to allow the ERC Program ... to be replaced by a program that focuses on that religion's doctrine and morality. ... But preventing a school like Loyola from teaching and discussing Catholicism in any part of the program from its own perspective does little to further those objectives while at the same time seriously interfering with the values underlying religious freedom.

[81] I would therefore allow the appeal, set aside the Minister's decision, and remit the matter to the Minister for reconsideration in light of these reasons. An exemption cannot be withheld on the basis that Loyola must teach Catholicism and Catholic ethics from a neutral perspective. ...

McLACHLIN CJ and MOLDAVER JJ (Rothstein J concurring):

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A. Does Loyola as a Religious Organization Enjoy Freedom of Religion Under Section 2(a) of the Canadian Charter and Section 3 of the Quebec Charter?

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[91] In our view, Loyola may rely on the guarantee of freedom of religion found in s. 2(a) of the *Canadian Charter*. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola. Canadian and international jurisprudence supports this conclusion.

[92] This Court has affirmed that freedom of religion under s. 2(a) ... has both an individual and a collective dimension. ...

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[94] The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.

• • •

[99] The Attorney General of Quebec points out that in *R. v. Edwards Books and Art Ltd.*, ... [1986] 2 S.C.R. 713, Dickson C.J. commented that "a business corporation cannot possess religious beliefs" (p. 784). However, a religious organization may in a very real sense have religious beliefs and rights. Thus, Dickson C.J. referred to the s. 2(a) freedom of "individuals and groups" (p. 759 (emphasis added)), describing that freedom using language from *R. v. Big M Drug Mart Ltd.* ... at p. 336, as "the right to manifest religious belief by worship and practice or by teaching and dissemination" (p. 757).

[100] On the submissions before us, and given the collective aspect of religious freedom long established in our jurisprudence, we conclude that an organization meets the requirements for s. 2(a) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes.

[101] The precise scope of these requirements may require clarification in future cases which test their boundaries, but it is evident that Loyola falls within their ambit. ...

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B. The Interpretation of the Legislative and Regulatory Scheme at Issue

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[112] Section 22 [the exemption provision] functions to ensure the legislative and regulatory scheme's compliance with the freedom of religion guaranteed by s. 2(a) of the *Charter*. It guards against the possibility that, in certain situations, the mandatory imposition of a purely secular curriculum may violate the *Charter* rights of a private religious school. This safeguard is consistent with the obligations of the state in a multicultural society. ... The state may not discourage religious faith in the public education system; this obligation has even more resonance in the context of a private religious school.

C. Analytical Approach Under the Charter

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[114] The first issue is whether Loyola's freedom of religion was infringed by the Minister's decision. The second issue is whether the Minister's decision—that only a purely secular course of study may serve as an equivalent to the ERC Program—limits Loyola's freedom of religion more than reasonably necessary to achieve the goals of the program. ...

• • •

E. Analysis of Loyola's Religious Freedom Claim

[130] ... As we have explained, Loyola is entitled to the freedom of religion protected by s. 2(a) of the *Charter*. This is not to say that the religious freedoms of other actors are not implicated by the Minister's denial. To the extent that the ERC Program would require Loyola's teachers to express a neutral viewpoint on religious matters, their religious freedoms may be at issue. The religious freedom of the parents of Loyola's students may be implicated, as they have the right to seek moral and religious education for their children. Perhaps even the religious freedom of Loyola's students themselves is raised by the denial of an exemption for Loyola to implement its alternative program.

[131] It is not necessary to conclusively decide these matters. Deciding the case on the basis of the religious freedom of Loyola itself is sufficient to dispose of this appeal. ...

• • •

[132] The freedom of religion protected by s. 2(a) of the *Charter* is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion. ... Thus, Loyola's expressed desire to teach its curriculum in accordance with Catholic beliefs falls within the scope of s. 2(a)'s protection.

• • •

[135] ... [W]e recognize that where the claimant is an organization rather than an individual, the "sincerity of belief" inquiry required by our jurisprudence [see *Amselem*] poses some difficulties. The existing test need not be abandoned, but a few clarifications are warranted.

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[138] There is no reason why the expressed belief of an organization cannot be examined to ensure it is made in good faith and is neither a fiction nor an artifice. ... Rather than demonstrating a sincere belief—which we readily concede a mere legal person is incapable of doing—an organizational claimant must show that the claimed belief or practice is consistent with both the purpose and operation of the organization.

[139] In evaluating this consistency between the claimed belief or practice and the organization's purpose and operation, the same non-exhaustive criteria from *Amselem* can be relied on. ... Objective indicators will perhaps play a more prominent role. It is proper to assess the claimed belief or practice in light of objective facts such as the organization's other practices, policies and governing documents. The beliefs and practices of an organization may also reasonably be expected to be more static and less fluid than those of an individual. Therefore, inquiry into past practices and consistency of position would be more relevant than in the context of a claimant who is a natural person.

[140] The two-part test from *Amselem* and *Multani*, modified to apply to an organization, yields the following questions: (1) Is Loyola's claimed belief that it must teach ethics and its own religion from the Catholic perspective consistent with its organizational purpose and operation? (2) Does the Minister's decision to deny Loyola an exemption from the ERC Program interfere with Loyola's ability to act in accordance with this belief, in a manner that is more than trivial or insubstantial? ...

[On the basis of the application judge's findings, McLachlin CJ and Moldaver J concluded that (1) Loyola's claimed belief that it was required to teach ethics and its own religion from the Catholic perspective was consistent with its organizational purpose and operation; and (2) the Minister's decision to deny Loyola an exemption from the ERC Program interfered with Loyola's ability to act in accordance with this belief in a manner that was more than trivial or insubstantial.]

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(3) Is the Minister's Decision Justified by Section 1 as a Reasonable Limit on Loyola's Religious Freedom?

[146] As discussed earlier, the core issue on this appeal is whether the Minister's insistence on a purely secular program of study to qualify for an exemption limited Loyola's right to religious freedom no more than reasonably necessary to achieve the ERC Program's goals. The government bears the burden of showing this. If it fails to do so, the Minister's decision is unconstitutional and must be set aside.

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[148] In our view, there is nothing inherent in the ERC Program's objectives (recognition of others and pursuit of the common good) or competencies (world religions, ethics, and dialogue) that requires a cultural and non-denominational approach. As we noted earlier ... , the intention of the government was to allow religious schools to teach the ERC Program without sacrificing their own religious perspectives. This goal is entirely realistic. A program of purely denominational instruction designed primarily to indoctrinate students to the correctness of certain religious precepts would not achieve the objectives of the ERC Program; however, a balanced curriculum, taught from a religious perspective but with all viewpoints presented and respected could, in our view, serve as an equivalent to the ERC Program. To the extent Loyola's proposal meets these criteria, it should not have been rejected out of hand.

[149] And yet it was, because the Minister premised her denial on the flawed determination that only a cultural and non-denominational approach could serve as equivalent. ...

• • •

[151] ... The Minister's definition of equivalency casts [the] intended flexibility in the narrowest of terms, and limits deviation to a degree beyond that which is necessary to ensure the objectives of the ERC Program are met. This led to a substantial infringement on the religious freedom of Loyola. In short, the Minister's decision was not minimally impairing. Therefore, it cannot be justified under s. 1 of the Charter as a reasonable limit on Loyola's s. 2(a) right to religious freedom.

F. The Appropriate Scope of an Equivalent Program

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[154] In assuring compliance with the *Charter*, an exemption must take into account the practical classroom realities posed by the ERC Program's topics. While Loyola's complaint rests on its Catholic identity, this identity has implications throughout the ERC Program. In our view, it would be insufficient to merely grant an exemption for Loyola to teach Catholicism from a Catholic perspective, while requiring an unmodified curriculum and a neutral posture in all other aspects of the program. Binding Loyola to a secular perspective at all times, other than during their discussion of the Catholic religion, offers scant protection to Loyola's freedom of religion, and would be unworkable in practice.

[155] Loyola proposes to teach the ethics competency in a way that recognizes its Catholic perspective. It does not want its teachers to be forced to remain neutral—or more realistically, mum—in the face of ethical positions that do not accord with the Catholic faith. Rather, Loyola proposes to have its teachers facilitate respectful and open-minded debate, where all positions are presented, but where students evaluate ethics and morals not in a vacuum but with knowledge of the Catholic perspective.

[156] Requiring Loyola's teachers to maintain a neutral posture on ethical questions poses serious practical difficulties and represents a significant infringement on how Loyola transmits an understanding of the Catholic faith. It is inevitable that ethical standards that do not comport with Catholic beliefs will be raised for discussion. Faced with a position that is fundamentally at odds with the Catholic faith, Loyola's teachers would be coerced into adopting a false and facile posture of neutrality. The net effect would be to render them mute during large portions of the ethics discussion—a discussion that is, as the ERC Program presupposes, crucial to developing a civilized and tolerant society.

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[158] ... Loyola has ... committed, however, to ensure that on every major ethical topic, students "understand not only the position of the Roman Catholic Church, but also those of all major thinkers and viewpoints[.]" ...

• • •

[160] There are subtle but important distinctions to make between the respectful treatment of differing viewpoints that Loyola proposes and the strict neutrality required under the generic ERC Program, unalleviated by a s. 22 exemption. The ERC Program compels teachers to adopt a professional posture of strict neutrality, such that all points of view and all religious perspectives are presented as equally valid. The Minister's denial appears to be rooted in the assumption that this posture is vital to attaining the objectives of the ERC Program. If a religious perspective is offered, then all other viewpoints that do not conform to it will necessarily be derogated and disrespected. This position presents a false dichotomy. Loyola has strongly and repeatedly expressed that its proposed alternative program would treat other religious viewpoints with respect—going to the extent of inviting religious leaders from other faiths into the classroom to ensure students have a rich and full understanding of differing perspectives. However, requiring a religious school to present the viewpoints of other religions as equally legitimate and equally credible is incompatible with religious freedom. Indeed, presenting fundamentally incompatible religious doctrines as equally legitimate and equally credible could imply that they are both equally false. Surely this cannot be a perspective that a religious school can be compelled to adopt.

[161] Additionally, this dichotomy does not accord with principles of interfaith cooperation and collaboration, which brings together people with deeply held commitments to their own faiths (and who therefore, by implication, have rejected other religious doctrines as "equally legitimate" or "equally credible") but who are nonetheless able to foster deep ties based on sincere mutual respect. ...

[162] With the foregoing in mind, we offer the following guidelines to delineate the boundaries of a s. 22 exemption in this case, and to inform the Minister's evaluation of future exemption applications:

- Loyola's teachers must be permitted to describe and explain Catholic doctrine and ethical beliefs from the Catholic perspective, and cannot be required to adopt a neutral position.
- Loyola's teachers must describe and explain the ethical beliefs and doctrines of other religions in an objective and respectful way.
- Loyola's teachers must maintain a respectful tone of debate—both by conveying their own contributions in a respectful way, and by ensuring the classroom dialogue proceeds in accordance with respect, tolerance and understanding for those with different beliefs and practices.
- Where the context of the classroom discussion requires it, Loyola's teachers may identify what Catholic beliefs are, why Catholics follow those beliefs, and the ways in which another specific ethical or doctrinal proposition does not accord with those beliefs, be it in the context of a particular different religion or an ethical position considered in the abstract.
- Loyola's teachers cannot be expected to teach ethics or religious doctrines that are contrary to the Catholic faith in a way that portrays them as equally credible or worthy of belief. Respect, tolerance, and understanding are all properly required, and the highlighting of differences must not give rise to denigration or derision. However, ensuring that all viewpoints are regarded as equally credible or worthy of belief would require a degree of disconnect from, and suppression of, Loyola's own religious perspective that is incompatible with freedom of religion.

G. Remedy

[163] We have concluded that the Minister's decision infringes Loyola's right to religious freedom under s. 2(a) of the *Charter*, in a manner that cannot be justified under s. 1. The Court is empowered by s. 24(1) of the *Charter* to craft an appropriate remedy in light of all of the circumstances.

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[165] We find it neither necessary nor just to send this matter back to the Minister for reconsideration, further delaying the relief Loyola has sought for nearly seven years. Based on the application judge's findings of fact, and considering the record and the submissions of the parties, we conclude that the only constitutional response to Loyola's application for an exemption would be to grant it. Accordingly, we would order the Minister to grant an exemption to Loyola, as contemplated under s. 22 of the regulation at issue, to offer an equivalent course to the ERC Program in line with Loyola's proposal and the guidelines we have outlined. [Emphasis in original.]

Appeal allowed.

NOTES

1. Both judgments in the *Loyola* decision seem to say that the Minister's refusal to grant an exemption from the ERC course meant that the school would be prevented from teaching Catholicism from a Catholic perspective. Yet the religious education (RE) course would continue to be part of Loyola's curriculum—even if it were taught separately from the ERC program.

2. Benjamin L Berger makes the following observation about the *Loyola* decision:

The differences between the majority and minority may ... fade on close inspection. Both sets of reasons insist that other religions must be discussed with respect and toleration, allow teachers to contrast the Catholic viewpoint with other religious systems, and allow for Catholicism to be taught from a Catholic viewpoint. Ultimately, then, the *Loyola* decision might be most telling in its reflection of the difficulties of managing the process of teaching and education from the elevation of constitutional adjudication. The unpredictability and dynamism of the classroom is, in some ways, antithetical to the aesthetic coherence sought through jurisprudence. Perhaps this—combined with the deep interest that both state and community hold in the cultivation of the child—is why education has persisted as such a fertile ground for the emergence of issues of law and religion.

See Benjamin L Berger, "The Supreme Court of Canada on Religious Freedom and Education: *Loyola High School v Québec (Attorney General)*" (23 March 2015), online (blog): I-CONECT <<http://www.iconnectblog.com/2015/03/the-supreme-court-of-canada-on-religious-freedom-and-education-loyola-high-school-v-quebec-attorney-general>>.

3. The *Doré* decision relied upon by Abella J is excerpted in Chapter 17. Further discussion of both *Doré* and *Loyola* can also be found in Chapter 18, Application, Section IV, dealing with the application of the Charter to administrative decision-making.

The *Ktunaxa* case, which follows, involved the application of s 2(a) to Indigenous spiritual practices.

The BC government approved a ski resort development on land with which the Ktunaxa people had a spiritual connection, which, they argued, breached their religious freedom under s 2(a) of the Charter. The community also argued that the province had failed to fulfill

its obligations to consult properly with the community under s 35 of the *Constitution Act, 1982*, before approving the development. The Supreme Court rejected both claims.

The Ktunaxa believe that the Great Bear Spirit dwells in a section of Jumbo Valley in BC, known to the community as Qat'muk, but that the construction and operation of a ski resort in the area would cause the spirit to leave. They argued that if the Bear Spirit was forced out of the area, many of their rituals would be emptied of meaning and their spiritual and material well-being would be harmed. The Court rejected the Ktunaxa's claim; however the two judgments, one by McLachlin CJ and Rowe J and the other by Moldaver J, followed different paths to this conclusion.

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)

2017 SCC 54

[The appellants represent the Ktunaxa people. The Ktunaxa's traditional territories include an area called Qat'muk, located in a valley in southeastern British Columbia. This area is spiritually significant to the Ktunaxa. It is home to an important population of grizzly bears, and to Grizzly Bear Spirit, or Klawta Tuktulakpis, "a principal spirit within Ktunaxa religious beliefs and cosmology."

The respondent is Glacier Resorts Ltd ("Glacier Resorts"). In 1991, Glacier Resorts filed a formal proposal to build a year-round ski resort in Qat'muk. For more than two decades, Glacier Resorts negotiated with the BC government and stakeholders, including the Ktunaxa, on the terms and conditions of the development. Early in the process, the Ktunaxa informed Glacier Resorts of the spiritual significance of Qat'muk, as well as the presence of Klawta Tuktulakpis. In response, Glacier Resorts made significant changes to the planned development. However, these changes did not completely satisfy the Ktunaxa. Consultations continued. In 2009, the Ktunaxa took the uncompromising position that development would drive Klawta Tuktulakpis from Qat'muk and irrevocably impair their religious beliefs and practices (the "Late-2009 Claim"). In November 2010, the Ktunaxa issued the "Qat'muk Declaration," which, among other things, mapped an area in which the Ktunaxa would not permit development. The mapped area included land vital to the resort's construction and operation. In 2012, the Minister signed a Master Development Agreement with Glacier Resorts, allowing development to proceed despite the Ktunaxa's claim.]

McLACHLIN CJ and ROWE J (Abella, Karakatsanis, Wagner, Gascon, and Brown JJ concurring):

- [57] A. Did the Minister's decision violate the Ktunaxa's freedom of conscience and religion?
- B. Was the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* reasonable?

V. Analysis

A. Did the Minister's Decision Violate the Ktunaxa's Freedom of Conscience and Religion?

(1) The Claim

[58] The Ktunaxa contend that the Minister's decision to allow the Glacier Resorts project to proceed violates their right to freedom of conscience and religion protected by s. 2(a) of the *Charter*. This claim is asserted independently from the Ktunaxa's s. 35

claim. Even if the Minister undertook adequate consultation under s. 35 of the *Constitution Act, 1982*, his decision could be impeached on the ground that it violated the Ktunaxa's *Charter* guarantee of freedom of religion. We note that with respect to the s. 2(a) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants.

[59] The Ktunaxa assert that the project, and in particular permanent overnight accommodation, will drive Grizzly Bear Spirit from Qat'muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure, they say, would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk.

[60] The Ktunaxa fault the Minister for not having considered their right to freedom of religion in the course of his decision. The Ktunaxa raised the potential breach of s. 2(a) before the Minister. Nevertheless, the Minister's Rationale for approving the Jumbo Glacier Resort did not analyze the s. 2(a) claim. The Minister should have discussed the s. 2(a) claim. However, his failure to conduct an analysis of the Ktunaxa's right to freedom of religion is immaterial because the claim falls outside the scope of s. 2(a). This was the finding of both the chambers judge and the Court of Appeal and we agree, though for somewhat different reasons.

(2) The Scope of Freedom of Religion

[61] The first step ... is to determine whether the claim falls within the scope of s. 2(a). If not, there is no need to consider whether the decision represents a proportionate balance between freedom of religion and other considerations: *Amselem*, at para. 181.

[62] ... [I]n *Big M Drug Mart*, [t]he majority of the Court, per Justice Dickson (as he then was), defined s. 2(a) as protecting "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (p. 336).

[63] So defined, s. 2(a) has two aspects—the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been adopted in subsequent cases [citations omitted].

[64] These two aspects of the right to freedom of religion—the freedom to hold a religious belief and the freedom to manifest it—are reflected in international human rights law. Article 18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) ("UDHR"), first defined the right in international law in these terms: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

[65] Similarly, art. 18(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), defined the right to freedom of religion as consisting of "freedom to have or to adopt a religion or belief of [one's] choice" and "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." ... Tarnopolsky J.A., in *R. v. Videoflicks Ltd.* (1984), 1984 CanLII 44 (ON CA), 48 O.R. (2d) 395 (C.A.) ... observed that art. 18(1) defined freedom of religion "as including not only the right to have or adopt a religion or belief of one's choice, but also to be able to 'manifest' the religion or belief" (p. 421 (emphasis deleted)), and added that s. 2(a) of the *Charter*—then a new and judicially unconsidered feature of Canada's Constitution—should be "interpreted in conformity with our international obligations" (p. 420). ... Dickson C.J.

approved Tarnopolsky J.A.'s approach to s. 2(a), noting that his definition of freedom of religion "to include the freedom to manifest and practice one's religious beliefs ... anticipated conclusions which were reached by this Court in the *Big M Drug Mart Ltd.* case": [citations omitted]. ... Dickson C.J. proposed, as Tarnopolsky J.A. had done, that the *Charter* be presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations. The Court has since adopted this interpretive presumption: [citations omitted].

[Chief Justice McLachlin and Rowe J then noted similar language in international human rights instruments to which Canada is not a party, finding them to be "important illustrations of how freedom of religion is conceived around the world" (at para 66).]

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[67] The scope of freedom of religion in these instruments is expressed in terms of the right's two aspects: the freedom to believe and the freedom to manifest belief. ... The question, then, is whether the Ktunaxa's claim falls within that scope.

(3) Application to This Case

[68] To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief: see *Multani*, at para. 34.

[69] In this case, it is undisputed that the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place. The chambers judge indicated that Mr. Luke came to this belief in 2004 but whether this belief is ancient or recent plays no part in our s. 2(a) analysis. The *Charter* protects all sincere religious beliefs and practices, old or new.

[70] The second part of the test, however, is not met in this case. This stage of the analysis requires an objective analysis of the interference caused by the impugned state action: *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 24. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. But the Minister's decision does neither of those things. This case is not concerned with either the freedom to hold a religious belief or to manifest that belief. The claim is rather that s. 2(a) of the *Charter* protects the presence of Grizzly Bear Spirit in Qat'muk. This is a novel claim and invites this Court to extend s. 2(a) beyond the scope recognized in our law.

[71] We would decline this invitation. The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship. We have been directed to no authority that supports the proposition that s. 2(a) protects the latter, rather than individuals' liberty to hold a belief and to manifest that belief. Section 2(a) protects the freedom to pursue practices, like the wearing of a kirpan in *Multani* or refusing to be photographed in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567. And s. 2(a) protects the right to freely hold the religious beliefs that motivate such practices. In this case, however, the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and

the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).

[72] The extension of s. 2(a) proposed by the Ktunaxa would put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs. In *Amselem*, this Court chose to protect any sincerely held belief rather than examining the specific merits of religious beliefs:

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation," precept, "commandment," custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

(para. 50, per Iacobucci J.)

The Court in *Amselem* concluded that such an inquiry into profoundly personal beliefs would be inconsistent with the principles underlying freedom of religion (para. 49).

[73] The Ktunaxa argue that the *Big M Drug Mart* definition of the s. 2(a) guarantee has been subsequently enriched by an understanding that freedom of religion has a communal aspect, and that the state cannot act in a way that constrains or destroys the communal dimension of a religion. Grizzly Bear Spirit's continued occupation of Qat'muk is essential to the communal aspect of Ktunaxa religious beliefs and practices, they assert. State action that drives Grizzly Bear Spirit from Qat'muk will, the Ktunaxa say, "constrain" or "interfere" with—indeed destroy—the communal aspect of s. 2(a) protection.

[74] The difficulty with this argument is that the communal aspect of the claim is also confined to the scope of freedom of religion under s. 2(a). It is true that freedom of religion under s. 2(a) has a communal aspect: *Loyola; Hutterian Brethren*, at para. 89; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650. But the communal aspects of freedom of religion do not, and should not, extend s. 2(a)'s protection beyond the freedom to have beliefs and the freedom to manifest them.

[75] We conclude that s. 2(a) protects the freedom to have and manifest religious beliefs, and that the Ktunaxa's claim does not fall within these parameters. It is therefore unnecessary to consider whether the Minister's decision represents a reasonable balance between freedom of religion and other considerations.

B. Was the Minister's Decision That the Crown Had Met Its Duty to Consult and Accommodate Under Section 35 of the Constitution Act, 1982 Reasonable?

[The majority Justices held that, contrary to the appellant's assertions, the Minister's conclusion that the Crown had met its duty to consolidate was reasonable. The Minister engaged in deep consultation on the spiritual claim prior to the Late-2009 Claim, and the changed the development plan in order accommodate the Ktunaxa spiritual claim. The Minister continued to attempt to consult for two years after the Late-2009 Claim, after which point it was clear that, given the position of the Ktunaxa, more consultation would be fruitless.]

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MOLDAVER J (Côté J concurring):

[117] I agree with the Chief Justice and Rowe J. that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 was met. Respectfully, however, I disagree with my colleagues' s. 2(a) analysis. In my view, the Ktunaxa's right to religious freedom was infringed by the Minister's decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. ...

(4) The Minister's Decision Infringes the Ktunaxa's Freedom of Religion Under Section 2(a) of the Charter

[124] As indicated, the s. 2(a) inquiry focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. This Court has recognized that religious beliefs are "deeply held personal convictions ... integrally linked to one's self-definition and spiritual fulfilment," while religious practices are those that "allow individuals to foster a connection with the divine" (*Amselem*, at para. 39). In my view, where a person's religious belief no longer provides spiritual fulfillment, or where the person's religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her *religious* beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her.

[125] The same holds true of a person's ability to pass on beliefs and practices to future generations. This Court has recognized that the ability of a religious community's members to pass on their beliefs to their children is an essential aspect of religious freedom protected under s. 2(a) (*Loyola*, at paras. 64 and 67). Where state action has rendered a certain belief or practice devoid of spiritual significance, this interferes with one's ability to pass on that tradition to future generations, as there would be no reason to continue a tradition that lacks spiritual significance.

[126] Therefore, where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual's ability to act in accordance with his or her religious beliefs or practices—whether by professing a belief, engaging in a ritual, or passing traditions on to future generations.

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[129] The Chief Justice and Rowe J. take a different approach. ... If I understand my colleagues' approach correctly, s. 2(a) of the *Charter* protects *only* the freedom to hold beliefs and manifest them through worship and practice (para. 71). In their view, even where the effect of state action is to render beliefs and practices devoid of all spiritual significance, claimants still have the freedom to hold beliefs and manifest those beliefs through practices, and there is therefore no interference with their ability to act in accordance with their beliefs. Thus, under my colleagues' approach, as long as a Sikh student can carry a kirpan into a school (*Multani*), Orthodox Jews can erect a personal succah (*Amselem*), or the Ktunaxa have the ability to conduct ceremonies and rituals, there is no infringement of s. 2(a), even where the effect of state action is to reduce these acts to empty gestures.

[130] I cannot accept such a restrictive reading of s. 2(a). As I have indicated, where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice. The scope of s. 2(a) is therefore not limited to the freedom to hold a belief and manifest that belief through religious practices. Rather, as this Court noted in *Amselem*, "[i]t is the religious or spiritual essence of an action" that attracts protection under s.2(a) (para. 47). In my view, the approach adopted by my

colleagues does not engage with this crucial point. It does not take into account that if a belief or practice becomes devoid of spiritual significance, it is highly unlikely that a person would continue to hold those beliefs or engage in those practices. Indeed, that person would have no reason to do so. With respect, my colleagues' approach amounts to protecting empty gestures and hollow rituals, rather than guarding against state conduct that interferes with "profoundly personal beliefs," the true purpose of s. 2(a)'s protection (*Edwards Books*, at p. 759).

[131] This approach also risks excluding Indigenous religious freedom claims involving land from the scope of s. 2(a)'s protection. As indicated, there is an inextricable link between spirituality and land in Indigenous religious traditions. In this context, state action that impacts land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance. My colleagues have not taken this unique and central feature of Indigenous religion into account. Their approach therefore risks foreclosing the protections of s. 2(a) of the *Charter* to substantial elements of Indigenous religious traditions.

4) The Minister's Decision Infringes the Ktunaxa's Freedom of Religion Under Section 2(a) of the Charter

[132] I turn now to the facts of this case. The Ktunaxa's religion encompasses multiple spirits and several places of spiritual significance (see, e.g., A.R., vol. II, at pp. 119 and 197). The Ktunaxa sincerely believe that Qat'muk is a highly sacred site, home to a very important spirit—Grizzly Bear Spirit. The Ktunaxa assert that Grizzly Bear Spirit provides them with spiritual guidance and assistance. They claim that the proposed development would drive Grizzly Bear Spirit out, sever their spiritual connection with Qat'muk, and render their beliefs in Grizzly Bear Spirit devoid of spiritual significance.

[133] The Chief Justice and Rowe J. frame the Ktunaxa's religious freedom claim as one that seeks to protect the "spiritual focal point of worship"—that is, Grizzly Bear Spirit (para. 71). I disagree. The Ktunaxa are seeking protection of their ability to act in accordance with their religious beliefs and practices, which falls squarely within the scope of s. 2(a). If the Ktunaxa's religious beliefs in Grizzly Bear Spirit become entirely devoid of religious significance, their prayers, ceremonies and rituals in recognition of Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. There would be no reason for them to continue engaging in these acts, as they would be devoid of any spiritual significance. Members of the Ktunaxa assert that without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, they would be unable to pass on their beliefs and practices to future generations in any meaningful way, as illustrated in the following excerpt from an affidavit quoted in the appellants' factum:

If the proposed resort were to go ahead in the heart of Qat'muk, I do not see how I can meaningfully speak to my grandchildren about Grizzly Bear Spirit. How can I teach them his songs, what to ask from him, if he no longer has a place recognizable to us and respected as his within our world? [para. 28]

[134] Viewed this way, I am satisfied that the Minister's decision approving the proposed development interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial. The decision therefore amounts to an infringement of the Ktunaxa's freedom of religion under s. 2(a).

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[Justice Moldaver determined, however, that the Minister's decision was reasonable in the circumstances. In particular, it "limited the Ktunaxa's [s 2(a)] right 'as little as reasonably possible' given the statutory objectives ... and amounted to a proportionate balancing" (at para 120).] [Emphasis in original.]

NOTES AND QUESTIONS

1. The most frequently made criticism of the Supreme Court of Canada's decision in *Ktunxana v BC* echoes a familiar and more general criticism of the Anglo-American understanding of religious freedom. The Court's narrow or "protestant" conception of religious freedom, which is focused on the individual—on their belief or commitment and their personal relationship with a transcendent God—is said to have the effect of denying meaningful protection to Indigenous and other spiritual systems that emphasize ritual and community life and that recognize a spiritual presence in the natural world. Is this criticism right or fair?
2. The majority judgment excluded from s 2(b) protection "the object of worship." Is this exclusion? What is the point of this exclusion?
3. The majority said that the s 2(a) claim must be decided without any account being taken of the particular circumstances of the claimant—the Ktunaxa. Can and should s 2(a) accommodation claims be considered without account being taken of such factors?
4. Some have argued that the Court misunderstood the religious practice and that the Grizzly Bear Spirit was not an object of worship for the Ktunaxa. Was the Court relying on a Christian understanding of religious practice?

CHAPTER TWENTY

FREEDOM OF EXPRESSION

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I. INTRODUCTION

A. THE CANADIAN FREE SPEECH TRADITION

Kent Roach & David Schneiderman, "Freedom of Expression in Canada"

in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Toronto: LexisNexis, 2013) at 431-33 (footnotes omitted)

The Canadian tradition of freedom of expression is usually traced back to the English common law. Yet the common law has not been particularly sympathetic to free speech claimants. Dicey admitted in his treatise on constitutional law that it is not "specially favourable to free speech or to free writing in the rules which it maintains in theory and often forces in fact as to the kind of statements which a man has a legal right to make" [AV Dicey, *Introduction to the Study of the Law of the Constitution of England*, 7th ed (London: Macmillan, 1885) at 236]. Rather, for Dicey, the solicitude owed to freedom of discussion in English law principally was due to the "supremacy" or "rule" of law—the idea that restraints on liberty require legislative prohibition and then prosecution before judges and juries. This practically had resulted in liberty of discussion [Dicey at 243].

The *Constitution Act, 1867* brought to Canada a constitution "similar in principle to that of the United Kingdom," though it was silent about liberties accruing to individuals. Nevertheless, the preamble suggested to courts that similar degrees of

freedom practically would be available in Canada. The Supreme Court of Canada, on occasion, has been prepared to vindicate freedom of expression rights by denying jurisdiction to provinces to enact laws in regard to speech. In the *Alberta Press Case*, Chief Justice Duff characterized "free public discussion of public affairs, notwithstanding its incidental mischiefs, [as] the breath of life for parliamentary institutions" [*Reference re Alberta Statutes*, [1938] SCR 100, 1938 CanLII 1 at 132-35]. Alberta's legislation would have permitted substantial governmental interference with the operation of newspapers in the province. This was beyond provincial competence, according to the Court, for it curtailed the right of public discussion and trespassed on the federal criminal law power. In *Switzman v. Ebling* [[1957] SCR 285, 1957 CanLII 2], one of the pivotal "implied bill-of rights" cases, Justices Rand and Abbott went further and suggested that jurisdiction to limit free speech rights may even be denied to Parliament. These cases are exceptional, however, as provinces continued to have authority to regulate expressive activity in so far as it related to matters falling within s. 92: laws concerning the regulation of streets, parks, and zoning by-laws were all within provincial competence though they may have impacted negatively on expressive freedoms. Even shortly before the coming into force of the Charter, in [*Dupond v City of Montreal*, [1978] 2 SCR 770, 1978 CanLII 201], concerning a Montreal municipal by-law temporarily prohibiting public gatherings and assemblies on the streets of the City, Justice Beetz for the majority of the Court wrote that "the right to hold public meetings on a highway or in a park is unknown to English law."

Nor did the experience under the Canadian Bill of Rights enhance Canada's free speech tradition. The Bill of Rights' fundamental freedoms (s. 1) were interpreted to reflect rights and freedoms in no "abstract sense" but "as they existed in Canada immediately before the statute was enacted" [*R v Burnshire*, [1975] 1 SCR 693, 1974 CanLII 150 at 705], in which case, the Bill of Rights "froze" the practice of rights as of 1960. We should add to this historical mix the panoply of federal restrictions on freedom of expression, whether they be the overly restrictive *Official Secrets Act* (now the *Security of Information Act*), the criminalization of sedition, false news and scandalizing the courts, the powers of surveillance over Canadian citizens and permanent residents, or the regrettable denials of freedom of speech under the *War Measures Act*. The Canadian law of freedom of expression, then, does not appear to have very deep roots.

With freedom of expression poorly anchored in Canadian constitutional law, section 2(b) might be viewed as having profoundly altered the Canadian constitutional scene. As our detailed discussion of the cases below suggest, the overall judicial orientation toward freedom of expression claims certainly has shifted, but perhaps not all that significantly.

B. PURPOSES OF THE GUARANTEE

Numerous explanations have been offered for the importance accorded to freedom of expression. Some of the main rationales are reviewed by McLachlin J in the following excerpt from her judgment in *R v Keegstra*. (Although the judgment was a dissenting opinion, the comments on freedom of expression were not the source of the disagreement.)

R v Keegstra

[1990] 3 SCR 697, 1990 CanLII 24

McLACHLIN J:

Various philosophical justifications exist for freedom of expression. Some of these posit free expression as a means to other ends. Others see freedom of expression as an end in itself.

Salient among the justifications for free expression in the first category is the postulate that the freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions. This is sometimes referred to as the political process rationale. ... The *locus classicus* of this rationale is A. Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

A corollary of the view that expression must be free because of its role in the political process is that only expression relating to the political process is worthy of constitutional protection. However, within these limits protection for expression is said to be absolute. The political process rationale has played a significant role in the development of First Amendment doctrine in the United States, and various justices of the US Supreme Court (though never a majority) have embraced its theory that protection of speech is absolute within these restricted bounds. Its importance has also been affirmed by Canadian courts, both before and since the advent of the Charter.

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The validity of the political process rationale for freedom of expression is undeniable. It is, however, limited. It justifies only a relatively narrow sector of free expression—one much narrower than either the wording of the First Amendment or s. 2(b) of the Charter would suggest.

Another venerable rationale for freedom of expression (dating at least to Milton's *Areopagitica* in 1644) is that it is an essential precondition of the search for truth.

[Milton wrote:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?]

Like the political process model, this model is instrumental in outlook. Freedom of expression is seen as a means of promoting a "marketplace of ideas," in which competing ideas vie for supremacy to the end of attaining the truth. The "marketplace of ideas" metaphor was coined by Justice Oliver Wendell Holmes, in his famous dissent in *Abrams v. United States*, 250 US 616 (1919).

[The passage by Holmes J referred to reads as follows:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is

the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.]

This approach, however, has been criticized on the ground that there is no guarantee that the free expression of ideas will in fact lead to the truth. Indeed, as history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.

Notwithstanding the cogency of this critique, it does not negate the essential validity of the notion of the value of the marketplace of ideas. While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, economic development and scientific and artistic creativity may stagnate in such societies.

Moreover, to confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proven either true or false. Many ideas and expressions which cannot be verified are valuable. Such considerations convince me that freedom of expression can be justified at least in part on the basis that it promotes the "marketplace of ideas" and hence a more relevant, vibrant and progressive society.

But freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve. This view holds that freedom of expression "derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being." It follows from this premise that all persons have the right to form their own beliefs and opinions, and to express them. "For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self": T.I. Emerson, "Toward a General Theory of the First Amendment" (1963), 72 *Yale L.J.* 877, at p. 879. It is demeaning of freedom of expression and wrong, the proponents of this view argue, to conceive the right only in terms of the ends it may assist in achieving. "[I]t is not a general measure of the individual's right to freedom of expression that any particular exercise of the right may be thought to promote or retard other goals of the society" (p. 880). Freedom of expression is seen as worth preserving for its own intrinsic value.

Those who assert that freedom of expression is worth protecting for its intrinsic value to the self-realization of both speaker and listener tend to combine this rationale with others. ... On its own, this justification for free expression is arguably too broad and amorphous to found constitutional principle. Furthermore, it does not answer the question of why expression should be deserving of special constitutional status, while other self-fulfilling activities are not. Nevertheless, an emphasis on the intrinsic value of freedom of expression provides a useful supplement to the more utilitarian rationales, justifying, for example, forms of artistic expression which some might otherwise be tempted to exclude.

Arguments based on intrinsic value and practical consequences are married in the thought of F. Schauer (*Free Speech: A Philosophical Enquiry* (1982)). Rather than evaluating expression to see why it might be worthy of protection, Schauer evaluates the reasons why a government might attempt to limit expression. Schauer points out that throughout history, attempts to restrict expression have accounted for a

disproportionate share of governmental blunders—from the condemnation of Galileo for suggesting the [E]arth is round to the suppression as “obscene” of many great works of art. Professor Schauer explains this peculiar inability of censoring governments to avoid mistakes by the fact that, in limiting expression, governments often act as judge in their own cause. They have an interest in stifling criticism of themselves, or even in enhancing their own popularity by silencing unpopular expression. These motives may render them unable to carefully weigh the advantages and disadvantages of suppression in many instances. That is not to say that it is always illegitimate for governments to curtail expression, but government attempts to do so must *prima facie* be viewed with suspicion.

Schauer’s approach reminds us that no one rationale provides the last word on freedom of expression. Indeed, it seems likely that theories about freedom of expression will continue to develop.

How do these diverse justifications of freedom of expression relate to s. 2(b) of the *Charter*? First, it may be noted that the broad wording of s. 2(b) of the *Charter* is arguably inconsistent with a justification based on a single facet of free expression. This suggests that there is no need to adopt any one definitive justification for freedom of expression. Different justifications for freedom of expression may assume varying degrees of importance in different fact situations. However, each of the above rationales is capable of providing guidance as to the scope and content of s. 2(b). [Emphasis in original.]

Compare McLachlin J’s views on the values associated with freedom of expression with those identified by Richard Moon in the excerpt below.

Richard Moon, The Constitutional Protection of Freedom of Expression

(Toronto: University of Toronto Press, 2000) at 3-4, 24-26
(footnotes omitted)

Freedom of expression does not simply protect individual liberty from state interference. Rather, it protects the individual’s freedom to communicate with others. The right of the individual is to participate in an activity that is deeply social in character that involves socially created languages and the use of community resources such as parks, streets, and broadcast stations. Yet the structure of constitutional adjudication, reinforced by an individual rights culture, tends to suppress the social or relational character of freedom of expression and its distributive demands (concern about the individual’s effective opportunity to communicate with others).

Recognition of the social character of freedom of expression is critical to understanding both the value and potential harm of expression and to addressing questions about the freedom’s scope and limits. Freedom of expression is valuable because human agency and identity emerge in discourse. We become individuals capable of thought and judgment and we develop as rational and feeling persons when we join in conversation with others. The social emergence of human thought, feeling, and identity can be expressed in the language of truth or individual autonomy or democratic self-government. Each of the traditional accounts of the value of freedom of expression (democratic-, truth-, and self-realization-based accounts) represents a particular perspective on, or dimension of, the constitution of human

agency in community life. ... While the social character of human agency is seldom mentioned in the traditional accounts of the value of freedom of expression, it is the unstated premise of each. ...

Recognition that individual agency and identity emerge in communicative interaction is crucial to understanding not only the value of expression but also its potential for harm. Our dependence on expression means that words can sometimes be hurtful. Our identity is shaped by what we say and by what others say to us and about us. Expression can cause fear, it can harass, and it can undermine self-esteem. Expression can also be deceptive or manipulative. Human reflection and judgment are dependent on socially created languages, which give shape to thought and feeling. While language enables us to formulate and communicate our ideas and to understand the ideas of others, it is not a transparent vehicle, an instrument that lies within our perfect control.

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The established accounts of the value of freedom of expression are described as either instrumental or intrinsic

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[But the] value (and potential harm) of expression will remain unclear as long as discussion about freedom of expression is locked into the intrinsic/instrumental dichotomy, in which the freedom is concerned with either the good of the community or the right of the individual. The value of freedom of expression rests on the social nature of individuals and the constitutive character of public discourse. This understanding of the freedom, however, has been inhibited by the individualism that dominates contemporary thinking about rights—its assumptions about the pre-social individual and the instrumental value of community life. Once we recognize that individual agency and identity emerge in the social relationship of communication, the traditional split between intrinsic and instrumental accounts (or social and individual accounts) of the value of freedom of expression dissolves. Expression connects the individual (as speaker or listener) with others and in so doing contributes to her capacity for understanding and judgment, to her engagement in community life and to her participation in a shared culture and collective governance.

The arguments described as instrumental focus on the contribution of speech to the collective goals of truth and democracy. However, we value truth not as an abstract social achievement but rather as something that is consciously realized by members of the community, individually and collectively, in the process of public discussion. Similarly, freedom of expression is not simply a tool or instrument that contributes to democratic government. We value freedom of expression not simply because it provides individuals with useful political information but more fundamentally because it is the way in which citizens participate in collective self-governance. There is no way to separate the goal from the process or the individual good from the public good.

Attaching the label “intrinsic” to autonomy or self-realization accounts of the freedom seems also to misdescribe the value at stake. Communication is a joint or public process, in which individual participants realize their human capacities and their individual identities. The individual does not simply gain satisfaction from expressing his pre-existing views on things: an individual’s views, and more broadly his judgment and identity, take shape in the communicative process.

Freedom of expression theories are also categorized as either “listener” or “speaker” centred. Listener-centred theories emphasize the right of the listener to hear and judge expression for herself. The listener’s right is protected as a matter of respect for her autonomy as a rational agent or for its contribution to social goals such as the development of truth or the advancement of democratic government.

Speaker-centred theories emphasize the value of self-expression. The individual's freedom to express himself is a part of his basic human autonomy or is critical to his ability to direct the development of his own personality. Each of these accounts recognizes the connection between speaking and listening, yet each values one or the other of these activities or, if it values them both, it values them as distinct or independent interests. ...

The focus of these accounts on the different interests of the speaker and the listener, misses the central dynamic of the freedom, the communicative relationship, in which the interests of speaker and listener are tied. The activities of speaking and listening are part of a process and a relationship. This relationship is valuable because individual agency emerges and flourishes in the joint activity of creating meaning.

NOTE: ROLE OF THE UNDERLYING RATIONALES IN FREEDOM OF EXPRESSION CASES

What role have these rationales, which McLachlin J describes as "philosophical justifications," played in freedom of expression cases under the Charter? One might have expected a fairly significant one, with the rationales being heavily relied on to determine which forms of expressive activity should receive protection under s 2(b). It turns out that these rationales have played some role in the s 2(b) analysis, although not as much as might have initially been expected.

One example is where a law, in its *effects*, limits expressive activity. The Supreme Court has distinguished between two different inquiries in s 2(b) cases depending on the nature of the limit on freedom of expression. More details are provided in the case of *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 1989 CanLII 87, excerpted below. Here we briefly introduce the distinctions the Court has developed. Where the purpose of a governmental measure is to "restrict content"—by singling out particular content (like children's advertising), controlling access to content (by, for example, mandating French-only language laws), or by controlling the ability to convey meaning (such as a ban on posting)—then the measure "necessarily limits" the guarantee of freedom of expression and the judicial inquiry moves onto s 1. Where a measure is content neutral and limits only the "physical consequences of certain human activity" (such as a rule against littering or a noise by-law), then the law limits freedom of expression not in its *purpose* but in its *effects*. In such a case, there is a further inquiry before moving onto s 1. A claimant must demonstrate that the expressive activity promotes or reflects at least one of the principles underlying the guarantee. In the case of a noise by-law, for example, it is not enough to show that the by-law merely restricts loud shouting; rather, a plaintiff must demonstrate that "her aim was to convey a meaning reflective of the principles underlying freedom of expression" (*Irwin Toy* at 977)—namely, one of the three rationales of self-government, truth, and individual fulfillment. Although this inquiry shifts the burden of proof onto Charter claimants, it might not be too burdensome. After all, because the Court has adopted a broad view of s 2(b), in which "all expressions of the heart and mind, however unpopular or distasteful" (*Irwin Toy* at 968), and even purely physical conduct that conveys meaning will qualify for constitutional protection, it should not be too difficult to show that the activity promotes one of the underlying values.

A second instance where the underlying rationales play a role in s 2(b) concerns expressive activity on government-owned property. As discussed below, in *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, the Supreme Court of Canada has outlined a test for determining whether there exists a constitutional right to free expression on government-owned property that takes into account "(a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression" (at para 74, emphasis added).

It turns out that the underlying rationales have played a much greater role under s 1, as shown in *Keegstra*, excerpted in Section IV, "Hate Speech."

For further reflection on the rationales the Court has used for protecting freedom of expression, see Robin Elliot, "The Supreme Court's Understanding of Democratic Self-Government Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I—Taking Stock" (2012) 59 SCLR (2d) 435.

II. THE SCOPE AND LIMITS OF FREEDOM OF EXPRESSION

What is the scope or content of s 2(b)? In its early freedom of expression judgments, the Supreme Court of Canada adopted an expansive view of the scope of s 2(b). The Court could have adopted any one of a number of strategies to more narrowly confine its scope—that is, the Court could have "defined in" certain expressive activities, while "defining out" other kinds: see Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts" (1981) 34 Vand L Rev 265. In what follows, we examine each of these potentially limiting strategies and the Supreme Court of Canada's treatment of them. (The material that follows has been adapted from Kent Roach & David Schneiderman, "Freedom of Expression in Canada," above, at 429–525.)

A. SPEECH VERSUS CONDUCT

The speech versus conduct distinction has been used by Canadian courts in the past to weed out claims to expressive freedom. In the pre-Charter case of *Dupond v City of Montreal*, [1978] 2 SCR 770, 1978 CanLII 201, excerpted in Chapter 15, Antecedents of the Charter, Beetz J characterized public demonstrations as a form of "collective action" rather than a form of speech: "[They are] of the nature of a display of force rather than that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse." Yet the Supreme Court of Canada chose to reject this distinction in the first significant freedom of expression case to come before it, *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 1986 CanLII 5. The dispute concerned the constitutionality of an injunction against labour picketing. The striking employees of Purolator planned to set up a picket line at the workplace of Dolphin Delivery. They believed that Dolphin Delivery was doing work for Supercourier, a company related to Purolator, which was carrying on Purolator's BC business during the strike. The Purolator workers hoped that the Dolphin Delivery workers would respect their picket line, putting pressure on Dolphin Delivery to stop doing Purolator work and, indirectly, on Purolator to settle the contract dispute.

Dolphin Delivery brought an application for an injunction against the Purolator union to prevent it from setting up the picket line. The Supreme Court of British Columbia granted the injunction on the grounds that a line by Purolator workers at the site of Dolphin Delivery would be a secondary picket meant to induce Dolphin Delivery to breach its contract with Supercourier and that this amounted to a common law tort.

The issue that came to the Supreme Court of Canada was whether the injunction violated freedom of expression under the Charter. In deciding whether the Charter had been breached, the Court had to decide, first, whether an injunction issued under the common law rules concerning picketing was subject to review under the Charter; second, whether picketing was a matter of freedom of expression protected by s 2(b); and, finally, if picketing was expression, whether the restriction of picketing in this case was a justifiable limit under s 1.

Justice McIntyre, writing for the majority of the Court, decided that the injunction was not government action subject to Charter review (that portion of the judgment can be found in Chapter 18, Application). However, he went on to consider the substantive issues in the event that the Charter applied. The following excerpt focuses on whether the union's freedom of expression claim fell within the scope of s 2(b).

RWDSU v Dolphin Delivery Ltd[1986] 2 SCR 573, 1986 CanLII 5

McINTYRE J (Dickson CJ and Estey, Chouinard, and Le Dain JJ concurring):

[1] This appeal raises the question of whether secondary picketing by members of a trade union in a labour dispute is a protected activity under s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, accordingly, not the proper subject of an injunction to restrain it. ...

[After reviewing the decisions of the lower courts, McIntyre J made the following observations about the facts of the case.]

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[10] ... In summary then, [the Chambers judge] found that the respondent was a third party, that the anticipated picketing would be tortious, that the purpose was to injure the plaintiff. It was assumed that the picketing would be peaceful, that some employees of the respondent and other trade union members of customers would decline to cross the picket lines, and that the business of the respondent would be disrupted to a considerable extent.

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Freedom of Expression

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[17] ... Is freedom of expression involved in this case? ... [I]n any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent. ...

[18] The appellants argue strongly that picketing is a form of expression fully entitled to *Charter* protection and rely on various authorities to support the proposition They reject the American distinction between the concept of speech and that of conduct made in picketing cases, and they accept the view of Hutcheon J.A. in the Court of Appeal ... that "Peaceful picketing falls within freedom of speech."

[The respondent argued that "constitutional protection under section 2(b) should only be given to those forms of expression that warrant such protection," as to do otherwise "would trivialize freedom of expression generally".]

[19] ... [T]he Court of Appeal [observed] that picketing in a labour dispute is more than mere communication of information. It is also a signal to trade unionists not to cross the picket line ... such that the result of the picketing would be to damage seriously the operation of the employer, not to communicate any information. Therefore, it is argued, since the picket line was not intended to promote dialogue or discourse ... , it cannot qualify for protection under the *Charter*.

[20] ... [I]t is evident that the purpose of the picketing in this case was to induce a breach of contract ... [and] that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure [...] ... Action on the part of the picketers will, of course, always accompany the expression, but not every action will remove it from *Charter* protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. [Here, however] the picketing would have been peaceful. I am therefore of the view that the picketing ... involved the exercise of the right of freedom of expression.

Section 1 of the Charter

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[22] ... Can an injunction based on the common law tort of inducing a breach of contract, which has the effect of limiting the *Charter* right to freedom of expression, be sustained as a reasonable limit imposed by law in the peculiar facts of this case. ...

[23] ... [T]he concern of the respondent is pressing and substantial. It will suffer economically in the absence of an injunction to restrain picketing. On the other hand, the injunction has imposed a limitation upon a *Charter* freedom. A balance between the two competing concerns must be found. ... This case involves secondary picketing—picketing of a third party not concerned in the dispute which underlies the picketing. The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible, work out their own agreement. ... When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legitimate weapon ... , it should not be permitted to harm others. ...

[24] ... I would say that the requirement of proportionality is also met, particularly when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence. It is my opinion then that a limitation on secondary picketing against a third party ... is "a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society."

Appeal dismissed.

NOTES AND QUESTIONS

1. In *UFCW, Local 1518, v KMart Canada Ltd*, [1999] 2 SCR 1083, 1999 CanLII 650, the Supreme Court of Canada distinguished between leafleting and picketing. The workers at several KMart stores, who had been locked out for six months while trying to negotiate a first collective agreement, distributed leaflets outside several non-unionized stores not directly involved. The leaflets described the dispute and asked potential customers to boycott KMart. There was no interference with employees or with the delivery of supplies. Nor was public access to the stores impeded in any way. Nevertheless, the Labour Relations Board held that the distribution of leaflets fell within the definition of secondary picketing in the BC *Labour Relations Code*, SBC 1992, c 82 and was therefore unlawful.

The Supreme Court of Canada ruled that the ban on secondary picketing in the BC *Labour Relations Code*, "which undoubtably encompass[es] leafleting" (at para 32), violated s 2(b) and was not justified under s 1. In reaching this conclusion, the Court distinguished between labour picketing and consumer leafleting. Since the latter "seeks to persuade" the public by means of "informed and rational discourse," it "does not trigger the 'signal' effect inherent in [a] picket line" and thus lacks "the same coercive component" (at para 43).

2. More recently, in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, which is also discussed in Chapter 18, the Supreme Court of Canada (re)interpreted the common law rules concerning secondary picketing in light of Charter values and held that "secondary picketing is generally lawful [under the common law] unless it involves tortious or criminal conduct" (at para 3). In a judgment written by McLachlin CJ and LeBel J, the

Court rejected the suggestion that expression in a labour context was “fundamentally less important than expression in other contexts”:

[97] ... It is far from clear that union speech is more likely to elicit an irrational or reflexive response than, for example, speech by a political organization. If we say that the signalling effect justifies a special prohibition in the labour context, does it not follow that signalling in other contexts may also justify blanket prohibitions? Moreover, it seems clear that freedom of expression is not confined to “rational” speech. Irrationality may support according less protection to particular kinds of speech. But it does not justify denying all protection as a matter of principle. [at para 97]

The Court understood “tortious” conduct to include inducing breach of contract. Is it obvious that expression should be restricted when it encourages an individual or corporation to breach a contract? (It is generally accepted that freedom of expression protects the right to argue in support of unlawful action.) Does the Court’s willingness to uphold the tort of inducement to breach of contract rest on an assumption that labour picketing has a “signalling effect”?

B. FORM VERSUS CONTENT

A second related strategy that could have been used to confine s 2(b) is the form versus content distinction. According to this view, the guarantee protects the content of messages, but not their form. This was a distinction advanced by the Attorney General of Quebec in the Supreme Court of Canada’s second major decision on freedom of expression, *Ford v Quebec (AG)*, [\[1988\] 2 SCR 712, 1988 CanLII 19](#). The case involved a challenge to the provisions of the Quebec *Charter of the French Language*, RSQ, c C-11, which required that outdoor commercial signs be exclusively in French. The Supreme Court of Canada found that the legislation violated freedom of expression under the *Quebec Charter of Human Rights and Freedoms* (which was considered equivalent to the Charter’s s 2[b]) and could not be upheld as a reasonable restriction under s 1. Invoking the language of Marshall McLuhan, the Attorney General of Quebec maintained that the Charter right protected not the medium but the message; there was a constitutional right to convey a message, but not the language, or form, in which that message was conveyed. The Court rejected this distinction, ruling that freedom of expression includes the freedom to express oneself in the language of one’s choice (at para 40):

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity [Section 2(b) of the Canadian *Charter* accords specific protection] to “freedom of thought, belief [and] opinion” That suggests that “freedom of expression” is intended to extend to more than the content of expression in its narrow sense.

In *Ford*, the Supreme Court of Canada also held that commercial expression—that is, advertising—falls within the scope of s 2(b):

[59] ... Given the earlier pronouncements of this Court [that Charter rights] should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*. ... Over and above its intrinsic value as expression, commercial expression ... [, which] protects listeners as well as speakers, plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The

Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society

A more extensive extract from the *Ford* decision is found in Chapter 24, Language Rights.

C. HIGH VALUE VERSUS LOW VALUE EXPRESSION

A third strategy that could have been used to confine the scope of s 2 (b) is to distinguish between high and low value expression: those expressive activities closely connected to the core of the guarantee of freedom of expression and those that lie farther from the core. Political speech, it is said, lies at or near the core, while pornography or hate speech is so far removed from that core as to be disqualified from constitutional protection. In *Ford*, the Court also rejected this distinction. Political speech was held to be only one among many forms of expression worthy of constitutional protection. Moreover, linking protection to these "philosophical" rationales would fuse two distinct processes that need to be kept separate—whether, on the one hand, expression is "within the ambit of the interests protected by the value of freedom of expression," and whether, on the other hand, an act of expression "deserves protection from interference under the structure of the Canadian Charter" (*Ford*, above at para 57). The Court also rejected the high value–low value distinction in determining whether an expressive activity was worthy of constitutional protection in *Irwin Toy*, immediately below—a case in which the Court consolidated its earlier rulings in *Dolphin Delivery* and *Ford* and, in a comprehensive set of reasons, laid out the basic approach to be followed when s 2(b) claims are made.

Irwin Toy Ltd v Quebec (AG) [\[1989\] 1 SCR 927, 1989 CanLII 87](#)

[This case involved a challenge to the provisions and related regulations of Quebec's *Consumer Protection Act*, SQ 1978, c 9 (CPA) governing children's advertising. Section 248 provided that "no person may make use of commercial advertising directed at persons under 13 years of age." Factors to be considered in determining whether an advertisement is directed to persons under 13 years of age included the nature and intended purpose of the goods advertised, the manner of presenting such advertisement, and the time and place it is shown. The regulations set out certain exemptions, such as advertising in children's magazines and announcements of children's programs or shows. After being charged with scores of breaches of the law, Irwin Toy sought a declaration that it was invalid on a number of bases, including the division of powers, and s 2(b) and s 7 of the Charter. The Supreme Court held that s 7 did not protect corporations and other artificial entities that were incapable of enjoying life, liberty, and security of the person. The Court also concluded that the provisions were *intra vires* the province as valid consumer protection legislation and did not invade federal jurisdiction over broadcasting or criminal law.]

DICKSON CJ and LAMER and WILSON JJ:

VI. Whether ss. 248 and 249 Limit Freedom of Expression as Guaranteed by the Canadian and Quebec Charters

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B. The First Step: Was the Plaintiff's Activity Within the Sphere of Conduct Protected by Freedom of Expression?

... Clearly, not all activity is protected by freedom of expression, and governmental action restricting this form of advertising only limits the guarantee if the activity in issue was protected in the first place. ...

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"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is ... "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. ...

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, ... some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. ...

Thus, the first question remains: Does the advertising aimed at children fall within the scope of freedom of expression? Surely it aims to convey a meaning, and cannot be excluded as having no expressive content. Nor is there any basis for excluding the form of expression chosen from the sphere of protected activity. ...

Consequently, we must proceed to the second step of the inquiry and ask whether the purpose or effect of the government action in question was to restrict freedom of expression. ...

C. The Second Step: Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?

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a. Purpose

When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government's purpose is virtually always to restrict expression. On

the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. To avoid both extremes, the government's purpose must be assessed from the standpoint of the guarantee in question. ...

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (*Freedom of Expression* (1981), at pp. 59-60):

The bold line ... between restrictions upon publication and regulation of the time, place and manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

Thus, for example, a rule against handing out pamphlets is a restriction on a manner of expression and is "tied to content," even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails restricting its content. By contrast, a rule against littering is not a restriction "tied to content." It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a "manner of expression" need not lead inexorably to restricting a content. Of course, rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning. ...

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... In determining [the state's purpose], the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

b. Effects

Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff's free expression. Here, the burden is on the plaintiff to demonstrate that such an effect occurred. In order so to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom.

... [T]he nature of the principles and values underlying the vigilant protection of free expression in a society such as ours ... can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment [for speakers and listeners]. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of

these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming ... a [state] purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. ... [W]hat kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case-by-case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to [one of the three values just articulated].

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In the instant case, the plaintiff's activity is not excluded from the sphere of conduct protected by freedom of expression. The government's purpose ... was to prohibit particular content of expression in the name of protecting children. These provisions therefore constitute limitations to s. 2(b) of the Canadian Charter. ... They fall [sic] to be justified under s. 1 of the Canadian Charter

VII. Whether the Limit on Freedom of Expression Imposed by ss. 248 and 249 Is Justified Under Section 9.1 of the Quebec Charter or Section 1 of the Canadian Charter

[The three judges then dealt with the issue of whether the scheme put into place by the impugned provisions is so vague as not to constitute a limit "prescribed by law." They concluded that there is nothing inherently confusing or contradictory about the provisions and that despite the element of discretion involved in the interpretation of the sections, the legislature had provided an intelligible standard. That aspect of the judgment is dealt with further in the discussion of "prescribed by law" and vagueness found in Chapter 17, The Framework of the Charter. The analysis then moved to the issue of justification under s 1.]

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The question becomes whether the evidence submitted by the government establishes that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place. Studies subsequent to the enactment of the legislation can be used for this purpose.

[On the evidentiary issue, the three judges found that although it is not open to the government, under s 1, to assert a legislative objective that did not animate the legislation at the time of enactment, in proving that the objective remains pressing and substantial the government is allowed to draw on the best evidence currently available.]

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a. Pressing and Substantial Objective

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In our view, the Attorney General of Quebec has demonstrated that the concern which prompted the enactment of the impugned legislation is pressing and substantial The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney General of Quebec, [TRANSLATION] "Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct." The material given in evidence before this Court is indicative of a generalized concern in Western societies with the impact of media, and particularly but not solely televised advertising, on the development and perceptions of young children. ... Broadly speaking, the concerns which

have motivated both legislative and voluntary regulation in this area are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority. Responses to the perceived problems are [varied.] However the consensus of concern is high.

In establishing the factual basis for this generally identified concern, the Attorney General relied heavily upon the US Federal Trade Commission (FTC) Final Staff Report and Recommendation, *In the Matter of Children's Advertising*, which ... [concludes] that young children (2-6) cannot distinguish fact from fiction or programming from advertising and are completely credulous when presented with advertising messages[...] ... The Report thus provides a sound basis on which to conclude that television advertising directed at young children is *per se* manipulative. Such advertising aims to promote products by convincing those who will always believe.

It is reasonable to extend this conclusion in two ways. First, it can be extended to advertising in other media. ... Second, it can be extended to advertising aimed at older children (7-13). The Attorney General filed a number of studies reaching somewhat different conclusions ... [but they all] suggest that at some point between age seven and adolescence, children become as capable as adults of understanding and responding to advertisements. The majority in the Court of Appeal interpreted this evidence narrowly and found that it only justified the objective of regulating advertising aimed at children six or younger They concluded, and we agree, that the evidence was strongest with respect to the younger age category. Opinion is more divided when children [between 7 and 13] are involved. But the legislature was not obliged to confine itself solely to protecting the most clearly vulnerable group. It was only required to exercise a reasonable judgment in specifying the vulnerable group.

[Reference was then made to Dickson CJ's ruling in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 1986 CanLII 12, excerpted in Chapter 19, Freedom of Religion, to the effect that s 1 requires a "reasonable limit" (at para 31), with the result that "courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line" (at para 147). The "line" in issue in *Edwards Books* was a legislative decision to exempt businesses having seven or fewer employees from a Sunday closing rule.]

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The same can be said of evaluating competing credible scientific evidence and choosing ... the upper age limit for the protected group here in issue. Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment ... , especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another. In dealing with inherently heterogeneous groups defined in terms of age or a characteristic analogous to age, evidence showing that a clear majority of the group requires the protection which the government has identified can help to establish that the group was defined reasonably. Here, the legislature has mediated between the claims of advertisers and those seeking commercial information on the one hand, and the claims of children and parents on the other. There is sufficient evidence to warrant drawing a line at age thirteen, and we would not presume to re-draw the line. ...

... The s. 1 ... materials demonstrate, on the balance of probabilities, that children up to the age of thirteen are manipulated by commercial advertising and that the objective of protecting all children in this age group is predicated on a pressing and substantial concern. We thus conclude that the Attorney General has discharged the onus under the first part of the *Oakes* test.

b. Means Proportional to the Ends

[The rational connection test was easily found to have been satisfied. The analysis then moved to the issue of minimal impairment.]

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... [I]n matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In *Edwards Books, supra*, Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. ...

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. ... [W]henever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions The same degree of certainty may not be achievable in cases involving the [competing claims and] scarce government resources.

In the instant case, the Court is called upon to assess competing social science evidence respecting ... children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

[The three judges found that the "strongest evidence" in support of minimal impairment was from the FTC Report, which found that young children (2 to 6 years of age) were "cognitively limited" and so could not distinguish advertising from entertainment. The report had determined that the only effective means for dealing with advertising directed at young children was a ban, but had also concluded that, on a

practical level, such a ban would be impossible to implement (in addition, presumably, to First Amendment problems under the US Constitution). It did not make any recommendation regarding children aged 7 to 13. The Quebec law was found to have overcome the practical limitations faced by the FTC. It contemplated a ban on advertising directed at children older than in the FTC report, confined the ban to only certain times of the day when children make up a larger segment of the audience, and specified categories of products and advertisements that allowed for a sophisticated appraisal of whether an advertisement was aimed at children.]

... [T]he respondent argued that a ban was not the only effective means for dealing with the problem posed by children's advertising. In particular, it pointed to the self-regulation mechanism provided by the *Broadcast Code for Advertising to Children* as an obvious alternative and emphasized that Quebec was unique among industrialized countries in banning advertising aimed at children The latter assertion must be qualified in two respects. First, as of 1984, Belgium, Denmark, Norway and Sweden did not allow any commercials on television and radio. Second, throughout Canada, as in Italy, the public network does not accept children's commercials (except, in the case of the CBC, during "family programs"). Consequently, Quebec's ban on advertising aimed at children is not out of proportion to measures taken in other jurisdictions. Nor is legislative action to protect vulnerable groups necessarily restricted to the least common denominator of actions taken elsewhere. Based on narrower objectives than those pursued by Quebec, some governments might reasonably conclude that self-regulation is an adequate mechanism for addressing the problem of children's advertising. But having identified advertising aimed at persons under thirteen as *per se* manipulative, the legislature of Quebec could conclude, just as reasonably, that the only effective statutory response was to ban such advertising.

In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions

iii. Deleterious Effects

There is no suggestion here that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective. Advertisers are always free to direct their message at parents and other adults. They are also free to participate in educational advertising. The real concern animating the challenge to the legislation is that revenues are in some degree affected. This only implies that advertisers will have to develop new marketing strategies for children's products. ...

[The impugned provisions were therefore upheld under s 1 of the Charter.]

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McINTYRE J (Beetz J concurring) (dissenting):

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While I agree with [my colleagues] that ss. 248 and 249 of the *Consumer Protection Act* infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*. ... I do not agree that they may be justified under s. 1 of the *Canadian Charter*

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Can it be said that the welfare of children is at risk because of advertising directed at them? I am not satisfied that any case has been shown that it is. There was evidence that small children are incapable of distinguishing fact from fiction in advertising. This is hardly surprising: many adults have the same problem. Children, however, do not remain children. They grow up and, while advertising directed at children may well be a source of irritation to parents, no case has been shown here that children suffer harm. Children live in a world of fiction, imagination and make believe. Children's literature is based upon these concepts. As they mature, they make adjustments and can be expected to pass beyond the range of any ill which might be caused by advertising. In my view, no case has been made that children are at risk. Furthermore, even if I could reach another conclusion, I would be of the view that the restriction fails on the issue of proportionality. A total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality.

In conclusion, I would say that freedom of expression is too important to be lightly cast aside or limited. It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited. It was this proposition that motivated the early church in restricting access to information, even to prohibiting the promulgation and reading of the scriptures in a language understood by the people. The argument that freedom of expression was dangerous was used to oppose and restrict public education in earlier times. The education of women was greatly retarded on the basis that wider knowledge would only make them dissatisfied with their role in society. I do not suggest that the limitations imposed by ss. 248 and 249 are so earth shaking or that if sustained they will cause irremediable damage. I do say, however, that these limitations represent a small abandonment of a principle of vital importance in a free and democratic society and, therefore, even if it could be shown that some child or children have been adversely affected by advertising of the kind prohibited, I would still be of the opinion that the restriction should not be sustained. Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one.

... Freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community.

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Appeal dismissed.

As we have seen, the Court in *Irwin Toy* rejected the high value–low value distinction in the determination of whether an expressive activity falls within s 2(b). Yet it appears to have embraced the distinction in the determination of whether a governmental interference is justified under s 1, an approach that has continued in subsequent cases. At the s 1 stage, the Court has taken to characterizing the expression at stake as being of high or low value, a characterization that helps to determine whether a strict or attenuated s 1 justification analysis is appropriate: see *Keegstra*, excerpted in Section IV. This is understood to be an

application of the “contextual” approach to Charter interpretation introduced in *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326, 1989 CanLII 20.

The distinction between core and marginal expression, or high value versus low value speech, plays a significant role in the Supreme Court’s approach to a variety of freedom of expression issues, including commercial advertising, hate promotion, and pornography. When the Court decides that a certain kind of expression has only a marginal connection to the values underlying freedom of expression, it applies some or all of the s 1 steps in a more flexible or less rigorous way. When reading the various cases in this chapter, consider whether there is any basis for this distinction.

NOTES AND QUESTIONS

1. According to the Supreme Court of Canada, s 2(b) protects any activity that “conveys or attempts to convey a message.” The Court uses the example of illegal or unauthorized parking to illustrate the potential breadth of the category of protected expression. Although parking, illegal or otherwise, is not ordinarily an expressive act, if an individual parks their car illegally as a protest of some kind, then that act of parking will be considered expression and fall within the scope of s 2(b).

An individual may communicate using symbolic forms such as spoken or written language, hand gestures, or wearing a black armband that may also be seen as conveying a message. Because the Supreme Court of Canada has defined expression so broadly that it includes all acts intended to convey a message, any act is potentially an act of expression. This also means that any law is potentially a restriction on expression. Has the Court defined the scope of s 2(b) too broadly? Could it have been defined more narrowly? For an argument that the Court’s “exceedingly broad” understanding of protected expression is fundamentally flawed, see Robin Elliot, “Back to Basics: A Critical Look at the Irwin Toy Framework for Freedom of Expression” (2011) 15 Rev Const Stud 205.

2. In *Irwin Toy*, the Supreme Court introduced an exception to its broad definition of constitutionally protected expression—expressive activity that takes the form of violence is not included within the guarantee of freedom of expression. All acts of expression have some sort of direct physical consequences—if not a broken nose, then perhaps broken silence. When will the physical effects of an expressive act be considered violent, so that the act falls outside the scope of s 2(b), and when will the act be protected under that section even though it causes injury to the interests of another—such as obstruction or harassment that might justify restriction under s 1?

In *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, excerpted below, the Supreme Court of Canada discussed the “violence exception.” The majority judgment of McLachlin CJ and Deschamps J (Binnie J dissenting on another point) included the following observations:

[60] Expressive activity may fall outside the scope of s. 2(b) protection because of how or where it is delivered. While all expressive content is worthy of protection (see *Irwin Toy*, at p. 969), the method or location of the expression may not be. For instance, ... violent expression is not protected . . . [not] because of the message it conveys (no matter how hateful) but rather because the method by which the message is conveyed is not consonant with Charter protection.

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[72] Expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee. . . . Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(b) because violent means and methods undermine the values that s. 2(b) seeks to protect. Violence prevents dialogue

rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it. [Emphasis in original.]

Are threats of violence included in the violence exception? In *RWDSU v Dolphin Delivery Ltd*, above, McIntyre J suggested that threats of violence might also be excluded, but in *Keegstra* (excerpted below), which was decided shortly after *Irwin Toy*, the Court held that threats of violence do not fall within the exception. However, more recently, in *R v Khawaja*, 2012 SCC 69, McLachlin CJ, writing for the Court, appears to have settled the matter in favour of excluding threats of violence:

[70] ... It makes little sense to exclude acts of violence from the ambit of s 2(b), but to confer protection on threats of violence. Neither are worthy of protection. Threats of violence, like violence, undermine the rule of law. As I wrote in dissent in *R. v. Keegstra*, ... [1990] 3 S.C.R. 697, threats of violence take away free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression (pp. 830–31). I therefore reject that the violence exception to s. 2(b) is confined to actual physical violence, without however deciding the precise ambit of the exception. Threats of violence fall outside the s. 2(b) guarantee of free expression.

3. In *Irwin Toy*, the Court introduced a distinction between laws that have as their purpose the control or restriction of expression and laws that have the effect of merely restricting expression. Where the law's purpose is to restrict protected expressive activity, the law will "automatically" violate s 2(b). However, where the law simply has the effect of limiting expressive activity, a violation of s 2(b) will occur only if the plaintiff can establish that the restricted expression advances one of the values underlying the guarantee. Some commentators argue that this step in the analysis is redundant because any activity that conveys meaning will be found to serve the values underlying the guarantee. If a municipal noise by-law has the effect of preventing me from communicating my political message using a megaphone at midnight in a residential neighbourhood, will it be difficult for me to show that my chosen form of expression advances freedom of expression values?

In introducing this, the Court in *Irwin Toy* was clearly drawing on a distinction central to US First Amendment jurisprudence between "content-based" restrictions and content-neutral, "time, place and manner" restrictions. In the United States, state-imposed content-based restrictions are viewed as a serious threat to First Amendment values and are difficult to justify. On the other hand, time, place, and manner restrictions, which seek to prevent harms caused by the form rather than the message of expression—for example, physical disruption of quiet or property use—will be upheld provided they are narrowly tailored and leave adequate alternative channels for communicative activity.

Is there any reason to differentiate between purpose-based and effects-based restrictions at the s 2(b) stage of Charter analysis? It is worth noting that on several occasions, the Court has said that "time, place and manner" restrictions may be easier to justify under s 1 than other types of restrictions. For a critical view of this aspect of the *Irwin Toy* framework, see Elliot, "Back to Basics," note 1 above.

4. As discussed in Chapter 17, we also see in *Irwin Toy* the development of a more deferential, flexible, reasonableness-based approach to the various strands of the s 1 test, and in particular the minimal impairment test. *Irwin Toy* builds on the initial developments in this direction in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 1986 CanLII 12, excerpted in Chapter 19. In *Irwin Toy*, this less stringent application of s 1 is viewed as appropriate in cases classified as "regulatory"—that is, involving socio-economic considerations where the government acts as the mediator between the claims of competing individuals or groups in the community. In contrast, a more rigorous application of s 1 is warranted in criminal law cases

where the government is the singular antagonist of the individual. Are the two kinds of cases as easily distinguished as the Court suggests?

A second theme is intertwined with the concerns expressed in *Irwin Toy* about the comparative institutional competence of courts and legislatures with respect to socio-economic matters. There are also suggestions that the more deferential standard of review is particularly appropriate in circumstances where the government is acting to protect a vulnerable group—retail workers in *Edwards Books* and children in *Irwin Toy*. This second rationale for deference reflects a desire on the part of the Court to ensure that the Charter be used as a tool of social justice—that it be interpreted in such a way as to improve, or at least not worsen, the situation of the economically and socially disadvantaged.

In later judgments, the Supreme Court of Canada has indicated that a variety of factors may affect the standard of proof under s 1, including (1) the nature of the harm and the inability to measure it, (2) the vulnerability of the group protected, (3) subjective fears and apprehension of harm, and (4) the nature of the infringed activity: see *R v Bryan*, [\[2007 SCC 12\]](#), per Bastarache J at para 10.

5. For a review of many of the freedom of expression cases found in this chapter from the perspective of the s 1 analysis and the evolution of the *Oakes* test, see Sujit Choudhry, "So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1" (2006) 34 *SCLR* (2d) 501, excerpted in Chapter 17.

III. COMMERCIAL EXPRESSION

As noted above, in *Ford v Quebec (AG)*, the Supreme Court of Canada held that commercial expression fell within the scope of s 2(b). Some commentators disagreed with this ruling, arguing that advertising is an instrumental form of expression undeserving of constitutional protection. For these critics, regulation of advertising is simply a form of economic regulation within the legitimate domain of the legislature: see, for example, Allan Hutchinson, "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990) 17 *Can Bus LJ* 2. In partial recognition of these concerns, the Court has said in subsequent judgments that, while commercial expression is protected under s 2(b), its restriction may be more easily justified because it is less directly connected to the values underlying our commitment to freedom of expression.

Rocket v Royal College of Dental Surgeons of Ontario, [\[1990\] 2 SCR 232, 1990 CanLII 121](#) involved a challenge to a regulation enacted under the Ontario *Health Disciplines Act*, RSO 1980, c 196 by the College of Dental Surgeons imposing stringent restrictions on advertising by dentists. The Supreme Court of Canada concluded that the regulation violated the Charter's guarantee of freedom of expression. In dealing with the s 1 analysis, McLachlin J, writing for a unanimous court, noted that although commercial expression is constitutionally protected, its commercial nature would be significant in the balancing exercise under s 1. She suggested that because the motive behind the expression was primarily the pursuit of economic profit, and because consumers of dental services are highly vulnerable to unregulated advertising, restrictions on expression of this kind might be easier to justify than other infringements of s 2(b). On the other hand, she also recognized the public interest served by such expression in enhancing the ability of consumers (or in this case, patients) to make informed choices. In the end, the Court concluded that the regulation could not be justified under s 1. While acknowledging that the regulation of advertising might be necessary to protect members of the public (who would have difficulty judging claims of quality) and maintain standards of professionalism, the Court found that:

The public has an interest in obtaining information as to dentists' office hours, the languages they speak, and other objective facts relevant to their practice—information which s. 37(39) prohibits dentists from conveying by advertising. Useful information is restricted without justification.

Another form of commercial expression, soliciting for the purposes of prostitution, was found to be protected by s 2(b) of the Charter in *Reference re ss 193 and 195.1(1)(c) of the criminal code (Man)*, [1990] 1 SCR 1123, 1990 CanLII 105. A majority of the Court concluded, however, that the *Criminal Code* provision prohibiting any communication in a public place for the purpose of engaging in prostitution could be upheld under s 1 as a proportionate response to the nuisance created by street solicitation. The economic purpose motivating the expression was taken into account by Dickson CJ in the balancing process:

[T]he expressive activity, as with any infringed *Charter* right, should also be analyzed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

The Supreme Court was invited to revisit this finding in *Canada (AG) v Bedford*, 2013 SCC 72, excerpted in Chapter 22, The Right to Life, Liberty, and Security of the Person, but declined to do so because no new legal issue was raised nor was there a significant change in the circumstances or evidence.

The regulation of the advertising of tobacco products has been the subject of two significant freedom of expression cases, discussed below. Although the object of these laws is to promote health by reducing tobacco consumption, they have attracted scrutiny under s 2(b) of the Charter.

NOTE ON RJR MACDONALD INC V CANADA, [1995] 3 SCR 199, 1995 CANLII 64

The federal *Tobacco Products Control Act*, SC 1988, c 20 prohibited tobacco advertising, the promotion of tobacco products, and required mandatory unattributed health warnings on all tobacco products sold in Canada. The law was held to be *intra vires* under the federal government's criminal law power. But for the mandatory health warnings, the government conceded that 2(b) was infringed. However, the government refused to divulge a report that was prepared and introduced to the Federal Cabinet that would have identified the alternative means the government had considered in enacting the law.

Justice La Forest (L'Heureux-Dubé, Gonthier, Cory JJ concurring) dissented, calling for a deferential s 1 test:

[63] This Court has on many occasions affirmed that the *Oakes* requirements must be applied flexibly, having regard to the specific factual and social context of each case. The word "reasonable" in s. 1 necessarily imports flexibility

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[67] ... Simply put, a strict application of the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern every time it wishes to address its effects. This could have the effect of virtually paralyzing the operation of government in the socio-economic sphere.

Courts are better placed, they wrote, to intervene to protect liberty. They are "not specialists in the realm of policy making, nor should they be" (at para 68). They continued:

[69] ... Health underlies many of our most cherished rights and values, and the protection of public health is one of the fundamental responsibilities of Parliament. On the other hand, however, it is clear that a prohibition on the manufacture, sale or use of tobacco products is unrealistic. Nearly seven million Canadians use tobacco products, which are

highly addictive. Undoubtedly, a prohibition of this nature would lead to an increase in illegal activity, smuggling and, quite possibly, civil disobedience. Well aware of these difficulties, Parliament chose a less drastic, and more incremental, response to the tobacco health problem. In prohibiting the advertising and promotion of tobacco products, as opposed to their manufacture or sale, Parliament has sought to achieve a compromise among the competing interests of smokers, non-smokers and manufacturers, with an eye to protecting vulnerable groups in society. Given the fact that advertising, by its very nature, is intended to influence consumers and create demand, this was a reasonable policy decision.

Moreover, tobacco advertising falls far from the "core" of freedom of expression:

[75] In my view, the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s. 1. It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it. The main, if not sole, motivation for this advertising is, of course, profit.

Reduction in smoking, the principal cause of deadly cancer, was a pressing and substantial objective. Though the social science evidence was ambivalent about the effects of banning tobacco advertising, rational connection was also satisfied. It must have some effect on consumer habits, otherwise why engage in expensive advocacy campaigns other than to maintain and expand their market? Minimal impairment was also satisfied, though a less expansive ban (a "partial ban," at para 17) could have been implemented. It is described as "relatively unintrusive" and "narrow" (at para 97, emphasis in original). Proportionate effects analysis also tilted in favour of the government ban. The dissenting judges did not find that the unattributed health warnings offended s 2(b). They were akin to labels on hazardous products. No adverse inference was drawn against the government for refusing to disclose evidence of alternative means.

Chief Justice McLachlin (Lamer CJ, Sopinka, Iacobucci, and Major JJ concurring) agreed that, although deference may be appropriate, the government is obliged to offer some "reasoned demonstration" for its choice of means:

[134] ... Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on Charter rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the Charter.

Nor should the Court distinguish too sharply between criminal prohibitions and social policy:

[135] ... [S]uch distinctions may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential. The cases at bar provide a cogent example. We are concerned with a criminal law, which pits the state against the offender.

Turning to s 1, a pressing and substantial objective and rational connection with the law was satisfied with reference to "reason and logic" (at para 164). Minimal impairment, however, was not satisfied. What was required was that the means fall within a "range of reasonable alternatives" (at para 160) but, here, there was insufficient evidence to justify a "full prohibition" (at para 163). The law, wrote the majority:

[162] ... bans all forms of advertising of Canadian tobacco products while explicitly exempting all foreign advertising of non-Canadian products which are sold in Canada. It extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands—all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health.

A “partial ban” would have reasonably achieved the important objective. Having been denied access to cabinet confidences, which would have explained the reasonable alternative means available, the Court was presented with “no evidence in defence of the total ban” (at para 165).

This omission, the majority continued, was “all the more glaring” (at para 166) since the Attorney General had carried out at least one study of alternatives to a total ban but refused to disclose it along with hundreds of other related documents. The Attorney General cited for its refusal “Cabinet confidentiality” protected under the *Canada Evidence Act*, RSC 1985, c C-5. The majority noted that: “In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government’s claim that a less invasive ban would not have produced an equally salutary result” (at para 166). The Attorney General failed to respond to RJR’s claim that there were, in fact, alternatives—instead “content[ing] himself with the bland statement that a complete ban is justified because Parliament ‘had to balance competing interests’” (at para 167). The majority found that assertion to not be the kind of evidence capable of demonstrating minimal impairment.

In addition, the majority said that it was important not to undervalue commercial expression. While tobacco consumption itself was not banned, consumers “who lawfully choose to smoke” (at para 170) are deprived “of information relating to price, quality and even health risks associated with different brands” (at para 162). Moreover, the profit motive was not determinative given that many forms of expression—such as books and newspapers—were also associated with generating revenue. Thus, “motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression” (at para 171).

The government failed to establish proportionality, not even as regards unattributed health warnings. The government could, as in the US, identify the government (in the US, the Surgeon General) as the author of these warnings rather than force tobacco companies to be associated with the opinion that smoking is detrimental to health.

Justice Iacobucci issued a concurring opinion that provided some guidance to the federal government moving forward. They could tailor the law by attributing warnings to government and enact a partial ban by prohibiting “lifestyle advertising only and limitations on advertising aimed at adolescents” (at para 191).

In 1997, the federal government passed new legislation regulating tobacco advertising and labelling. The *Tobacco Act*, SC 1997, c 13 prohibits most tobacco advertising, but creates an exception for “information advertising” and “brand-preference advertising” contained in publications (primarily magazines) directed at an adult readership. All “lifestyle” advertising is banned. The legislation also requires the placement of health warnings, in a prescribed form and manner, on tobacco packages, but the warnings are attributed to a prescribed person or body. The Court was satisfied with changes to the federal law, roughly along the lines suggested in *RJR-MacDonald, in Canada (AG) v JTI-Macdonald Corp*, [2007 SCC 30](#).

NOTES AND QUESTIONS

1. Justice McLachlin was prepared to uphold a ban on lifestyle advertising because she accepted that this sort of advertising had the effect of increasing tobacco consumption.

However, she concluded that informational and brand preference advertising should not be restricted because they did not encourage the smoking habit but simply reinforced brand loyalty or encouraged brand switching. Is there any real basis for this distinction? Can an ad reinforce brand loyalty without reinforcing the smoking habit? Can it encourage brand switching without encouraging smokers not to quit or non-smokers to start?

Both McLachlin and La Forest JJ seemed to assume that cigarette advertising could be restricted if it was shown to be effective in persuading its audience to smoke, but that it could not be restricted if it was shown to be ineffective. Yet how can it be that the justification for restricting expression is stronger when the expression persuades its audience to start or continue smoking? If people have a legal right to perform a particular act, such as smoking, is it not wrong to prevent them from hearing expression that supports performance of that act? Does the Court's judgment rest on an assumption that at least some forms of tobacco advertising are manipulative or deceptive?

2. In *Rocket v Royal College of Dental Surgeons of Ontario*, McLachlin J noted that the motive behind commercial expression was "primarily economic" and that the loss caused by censorship of this form of expression "is merely loss of profit, and not loss of opportunity to participate in the political process or the marketplace of ideas, or to realize one's spirited or artistic self-fulfillment." For these reasons she decided that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)." However, in *RJR-MacDonald*, she argued that the profit motive or economic orientation should not lessen the claim of expression to constitutional protection. Did McLachlin J change her mind and accept that profit-motivated expression is no less valuable than other forms of expression?

3. David Schneiderman has argued that the Court treated commercial expression as essentially benign:

In *RJR-MacDonald* the Court did not perceive the legislative objective as prohibiting harmful speech. Even though tobacco consumption admittedly was harmful to one's health, the advertising at issue, promoting a lawful product, was not itself harmful. The state interest in protecting vulnerable groups and preventing harm may help to explain the Court's approach to commercial speech as a whole. The Court does not consider that commercial speech— manipulative advertising with the primary (if not exclusive) purpose of constructing needs and shaping purchasing habits—causes harm to anyone. Full and rigorous protection of much commercial speech makes sense because such speech is not controversial. It does not target vulnerable groups and it does not cause harm. This approach is particularly justifiable when the advertising conveys "information" to consumers. In societies with market economies, commercial speech provides important information to citizens about a matter that concerns them immensely: the acquisition of goods and services as an expression of their individuality.

See David Schneiderman, "Consumer Interests and Commercial Speech: A Comment on *RJR-Macdonald v Canada (AG)*" (1996) 30 UBC L Rev 165 at 175 (footnotes omitted).

4. Justice McLachlin found that the provision in the *Tobacco Act* requiring tobacco manufacturers to place unattributed health warnings on tobacco packages violated their freedom of expression and could not be justified under s 1. Do all product labelling laws, including those that require the identification of poisons or the listing of food ingredients, violate the right to freedom of expression (and the Charter)? If not, why are cigarette health warnings different?

Freedom of expression is understood as entailing not just the right to express one's own ideas, but also the right not to speak. What is objectionable about compelled expression? Is it that the audience might mistakenly attribute the message to the speaker? In many or most cases in which individuals are compelled to express themselves, the audience is aware that the message is compelled and is not the individual's own. Did the cigarette purchasers think

that the health warnings on packages were the voluntarily expressed opinions of the manufacturers? Another view is that compelled expression is objectionable not because individuals will be incorrectly identified with views that are not their own, but because they will suffer the indignity of having to express such views. Does this sort of shame arise in the *RJR-MacDonald* case?

In Canada, prior to *RJR-MacDonald*, the right not to speak was recognized in *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 1989 CanLII 92. In that case, a labour adjudicator, after finding that an employee had been wrongfully dismissed, ordered the employer, *inter alia*, to provide the employee with a letter of recommendation. The letter was to include specified information concerning the employee's sales performance and also a statement to the effect that the adjudicator had found the employee's termination to constitute unjust dismissal. The order was found to violate freedom of expression. However, it was upheld under s 1. Central to the Court's s 1 assessment was a recognition of the "unequal balance of power that normally exists between an employer and employee."

How far does the right not to speak extend? Does it prohibit the state from using, or allowing someone else to use, an individual's property to support expressive activity with which the individual does not agree? In *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68, the Supreme Court of Canada addressed the issue of compulsory union dues and their expenditure by the union on political issues. Lavigne was an employee at a community college. As a member of the bargaining unit, but not of the union, he was subject to a mandatory dues check-off. After the union made contributions to left-leaning causes, Lavigne argued that his freedom of expression was violated since his compulsory payments to the union were spent on political matters not directly related to collective bargaining. The Court was unanimous that the compelled union dues did not violate freedom of expression under s 2(b). It stressed that others were unlikely to attribute to Lavigne the views expressed by the union and that he had plenty of opportunity to disassociate himself from those views. For further reading on compelled expression, see Robin Elliot & David W-L Wu, "Compelled Expression and the Charter" (2015) 68 SCLR (2d) 485.

Signs and posters are a common means of commercial expression. To what extent can their use be limited? The Supreme Court of Canada first dealt with this issue in *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084, 1993 CanLII 60 (discussed further in Section VII, "Access to Public Property"). Ramsden was found charged with breaching a by-law that prohibited posterizing on city utility poles. At the Supreme Court of Canada, Iacobucci J, writing for the Court, held that posterizing on public property, such as utility poles, fell within the scope of s 2(b) and (at 1107) that

the total ban on posterizing on public property does not impair the right as little as is reasonably possible, given the many alternatives available to the appellant.

Moreover, the benefits of the by-law are limited while the abrogation of the freedom is total, thus proportionality between the effects and the objective has not been achieved. While the legislative goals are important, they do not warrant the complete denial of access to a historically and politically significant form of expression. I would agree ... that "[a]s between a total restriction of this important right and some litter, surely some litter must be tolerated." Therefore, the by-law cannot be justified under s. 1.

R v Guignard, immediately below, deals with another aspect of commercial expression—"counter-advertising" by consumers—in the context of a challenge to a municipal by-law that prohibited advertising signs in certain parts of a municipality. In a judgment authored by LeBel J, the Court struck down the by-law.

R v Guignard2002 SCC 14

[In 1996, after an insurance dispute, Guignard erected a sign criticizing his insurance provider. A municipal inspector ordered him to remove the sign within 24 hours, citing a by-law prohibiting advertising signs outside an industrial area (*Règlement d'urbanisme no 1200 de la Ville de Saint-Hyacinthe*, s 14.1.5(p)). When he refused to comply, the municipality charged Guignard with contravening the by-law.]

LeBEL J (McLachlin CJ and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, and Arbour JJ concurring):

[23] ... [C]ommercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising. As we know and can attest, sometimes with mixed feelings, the ubiquitous presence of advertising is a defining characteristic of western societies. Usually, it attempts to convey a positive message to potential consumers. However, it sometimes involves comparisons and may even be negative. On the other hand, consumers also have freedom of expression. This sometimes takes the form of "counter-advertising" Within limits prescribed by the legal principles relating to defamation, every consumer enjoys this right ... [to] express their frustration or disappointment with a product or service ... [and to share] their concerns, worries or even anger with other consumers and try to warn them against the practices of a business. Given the tremendous importance of economic activity in our society, a consumer's "counter-advertising" assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.

[24] "Counter-advertising" is not ... a form of expression derived from commercial speech. Rather, it is a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens.

[25] ... In *Ramsden v. Peterborough (City)*, ... [1993] 2 S.C.R. 1084, this Court stressed the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources. Signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns. ...

[26] ... Even when a legislative or regulatory provision is neutral in appearance, it can have a major impact on the ability of a person or group to engage in expressive activity (see *Irwin Toy*, at pp. 974-75).

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[30] ... The by-law severely curtails Guignard's freedom to express his dissatisfaction with the practices of his insurance company publicly. It forces him to use advertising methods that presuppose the availability of adequate financial resources. Alternatively, it restricts him to private or virtually private communications such as distributing leaflets in the neighbourhood around his property, which is undoubtedly less effective, to convey to the public his opinion about the quality of his insurer's services.

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[32] The only appropriate remedy in this case is a declaration that the provisions of the municipal by-law the appellant has challenged are invalid. ... However, given the importance of the zoning by-law in municipal land use planning and the risk of

creating acquired rights, during a period in which there was a legal vacuum, ... that relief must be tempered by suspending the declaration of invalidity for a period of six months, to give the municipality an opportunity to revise its by-law.

NOTES AND QUESTIONS

1. Should a municipality be able to regulate billboards for aesthetic reasons? Can it regulate the size of signs, or can it go further and simply ban all signs? See, for example, *Vann Niagara Ltd v Oakville (Town)*, [2003 SCC 65](#); *Vancouver (City) v Jaminer*, [2001 BCCA 240](#); *Ontario (Minister of Transportation) v Miracle*, 249 DLR (4th) 680, [2005] OJ No 299 (QL) (CA).

2. In May 2019, the Ontario legislature enacted the *Federal Carbon Tax Transparency Act*, 2019, SO 2019, c 7. The law required gas stations in Ontario to affix stickers to gas pumps notifying consumers that the federal carbon pricing scheme "cost[s] the consumer an additional 4.4 cents per litre of gasoline, which will escalate gradually to a high of 11.1 cents per litre in three years' time." Retailers failing to do so would engender substantial, daily fines. In *CCLA v AG of Ontario*, [2020 ONSC 4838](#), the Ontario Superior Court struck down the relevant provisions as a form of compelled speech inconsistent with the Charter. It noted:

[63] ... [I]n designing the Sticker and making it mandatory the government is trying to accomplish a task that is only coincidentally related to conveying the price of automobile fuel of carbon emissions. That is, the government is not so much explaining a policy, but rather is making a partisan argument. In placing its version of Fuel Charge information on every gas pump in the province, the government is attempting to, in Premier Ford's words, demonstrate to Ontarians how the governing federal Liberals are "gouging them."

[64] In this way, the [provisions] create not so much consumer messages but political missives. ... The message is that the incumbent party in Ontario has better policy ideas than the incumbent party in Ottawa. That is a perfectly acceptable message in a political campaign, but it is not the one that the government has purported to enact.

[65] ... It is essential to the concept of the rule of law that the law does not serve political leaders, but rather political leaders serve the law: *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121, 142. By using the law for partisan ends, the Ontario legislature has enacted a measure that runs counter to, rather than in furtherance of, the purposes underlying freedom of expression.

For discussion of the constitutional battles over the federal carbon pricing scheme, see Chapter 9, Peace, Order, and Good Government.

IV. HATE SPEECH

Hate speech in Canada is currently restricted or regulated by both federal and provincial laws. The *Criminal Code* of Canada prohibits three types of "hate propaganda." Section 318(1) prohibits the advocacy or promotion of genocide; s 319(1) prohibits the incitement of hatred against an identifiable group, when this incitement is likely to lead to a breach of the peace; and s 319(2) prohibits the wilful promotion of hatred against an identifiable group. As well, s 320 enables a court to order the seizure or erasure of material that the court determines to be "hate propaganda."

The *Criminal Code* prohibitions were adopted pursuant to recommendations made by the Special Committee on Hate Propaganda in Canada, otherwise known as the Cohen Committee, whose members included Pierre Elliott Trudeau, Associate Professor of Law at Université de Montréal, and Mark MacGuigan, Associate Professor of Law at the University of Toronto. The committee reported on the state of hate mongering in Canada in 1965 and concluded:

The Committee firmly believes that Canadians who are members of any identifiable group in Canada are entitled to carry on their lives as Canadians without being victimized by the deliberate, vicious promotion of hatred against them. In a democratic society, freedom of speech does not mean the right to villify. ... However small the actors may be in number, the individuals and groups promoting hate in Canada constitute a "clear and present danger" to the functioning of a democratic society. For in times of social stress such "hate" could mushroom into a real and monstrous threat to our way of life.

See *Report of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at 24.

Building on the *Criminal Code* provisions, the *Customs Tariff*, SC 1997, c 36 prohibits the importation of materials that constitute hate propaganda. Human rights codes also regulate hate speech. Until its repeal in 2013 (c 37, s 2), s 13 of the *Canadian Human Rights Act*, SC 1976-77, c 33 (CHRA) prohibited telephonic or Internet communication that was likely to expose the members of an identifiable group to hatred or contempt. The human rights codes of British Columbia, Alberta, Saskatchewan, and the Northwest Territories continue to include provisions similar to s 13 of the CHRA, prohibiting signs, notices, and other representations that are likely to expose the members of an identifiable group to hatred or contempt.

US courts have tended to view laws regulating hate speech as unconstitutional content-based restrictions of the First Amendment. Hate speech is considered to fall within the scope of constitutionally protected expression. For the US Supreme Court, the harm to target audiences caused by most hate speech is not sufficient to justify the restriction of the fundamental right to free speech. However, if hate speech is directed at particular individuals with an intent to threaten or intimidate, such expression will not be protected by the First Amendment: *Virginia v Black*, 538 US 343, 123 S Ct 1536 (2003).

In *Keegstra*, which follows, and its companion case, *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 1990 CanLII 26, discussed in the subsequent notes, the Supreme Court of Canada seems to have taken a different approach, one that gives greater weight to equality values. As you read *Keegstra*, consider the following questions: What is the harm caused by hate speech? Can a hate-speech law be drafted with sufficient precision to catch only harmful speech? Should the promoters of hate be seen as a persecuted minority, or as extreme representatives of the dominant culture? In answering these questions, should we distinguish between different forms of hate speech—for example, between racist threats and insults directed at members of a particular racial or ethnic group and racist claims meant to "persuade" members of the general community about the undesirable characteristics of certain racial or ethnic groups?

R v Keegstra

[1990] 3 SCR 697, 1990 CanLII 24

[Keegstra, a high school teacher, was charged with hate propaganda for a number of comments he made in his classes. He attributed various evil qualities to Jews, including describing them as as "treacherous," "subversive," "sadistic," "money-loving," "power hungry," and "child killers." He taught his classes that Jewish people seek to destroy Christianity, are responsible for wars and revolution, "created the Holocaust to gain sympathy," and are deceptive, secretive, and inherently evil. Mr Keegstra expected his students to reproduce his teachings in class and on exams.

The relevant sections of the *Criminal Code* read:

319(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.
- • •

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as in section 318;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

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318(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin]

DICKSON CJ (Wilson, L'Heureux-Dubé, and Gonthier JJ concurring):

V. The History of Hate Propaganda Crimes in Canada

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... Following the Second World War and revelation of the Holocaust, in Canada and throughout the world a desire grew to protect human rights, and especially to guard against discrimination. Internationally, this desire led to the landmark *Universal Declaration of Human Rights* in 1948, and, with reference to hate propaganda, was eventually manifested in two international human rights instruments. In Canada, ... Justice Minister Guy Favreau [appointed] a special committee to study problems associated with the spread of hate propaganda in Canada.

[The composition of the Cohen Committee has been discussed above.]

... [The] Committee ... in 1966 ... released the unanimous *Report of the Special Committee on Hate Propaganda in Canada*.

The tenor of the Report is reflected in the opening paragraph of its preface, which reads:

This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very

order itself, there is bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.

In keeping with these remarks, the recurrent theme running throughout the Report is the need to prevent the dissemination of hate propaganda without unduly infringing the freedom of expression[.] ...

VI. Section 2(b) of the Charter: Freedom of Expression

Having briefly set out the history of attempts to prohibit hate propaganda, I can now address ... whether the *Charter* guarantee of freedom of expression is infringed by s. 319(2) of the *Criminal Code*. ...

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... Communications which wilfully promote hatred against an identifiable group without doubt convey a meaning, and are intended to do so by those who make them. ... [I]t must therefore be concluded that the first step of the *Irwin Toy* test is satisfied.

Moving to the second stage of the s. 2(b) inquiry, one notes that the prohibition in s. 319(2) aims directly at words—in this appeal, Mr. Keegstra's teachings—that have as their content and objective the promotion of racial or religious hatred. ... Section 319(2) therefore overtly seeks to prevent the communication of expression, and hence meets the second requirement of the *Irwin Toy* test.

... I thus find s. 319(2) to constitute an infringement of the freedom of expression guaranteed by s. 2(b) of the *Charter*. ...

[Chief Justice Dickson then briefly canvassed and rejected two arguments that hate speech did not fall within the ambit of s 2(b). He concluded, first, that hate speech was not a form of violence that would fall within the *Irwin Toy* exception. See the earlier notes about the treatment of violence under section 2(b). Second, he considered whether freedom of expression should be defined and limited by reference to other Charter provisions and Canada's international commitments (discussed below). He rejected that idea in favour of defining the freedom broadly and leaving consideration of those other values to the s 1 stage.]

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VII. Section 1 Analysis of Section 319(2)

A. General Approach to Section 1

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Obviously, ... [the phrase "free and democratic society"] embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution, although the balancing exercise in s. 1 is not restricted to values expressly set out in the *Charter*[.] ...

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... [A] rigid or formalistic approach to the application of s. 1 must be avoided. The ability to use s. 1 as a gauge which is sensitive to the values and circumstances particular to an appeal has been identified as vital in past cases

[Chief Justice Dickson then rejected the applicability of US constitutional doctrine in this area, noting that the Canadian Charter, unlike the US *Bill of Rights*, contains an express limitation clause. Moreover, he posited that Canada's international law

commitments, as well as the Charter's provisions with respect to equality and multiculturalism, suggested different pathways for the development of Canadian constitutional analysis.]

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C. Objective of Section 319(2)

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(i) Harm Caused by Expression Promoting the Hatred of Identifiable Groups

[The Chief Justice noted the conclusions of the Cohen Committee as well as a 1984 House of Commons Special Committee on Participation of Visible Minorities in Canadian Society.]

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... [T]he presence of hate propaganda in Canada is sufficiently substantial to warrant concern. ... Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. ...

... The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. ...

A second harmful effect of hate propaganda ... is its influence upon society at large. ... [It is] not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. ...

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(ii) International Human Rights Instruments

... I would also refer to international human rights principles ... for guidance with respect to assessing the legislative objective. [Here Dickson CJ cited the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. TS 1970, No. 28 (hereinafter CERD) and the *International Covenant on Civil and Political Rights*, 999 UNTS 171 (1966).]

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(iii) Other Provisions of the Charter

Significant indicia of the strength of the objective behind s. 319(2) are ... also expressly evident in various provisions of the *Charter* itself. ... Most importantly ... , ss. 15 and 27 represent a strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament's objective in prohibiting hate propaganda.

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(iv) Conclusion Respecting Objective of Section 319(2)

In my opinion, it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance. ...

D. Proportionality

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... [T]he interpretation of s. 2(b) under *Irwin Toy* gives protection to a very wide range of expression. Content is irrelevant to this interpretation, ... [which] often operates to leave unexamined the extent to which the expression at stake in a particular case promotes freedom of expression principles. ... [H]owever, the s. 1 analysis ... cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values ... to treat all expression as equally crucial to those principles at the core of s. 2(b).

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... [I]n my opinion the expression prohibited by s. 319(2) is not closely linked to the rationale underlying s. 2(b). ...

At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining ... political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information. ... Taken to its extreme, this argument would require us to permit the communication of all expression The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. ... There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

Another component central to ... s. 2(b) concerns the vital role of free expression as a means of ... self-fulfillment by developing and articulating thoughts and ideas It is true that s. 319(2) inhibits this process among those individuals whose expression it limits, and hence arguably works against freedom of expression values. On the other hand, such self-autonomy stems in large part from ... [nurturing] an identity derived from membership in a cultural or religious group. The message put forth by individuals who fall within the ambit of s. 319(2) represents a most extreme opposition to [this] idea The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates ... an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society.

Moving on to a third strain of thought[,] ... [t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and ... is largely derived from the Canadian commitment to democracy. ...

The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong[, even hateful] language in political and social debate ... is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political," thus putatively placing it at the very heart of ... the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic [sic] to democratic values. Hate propaganda ... [argues] for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

Indeed, one may ... contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers. ...

• • •

(ii) Rational Connection

... [I]t would be difficult to deny that the suppression of hate propaganda reduces the harm such expression does to individuals who belong to identifiable groups and to relations between various cultural and religious groups in Canadian society.

Doubts have been raised, however, as to whether the actual effect of s. 319(2) is to undermine any rational connection between it and Parliament's objective. As stated in the reasons of McLachlin J., there are three primary ways in which ... the impugned legislation might be seen as an irrational means of carrying out the Parliamentary purpose. First, ... the provision may actually promote the cause of hate-mongers[.] ... [P]ersons accused of intentionally promoting hatred often see themselves as martyrs, and may actually generate sympathy ... in the role of under-dogs engaged in battle against the immense powers of the state. Second, the public may view the suppression of expression by the government with suspicion, [possibly perceiving it as] containing an element of truth. Finally, it is often noted ... that Germany of the 1920s and 1930s possessed and used hate propaganda laws similar to those existing in Canada, and yet these laws did nothing to stop the triumph of a racist philosophy under the Nazis.

... I recognize that the effect of s. 319(2) is impossible to define with exact precision—the same can be said for many laws, criminal or otherwise. In my view, however, the position that there is no strong and evident connection between the criminalization of hate propaganda and its suppression is unconvincing. ...

It is undeniable that media attention has been extensive ... Yet from my perspective, s. 319(2) serves to illustrate to the public the severe reprobation ... [for] messages of hate directed towards racial and religious groups. ... [Criminal law and processes are themselves] a form of expression, and the message sent out is that hate propaganda is harmful to target group members and threatening to a harmonious society[.] ...

In this context, it can also be said that government suppression of hate propaganda will not make the expression attractive and hence increase acceptance of its content. Similarly, it is very doubtful that Canadians will have sympathy for either propagators of hatred or their ideas. Governmental disapproval of hate propaganda does not invariably result in dignifying the suppressed ideology. Pornography is not dignified by its suppression, nor are defamatory statements against individuals seen as meritorious because the common law lends its support to their prohibition. Again, I stress my belief that hate propaganda legislation and trials are a means by which the values beneficial to a free and democratic society can be publicized. ...

As for ... pre-World War Two Germany ... [N]o one is contending that hate propaganda laws can in themselves prevent the tragedy of a Holocaust; conditions particular to Germany made the rise of Nazi ideology possible despite the existence and use of these laws ... Rather, hate propaganda laws are one part of a free and democratic society's bid to prevent the spread of racism, and their rational connection to this objective must be seen in such a context. ... Indeed, this Court's attention has been drawn to the fact that a great many countries possess legislation similar to that found in Canada[.] ...

... [I] therefore conclude that the first branch of the proportionality test has been met. ...

(iii) Minimal Impairment of the Section 2(b) Freedom

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... [It is argued that the law] creates a real possibility of punishing expression that is not hate propaganda. It is thus submitted that the legislation is overbroad, ... and also unduly vague In either instance, it is said that the effect of s. 319(2) is to limit the expression of merely unpopular or unconventional communications. Such communications may present no risk of causing the harm which Parliament seeks to prevent, and will perhaps be closely associated with the core values of s. 2(b). This overbreadth and vagueness could consequently allow the state to ... infringe excessively the freedom of expression or, what is more likely, could have a chilling effect whereby persons potentially within s. 319(2) would exercise self-censorship. Accordingly, those attacking the validity of s. 319(2) contend that vigorous debate on important political and social issues, so highly valued in a society that prizes a diversity of ideas, is unacceptably suppressed by the provision. ...

... In order to ... determine whether s. 319(2) minimally impairs the freedom of expression, the nature and impact of specific features of the provision must be examined in some detail. ...

[Chief Justice Dickson first noted that statements made in private conversation were excluded from s 319(2), even if such statements were made in a public forum, indicating Parliament's concern not to intrude on the privacy of the individual. He then noted the demanding *mens rea* element entailed by the requirement that the promotion of hatred be "wilful," which had been interpreted as requiring that the accused have subjectively desired the promotion of hatred or have foreseen such a consequence as certain to result from the communication.]

• • •

It has been argued, however, that even a demanding *mens rea* component fails to give s. 319(2) a constitutionally acceptable breadth. The problem is said to lie in the failure of the offence to require proof of actual hatred resulting from a communication, the assumption being that only such proof can demonstrate a harm serious enough to justify limiting ... freedom of expression[.] ...

While mindful of the dangers ... , I do not find them sufficiently grave to compel striking down s. 319(2). First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group. In fact, to require direct proof of hatred in listeners would severely debilitate the effectiveness of s. 319(2) in achieving Parliament's aim. It is well-accepted that Parliament can use the criminal law to prevent the risk of serious harms[,] ... and in view of the grievous harm to be avoided ... , I conclude that proof of actual hatred is not required in order to justify a limit under s. 1.

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The meaning of "hatred" remains to be elucidated. ... [T]he word "hatred" [must] be defined according to the context in which it is found. A dictionary definition may be of limited aid to such an exercise, for by its nature a dictionary seeks to offer a panoply of possible usages, rather than the correct meaning of a word as contemplated by Parliament. Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. ... Hatred is predicated on destruction, and hatred against

identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

• • •

The factors mentioned above suggest that s. 319(2) does not unduly restrict the s. 2(b) guarantee. The terms of the offence, as I have defined them, rather indicate that s. 319(2) possesses definitional limits which act as safeguards to ensure that it will capture only expressive activity which is openly hostile to Parliament's objective, and will thus attack only the harm at which the prohibition is targeted. ...

[Chief Justice Dickson then reviewed the defences found in s 319(3) as further evidence of the narrow scope of s 319(2). With respect to the defence of truth found in s 319(3)(a), he expressed doubt as to whether even truthful statements communicated with an intention to promote hatred would be required to be free from criminal condemnation.]

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... I should comment on a final argument marshalled in support of striking down s. 319(2) because of overbreadth or vagueness. It is said that the presence of the legislation has led authorities to interfere with a diverse range of political, educational and artistic expression, demonstrating only too well the way in which overbreadth and vagueness can result in undue intrusion and the threat of persecution. In this regard, a number of incidents are cited where authorities appear to have been overzealous in their interpretation of the law, including the arrest of individuals distributing pamphlets admonishing Americans to leave the country and the temporary holdup at the border of a film entitled *Nelson Mandela* and Salman Rushdie's novel *Satanic Verses* ... note that the latter two examples involve not s. 319(2), but similar wording found in the *Customs Tariff*, S.C. 1987, c. 49, s. 114, and Schedule VII, Code 9956(b)).

That s. 319(2) may in the past have led authorities to restrict [valuable] expression ... is surely worrying. I hope, however, that my comments as to the scope of the provision make it obvious that only the most intentionally extreme forms of expression will find a place within s. 319(2). In this light, one can safely say that the incidents mentioned above illustrate not over-expansive breadth and vagueness in the law, but rather actions by the state which cannot be lawfully taken pursuant to s. 319(2). The possibility of illegal police harassment clearly has minimal bearing on the proportionality of hate propaganda legislation to legitimate Parliamentary objectives, and hence the argument based on such harassment can be rejected.

C. Alternative Modes of Furthering Parliament's Objective

One of the strongest arguments [against] s. 319(2) ... [is] that non-criminal responses can more effectively combat the harm caused by hate propaganda. Most generally, it is said that discriminatory ideas can best be met with information and education programmes extolling the merits of tolerance and cooperation between racial and religious groups. As for the prohibition of hate propaganda, human rights statutes are pointed to as being a less severe and more effective response than the criminal law. ... This conciliatory tack is said to be preferable to penal sanction because an incentive is offered the disseminator to cooperate with human rights tribunals and thus to amend his or her conduct.

Given the stigma and punishment associated with a criminal conviction and the presence of other modes of government response in the fight against intolerance,

it is proper to ask whether s. 319(2) can be said to impair minimally the freedom of expression. With respect to the efficacy of criminal legislation in advancing the goals of equality and multicultural tolerance in Canada, I agree that the role of s. 319(2) will be limited. It is important, in my opinion, not to hold any illusions about the ability of this one provision to rid our society of hate propaganda and its associated harms. Indeed, to become overly complacent, forgetting that there are a great many ways in which to address the problem of racial and religious intolerance, could be dangerous. Obviously, a variety of measures need be employed in the quest to achieve such lofty and important goals.

In assessing the proportionality of a legislative enactment to a valid governmental objective, however, s. 1 should not ... in every instance ... force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

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I thus conclude that s. 319(2) of the *Criminal Code* does not unduly impair the freedom of expression. ...

[With respect to the third branch of the proportionality test, Dickson CJ emphasized the enormous importance of the objective of s 319(2): "Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure." He then concluded that, in light of that objective, the effects of s 319(2), "involving as they do the restriction of expression largely removed from the heart of free expression values, are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s 2(b)." The infringement of freedom of expression was therefore upheld as a reasonable limit under s 1. Chief Justice Dickson's discussion of s 319(3)(a) and the presumption of innocence guaranteed under s 11(d) of the Charter have been omitted. He concluded that the presumption of innocence was infringed, but that the limitation of the right could be upheld under s 1.]

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McLACHLIN J (Sopinka J concurring; La Forest J concurring in part) (dissenting):

Hate literature presents a great challenge to our conceptions about the value of free expression. Its offensive content often constitutes a direct attack on many of the other principles which are cherished by our society. Tolerance, the dignity and equality of all individuals; these and other values are all adversely affected by the propagation of hateful sentiment. The problem is not peculiarly Canadian; it is universal. Wherever racially or culturally distinct groups of people live together, one finds people, usually a small minority of the population, who take it upon themselves to denigrate members of a group other than theirs. ...

The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. Insofar as it may persuade others to the same point of view, it may threaten social stability. And it is intrinsically offensive to people—the majority in most democratic countries—who believe in the equality of all people regardless of race or creed.

[Justice McLachlin reviewed the treatment of hate propaganda under the US First Amendment and then went on to discuss the approach adopted under international instruments.]

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Both the American and international approach recognize that freedom of expression is not absolute, and must yield in some circumstances to other values. The divergence lies in the way the limits are determined. On the international approach, the objective of suppressing hatred appears to be sufficient to override freedom of expression. In the United States, it is necessary to go much further and show clear and present danger before free speech can be overridden.

The *Charter* follows the American approach in method, affirming freedom of expression as a broadly-defined and fundamental right, and contemplating balancing the values protected by and inherent in freedom of expression against the benefit conferred by the legislation limiting that freedom under s. 1 of the *Charter*. This is in keeping with the strong liberal tradition favouring free speech in this country—a tradition which had led to conferring quasi-constitutional status on free expression in this country prior to any bill of rights or Charter. At the same time, the tests are not necessarily the same as in the United States.

[After finding that s 319(2) infringed freedom of expression, McLachlin J proceeded to the s 1 analysis. She easily concluded that the legislative goals of protecting social harmony and individual dignity were of a substantial nature. She then moved to the proportionality analysis.]

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(b) Rational Connection

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... [I]t is clear that the legislation does, at least at one level, further Parliament's objectives. Prosecutions of individuals for offensive material directed at a particular group may bolster its members' beliefs that they are valued and respected Such a use of the criminal law may well affirm certain values and priorities which are of a pressing and substantial nature.

It is necessary, however, to go further, and consider ... whether, given the actual effect of the legislation, a rational connection exists between it and its objectives. Legislation designed to promote an objective may in fact impede that objective.

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... Section 319(2) may well have a chilling effect on defensible expression by law-abiding citizens. At the same time, it is far from clear that it provides an effective way of curbing hatemongers. Indeed, many have suggested it may promote their cause. Prosecutions under the *Criminal Code* for racist expression have attracted extensive media coverage. Zundel, prosecuted not under s. 319(2) but for the crime of spreading false news (s. 181), claimed that his court battle had given him "a million dollars worth of publicity": *Globe and Mail*, March 1, 1985, p. P1.

Not only does the criminal process confer on the accused publicity for his dubious causes—it may even bring him sympathy.

The argument that [hate speech] prosecutions ... will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, these listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it. Theories of a grand conspiracy ... can become all too appealing if government dignifies them by completely suppressing their utterance.

Historical evidence also gives reason to be suspicious of the claim that hate propaganda laws contribute to the cause of multiculturalism and equality. ...

[Justice McLachlin referred to evidence about the ineffectiveness of anti-hate laws in pre-Hitler Germany and the use of criminal prosecutions by the Nazis as platforms to propagate their message.]

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Viewed from the point of view of actual effect, the rational connection ... may be argued to be tenuous. Certainly it cannot be said that there is a strong and evident connection between the criminalization of hate propaganda and its suppression.

(c) Minimum Impairment

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... Despite the limitations found in s. 319(2), a strong case can be made that it is overbroad

The first difficulty lies in the different interpretations which may be placed on the word "hatred." ...

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It is argued that the requirement of "wilful promotion" eliminates from the ambit of s. 319(2) statements which are made for honest purposes such as telling a perceived truth or contributing to a political or social debate. The difficulty with this argument is that those purposes are compatible with the intention ... of promoting hatred. A belief that what one says about a group is true and important to political and social debate is quite compatible with and indeed may inspire an intention to promote active dislike of that group. Such a belief is equally compatible with foreseeing that promotion of such dislike may stem from one's statements. The result is that people who make statements primarily for non-nefarious reasons may be convicted of wilfully promoting hatred.

[Justice McLachlin refused to place much weight on the absence of any requirement that actual harm or incitement to hatred be shown, recognizing the difficulty of assessing with any precision the effects that expression of a particular message will have on those who are ultimately exposed to it. She also acknowledged that the breadth of s 319(2) was narrowed somewhat by the defences.]

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The real answer to the debate about [overbreadth] is provided by the section's track record. Although the section is of relatively recent origin, it has provoked many questionable actions on the part of the authorities. There have been no reported convictions, other than the instant appeals. But the record amply demonstrates that intemperate statements about identifiable groups, particularly if they represent an unpopular viewpoint, may attract state involvement or calls for police action. [McLachlin noted calls for banning Leon Uris's pro-Zionist novel *The Haj* (1984); barriers to importing Salman Rushdie's *Satanic Verses* (1988) and a film about Nelson Mandela ordered as an educational tool by a post-secondary institution; and arrests for distributing pamphlets containing the words "Yankee Go Home." Even if "many cases are winnowed out" by prosecutors, it showed that "initially quite a lot of speech is caught by s. 319(2)."]

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Even [absent specific criminal proceedings], ... the chilling effect of the law may be substantial. The more vague the language of the prohibition, the greater the danger that right-minded citizens may curtail ... their expression [so as not to] run afoul of the law. The danger here is not so much that the legislation will deter those bent on promoting hatred The danger is rather that the legislation may have a

chilling effect on legitimate activities important to our society . . . Given the vagueness of the prohibition of expression in s. 319(2), one may ask how speakers are to know when their speech may be seen as encroaching on the forbidden area. The reaction is predictable. The combination of overbreadth and criminalization may well lead people desirous of avoiding even the slightest brush with the criminal law to protect themselves in the best way they can—by confining their expression to non-controversial matters. Novelists may steer clear of controversial characterizations of ethnic characteristics, such as Shakespeare's portrayal of Shylock in *The Merchant of Venice*. Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered. These matters go to the heart of the traditional justifications for protecting freedom of expression.

... [The] second aspect of minimum impairment [is that] ... the very fact of criminalization [may] represent an excessive response to the problem of hate propagation. ... Given the stigma that attaches and the freedom which is at stake, the contest between the individual and the state ... must be regarded as difficult and harrowing in the extreme. ... The additional sanction of the criminal law may pose little deterrent to a convinced hate-monger who may welcome the publicity it brings; it may, however, deter the ordinary individual.

Moreover, it is arguable whether criminalization of expression calculated to promote racial hatred is necessary. Other remedies are perhaps more appropriate and more effective. Discrimination on grounds of race and religion is worthy of suppression. Human rights legislation, focusing on reparation rather than punishment, has had considerable success in discouraging such conduct. ...

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Finally, it can be argued that greater precision is required in the criminal law than, for example, in human rights legislation because of the different character of the two types of proceedings. ...

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(d) Importance of the Right Versus Benefit Conferred

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... Viewed from the perspective of our society as a whole, the infringement of the guarantee of freedom of expression before this Court is a serious one. Section 319(2) ... strikes directly at [expressive] content and at the viewpoints of individuals. It strikes, moreover, at viewpoints in widely diverse domains, whether artistic, social or political. It is capable of catching ... works of art and the intemperate statement made in the heat of social controversy. While few may actually be prosecuted ... , many fall within the shadow of its broad prohibition. These dangers are exacerbated by the fact that s. 319(2) applies to all public expression. ...

The consequences of the infringement of freedom of speech imposed by s. 319(2) of the *Criminal Code* considered from the viewpoint of the individual caught within its net are equally serious. [Here McLachlin J cited the possible penalties, the difficulty of determining hateful speech in advance, and associated fears of speakers who are not hate-mongers.] ...

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I turn then to the other side of the scale . . . As indicated earlier, ... the objectives ... are of a most worthy nature. Unfortunately, the claims of gains to be achieved ... are tenuous. It is far from clear that the legislation does not promote the cause of

hate-mongering extremists and hinder the possibility of voluntary amendment of conduct more than it discourages the spread of hate propaganda. ...

In my opinion, the result is clear. Any questionable benefit of the legislation is outweighed by the significant infringement on the constitutional guarantee of free expression effected by s. 319(2) of the *Criminal Code*. ...

[Justice McLachlin concluded that the limit on expression effected by s 319(2) could not be justified under s 1. On the presumption of innocence issue, she found that s 319(3) of the *Criminal Code* infringed the presumption of innocence and could not be upheld under s 1. Justice La Forest agreed with McLachlin J on the freedom of expression issue but found it unnecessary to deal with the issue respecting the right to be presumed innocent.] [Emphasis in original.]

Appeal allowed.

NOTES AND QUESTIONS

1. The definition of "identifiable group" in s 318(4) of the *Criminal Code* now reads:

318(4) In this section, *identifiable group* means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability.

2. The "chilling effect" discussed in *Keegstra* is a term drawn from US First Amendment jurisprudence: see *New York Times v Sullivan*, 376 US 254, 84 S Ct 710 (1964). The concern is that a broad and imprecisely worded restriction will deter or "chill" expression—that speakers will prefer to steer clear of the prohibited zone rather than risk running afoul of the law.

The disagreement between Dickson CJ and McLachlin J turns, in part, on their willingness to accept the argument from chilling effect. Do you think that hate-speech regulation has a chilling effect? Can the problem be avoided by better drafting—by defining the prohibited activity more precisely?

Note that in *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 [*Hill*], the Court appeared to give little weight to the argument that the common law of defamation, combined with high damage awards, chills criticism of public officials. The Court may now be more open to this argument in light of their subsequent decision in *Grant v Torstar Corp*, 2009 SCC 61. Both *Hill* and *Grant* are discussed in more detail in Section VIII, "Defamation."

3. Many of the concerns expressed by McLachlin J resurfaced in her decision for a majority of the Court in *R v Zundel*, [1992] 2 SCR 731, 1992 CanLII 75. Ernst Zundel was one of the world's most prolific Holocaust deniers, operating out of a boarded-up house in downtown Toronto. A private citizen swore an information before a Justice of the Peace alleging that Zundel wilfully published news that he knew was false and likely to cause injury or mischief to a public interest, contrary to s 181 of the *Criminal Code*.

In *Zundel*, the Supreme Court of Canada unanimously agreed that the deliberate publication of statements that the speaker knows to be false is a protected form of expression under s 2(b). The Court referred to the difficulty of determining whether the statements were in fact false and the dangers of excluding statements from constitutional protection that had even a marginal relation to the values protected by freedom of expression. However, the Court split 4–3 over whether s 181, the false news provision, was a justified and reasonable limit on freedom of expression.

Justice McLachlin held for the majority that the false news provision, an old and obscure provision of the Code, had not been enacted for a purpose that was important enough to limit a Charter right or freedom. She stressed that other countries did not have similar laws

and that, at best, the law was originally enacted "to protect the mighty and the powerful from discord or slander." Even assuming that the law was intended to promote racial and social tolerance, McLachlin J concluded that it was disproportionate and overbroad for that purpose. She warned that it "makes possible conviction for virtually any statement which does not accord with currently accepted 'truths,' and lends force to the argument that the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas."

The minority stressed, as did the majority in *Keegstra*, the importance of prohibiting speech that ran counter to the constitutional values of equality and multiculturalism, the tenuous connection between hate speech and the purposes of freedom of expression, and the procedural safeguards provided by a criminal prosecution.

NOTE: CANADA (HUMAN RIGHTS COMMISSION) V TAYLOR

Canada (Human Rights Commission) v Taylor was decided at the same time as *Keegstra*. At issue was the constitutionality of s 13 of the *Canadian Human Rights Act*, SC 1976-77, c 33, which, as it then read, provided that it was a discriminatory practice for a person to use the telephone to repeatedly communicate messages "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination." (Section 13 was subsequently amended to extend to Internet communication.) Taylor and the Western Guard Party instituted a telephone message service with pre-recorded messages on the theme of the Jewish conspiracy to control Canadian society. After several successful complaints against him, Taylor challenged s 13(1) under s 2(b) of the Charter (which had since come into force).

Chief Justice Dickson, writing for the majority, held that s 13 of the *Canadian Human Rights Act* breached s 2(b) of the Charter, but was a "reasonable" and "demonstrably justified" limit under s 1. In defining the scope of s 13, and more particularly the terms "hatred" and "contempt," the Chief Justice focused on "unusually strong and deep-felt emotions of detestation, calumny and vilification" was not "particularly expansive." He noted, however, that "the nature of human rights legislation militates against an unduly narrow reading of s 13(1)" and indicated that he had no "wish to transgress the well-established principle that the rights enumerated in such a code should be given their full recognition and effect through a fair, large and liberal interpretation." Even though "the section may impose a slightly broader limit upon freedom of expression than does s. 319(2) [the hate-promotion provision] of the *Criminal Code* ... the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision." In his view,

as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of the feeling described in the phrase "hatred or contempt," there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.

In her dissenting judgment in *Taylor*, McLachlin J argued that the "absence of any requirement of intent or foreseeability of the actual promotion of hatred or contempt," while "consistent with the remedial ... focus of human rights legislation," broadened the scope of the section so that it included communication that ought not to be prohibited. In response, Dickson CJ observed that in contrast to criminal law, the purpose of human rights legislation is to "compensate and protect" the victim rather than to "stigmatize or punish" the person who has discriminated against them.

NOTES: HUMAN RIGHTS CODES AND FREEDOM OF EXPRESSION

1. In 2001, s 13(1) of the *Canadian Human Rights Act* was amended to apply to messages communicated over the Internet, significantly expanding the scope of its application. This expansion raised questions of whether s 13(1) was restricting freedom of expression in ways that were no longer constitutional. The ensuing debate resulted in the repeal of the provision in 2013 (see note 3 below).

2. Section 12 of the *Canadian Human Rights Act*, another provision dealing with discriminatory speech, states that it is unlawful to display any notice, sign, symbol, emblem, or other representation that indicates discrimination or an intention to discriminate against an identifiable group. All provincial and territorial human rights laws, except for those in the Yukon Territory, include a provision similar to s 12. When this provision was first enacted in Ontario, its purpose was to prohibit signs in store windows that indicated that members of certain racial or ethnic groups would not be served. However, in some jurisdictions, the discriminatory sign provision has been interpreted broadly so that it extends to discriminatory speech that appears on signs and, in some provinces, that occurs in publications.

3. Human rights code regulation of hate speech has become the subject of public debate over the past few years. A controversy arose from complaints made to the Canadian Human Rights Commission and the BC Human Rights Tribunal against *Maclean's* magazine for its publication of an article by Mark Steyn, "The Future Belongs to Islam," *Maclean's* (20 October 2006). Steyn argued (among other things) that Muslims would come to dominate Europe through immigration and higher birth rates and that their goal is to make European countries into Muslim states that enforce sharia law. He also argued that Muslims are generally supportive of violence to achieve this end. Both complaints were dismissed. Another well-publicized Canadian case involved a complaint made to the Alberta Human Rights Commission against Ezra Levant and the *Western Standard* magazine following the publication of the "Danish cartoons." The complaint was dismissed by the commission.

A report written by Richard Moon, "Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet" (Canadian Human Rights Commission, October 2008), recommended the repeal of s 13, which occurred in 2013 (c 37, s 2). Professor Moon wrote (at 1-2):

The use of censorship by the government should be confined to a narrow category of extreme expression—that which threatens, advocates or justifies violence against the members of an identifiable group, even if the violence that is supported or threatened is not imminent. ... Less extreme forms of discriminatory expression, although harmful, cannot simply be censored out of public discourse. Any attempt to [do so] would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. Because these less extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion. But because they are so pervasive, it is also vital that they be addressed or confronted. We must develop ways other than censorship to respond to [this sort of] expression

This understanding of the purpose of hate speech law, as the protection of the members of identifiable groups from the risk of violence generated by hate speech, is narrower than the more familiar justification which emphasizes the protection of the individual's dignity and his/her right to equal respect within the community. It may, however, offer a better account of the actual practice of hate speech law in Canada, which focuses on the most extreme and hateful instances of expression. ... However, [it] does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of

the "dispute" between them. [He concluded that hate speech should continue to be prohibited under the *Criminal Code*.]

The hate-speech provisions of the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1 were challenged, and upheld, in *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#), excerpted below. As you will see, the Supreme Court of Canada acknowledged, but dismissed, concerns that the definition of "hatred" in the Code was unduly subjective and overbroad.

4. Human rights codes prohibit racial and other forms of discrimination in the provision of employment, accommodation, and other services available to the public. This prohibition has been interpreted as covering acts that create a "negative environment" that adversely affects a person's ability to access and enjoy a particular service. Thus, expression that contributes to the creation of such an environment may be found to constitute a discriminatory practice. An obvious example of expression that contributes to a negative environment is racial name-calling and verbal abuse directed at an individual in their workplace.

The issue of expression creating a negative environment was dealt with by the Supreme Court of Canada in *Ross v New Brunswick School District No 15*, [\[1996\] 1 SCR 825, 1996 CanLII 237](#). The case involved a schoolteacher (Ross) whose expression of anti-Semitic views outside the classroom (in published writings and public appearances) was found by a human rights tribunal to have created a poisoned environment within the classroom. The tribunal found that the school board, in allowing Ross to continue to teach, was guilty of discrimination under the provincial human rights code. In reaching this conclusion, the human rights tribunal relied on evidence of discriminatory conduct engaged in by some students. Although there was no evidence that anti-Jewish statements by students in the school were directly influenced by Ross's teachings, the tribunal concluded that it was reasonable to anticipate such an influence given the high degree of publicity surrounding Ross's publications. The tribunal ordered the school board to remove Ross from the classroom and to make efforts to find him a non-teaching position. Ross was also permanently prohibited from publishing or distributing anti-Semitic writings as a condition of retaining employment with the school board. Ross appealed, arguing that the orders violated his freedom of expression under the Charter.

The Supreme Court of Canada upheld the order removing Ross from the classroom as a reasonable limit on freedom of expression. In doing so La Forest J, writing for the Court, stressed the importance of the educational context (at 873-74):

There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. ... Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom, are paramount in the education of young children. This helps foster self-respect and acceptance by others.

The Court did not, however, uphold the permanent speech ban as a reasonable limit under s 1. In the Court's view, once Ross was no longer in a teaching position, there was no reason to think that his writings would continue to produce a poisoned atmosphere in the classroom: see also the Court of Appeal's decision in *Kempling v College of Teachers (British Columbia)*, [2005](#)

BCCA 327, upholding the one-month suspension of a teacher for anti-homosexual statements published in a newspaper and dismissing Charter challenges based on ss 2(a) and 2(b).

Saskatchewan (Human Rights Commission) v Whatcott

2013 SCC 11

[This case concerned a challenge to a prohibition on hateful publications in the *Saskatchewan Human Rights Code*. Although the decision was similar to the Court's reasons in *Canada (Human Rights Commission) v Taylor*, the relevant provision in the Saskatchewan Code, s 14(1), was broader than s 13(1) of the *Canadian Human Rights Code*, providing:

- 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:
 - (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
 - (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
- (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

"Prohibited ground" as defined in the Act includes "sexual orientation."]

ROTHSTEIN J (McLachlin CJ and LeBel, Fish, Abella, and Cromwell JJ concurring):

[Whatcott was the subject of complaints relating to four flyers he distributed on behalf of the Christian Truth Activists. The flyers, which were placed in household mailboxes, contained many offensive statements, many offensive statements linking homosexuality to pedophilia and HIV/AIDS. Also included were references to biblical texts. Four individuals alleged that the material promoted hatred against individuals because of their sexual orientation, thereby violating s 14 of the Code.

The Human Rights Tribunal found that Mr Whatcott's flyers promoted hatred against individuals because of their sexual orientation and so violated the Code. It concluded that the prohibition was a reasonable restriction on Whatcott's freedom of expression and religion. Whatcott was barred from distributing the flyers or similar material and was ordered to pay compensation to each of the complainants.

Before beginning a constitutional analysis of the Code, Rothstein J addressed the definition of hatred from *Taylor* and the criticisms of it as being either unduly subjective or overbroad. *Taylor* had defined hatred as involving "unusually strong and deep-felt emotions of detestation, calumny and vilification." Justice Rothstein felt it appropriate to tweak the *Taylor* definition of hatred by excluding "calumny"—that is, speech amounting to false misrepresentations. Detestation and vilification were thus the harmful effects that the Code sought to eliminate and "only extreme and egregious examples of delegitimizing expression" (at para 46) would be considered hate speech. This definition of hatred, he declared, "excludes merely offensive or hurtful expression" (at para 46). "The question courts must ask," wrote Rothstein J, "is

whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred" (at para 56).

Justice Rothstein noted that in the years following *Taylor*, there had been considerable human rights and academic commentary about what constitutes hatred, and that concerns had been voiced about the subjective and overbroad nature of the term. He concluded, however, that it was possible to identify the "hallmarks" of hatred:

[44] ... Hate speech often vilifies the targeted group by blaming its members for the current problems in society, alleging that they are a "powerful menace" ... ; that they are carrying out secret conspiracies to gain global control ... ; or plotting to destroy western civilization Hate speech also further delegitimizes the targeted group by suggesting its members are illegal or unlawful, such as by labelling them "liars, cheats, criminals and thugs" ... , a "parasitic race" or "pure evil"

[45] Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles ... , or "deviant criminals who prey on children" One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or as subhuman. References to a group as "horrible creatures who ought not to be allowed to live"; "incognizant primates," "genetically inferior" and "lesser beasts"; or "sub-human filth" are examples of dehumanizing expression that calls into question whether group members qualify as human beings.

Having thus interpreted the Code provision, the Court moved on to determine its constitutionality. The standard of review for issues of constitutionality was held to be that of correctness.

The Human Rights Commission conceded that Whatcott's freedom of expression was infringed, and so the Court turned to s 1, finding the legislative objective pressing and substantial. But the Court found that the words "ridicules, belittles or otherwise affronts the dignity of" in s 14(1)(b) were not "rationally connected to reducing systemic discrimination against vulnerable groups" (at para 99). The expression captured by those words was found not to rise to the level of "ardent and extreme feelings" (at para 89) essential to the constitutionality of the limitation on expression in *Taylor*, so the Court ordered those words struck out. The following passages address the minimal impairment branch of the s 1 analysis and Whatcott's s 2(a) argument.]

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[111] In my view, once the additional words are severed from s. 14(1)(b), the remaining prohibition is not overbroad. A limitation predicated on expression which exposes groups to hatred tries to distinguish between healthy and heated debate on controversial topics of political and social reform, and impassioned rhetoric which seeks to incite hatred as a means to effect reform. The boundary will not capture all harmful expression, but it is intended to capture expression which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent. In that way, the limitation is not overbroad, but rather tailored to impair freedom of expression as little as possible.

2. Nature of the Expression

[112] Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(b) of the *Charter*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the

expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.

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[114] Hate speech is at some distance from the spirit of s. 2(b) because it does little to promote, and can in fact impede, the values underlying freedom of expression. As noted by Dickson C.J. in *Keegstra*, expression can be used to the detriment of the search for truth (p. 763). As earlier discussed, hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim. These are important considerations in balancing hate speech with competing *Charter* rights and in assessing the constitutionality of the prohibition in s. 14(1)(b) of the *Code*.

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[120] In my view, s. 14 of the *Code* provides an appropriate means by which to protect almost the entirety of political discourse as a vital part of freedom of expression. It extricates only an extreme and marginal type of expression which contributes little to the values underlying freedom of expression and whose restriction is therefore easier to justify ... [citations omitted]. This suggests that, at least in this respect, the provision is not overbroad in its application.

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C. Section 2(a) of the Charter

[152] I now turn to a consideration of whether s. 14(1)(b) infringes the *Charter* guarantee of freedom of conscience and religion under s. 2(a). Mr. Whatcott argues that, to the extent that s. 14(1)(b) of the *Code* precludes criticism of same-sex conduct or activity, it infringes freedom of religion under s. 2(a). He submits that sexual conduct has long been a topic of religious discussion and debate, and that "[o]bjectection to same-sex sexual activity is common among religious people. They object because they believe this conduct is harmful; and many religious people also believe that they are obligated to do good and warn others of the danger": R.F., at para. 78. Mr. Whatcott contends that s. 2(a) protects his right to proclaim this aspect of his religion.

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[156] It was not in dispute that Mr. Whatcott sincerely believes that his religion requires him to proselytize homosexuals. To this end, he appears to employ expression of an extreme and graphic nature to make his point more compelling. To the extent that his choice of expression is caught by the hatred definition in s. 14(1)(b), the prohibition will substantially interfere with Mr. Whatcott's ability to disseminate his belief by display or publication of those representations. Section 14(1)(b) of the *Code* infringes freedom of conscience and religion as guaranteed under s. 2(a) of the *Charter*.

[Turning again to s 1, Rothstein J repeated the exercise of excising the words "ridicules, belittles or otherwise affronts the dignity of" from the *Code* (at para 164) and found the remainder of the provision to be a justifiable limit on freedom of religion.

Having determined the constitutionality of s 14 of the *Code*, the Court then turned to the issue of whether the flyers contravened the *Code*. On this issue, the standard of review regarding the tribunal's decision was found to be one of reasonableness (at para 168)].

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[174] I agree that the words and phrases in a publication cannot properly be assessed out of context. The expression must be considered as a whole, to determine the overall impact or effect of the publication. However, it is also legitimate to proceed

with a closer scrutiny of those parts of the expression which draw nearer to the purview of s. 14(1)(b) of the Code. In most cases, the overall context of the expression will affect the presentation, tone, or meaning of particular phrases or excerpts. However, a dissertation on public policy issues will not necessarily cleanse passages within a publication that would otherwise contravene a hate speech prohibition [citations omitted].

[175] In my view, it was not unreasonable for the Tribunal in this case to isolate the phrases it considered to be in issue. If, despite the context of the entire publication, even one phrase or sentence is found to bring the publication, as a whole, in contravention of the Code, this precludes publication of the flyer in its current form.

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[177] Genuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate. If Mr. Whatcott's message was that those who engage in sexual practices not leading to procreation should not be hired as teachers or that such practices should not be discussed as part of the school curriculum, his expression would not implicate an identifiable group. If, however, he chooses to direct his expression at sexual behaviour by those of a certain sexual orientation, his expression must be assessed against the hatred definition in the same manner as if his expression was targeted at those of a certain race or religion.

[Turning to the content of the flyers, Rothstein J found that some of them combined many of the "hallmarks" of hatred: "The message which a reasonable person would take from the flyers is that homosexuals, by virtue of their sexual orientation, are inferior, untrustworthy and seek to proselytize and convert our children" (para 188).]

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[190] Whether or not Mr. Whatcott intended his expression to incite hatred against homosexuals, in my view it was reasonable for the Tribunal to hold that, by equating homosexuals with carriers of disease, sex addicts, pedophiles and predators who would proselytize vulnerable children and cause their premature death, Flyers D and E would objectively be seen as exposing homosexuals to detestation and vilification.

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[194] However, in my view, the Tribunal's decision with respect to Flyers F and G was unreasonable. ...

[195] Flyers F and G are identical, and are comprised mainly of a reprint of a page of the classified advertisements from a publication called Perceptions. Printed by hand in bold print at the top of the page are the words "Saskatchewan's largest gay magazine allows ads for men seeking boys." Although there were conflicting views expressed on whether the references in the ads in question to "any age"; "boys/men"; or "[y]our age ... is not so relevant" were in fact a reference to men seeking children (as Mr. Whatcott meant to imply by his additional biblical reference), the true purpose and meaning of the personal ads are, for our purposes, irrelevant. Mr. Whatcott also added the handwritten words: "If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea' Jesus Christ" and "[t]he ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan!"

[196] In my view, it cannot reasonably be found that Flyers F and G contain expression that a reasonable person, aware of the relevant context and circumstances, would find as exposing or likely to expose persons of same-sex orientation to detestation and vilification. Reproduction of the ads themselves, and the statement as to how the ads could be interpreted as "men seeking boys," do not manifest hatred. The implication that the ads reveal men seeking under-aged males, while offensive,

is presented as Mr. Whatcott's interpretation of what the ads mean. He insinuates that this is a means by which pedophiles can advertise for victims, but the expression falls short of expressing detestation or vilification in a manner that delegitimizes homosexuals. The expression, while offensive, does not demonstrate the hatred required by the prohibition.

[197] With respect to the purported excerpt from the Bible, I would agree with the comments of Richards J.A., at para. 78 of [*Owens v Human Rights Commission (Sask)*, 2002 SKQB 506, rev'd 2006 SKCA 41] that

it is apparent that a human rights tribunal or court should exercise care in dealing with arguments to the effect that foundational religious writings violate the *Code*. While the courts cannot be drawn into the business of attempting to authoritatively interpret sacred texts such as the Bible, those texts will typically have characteristics which cannot be ignored if they are to be properly assessed in relation to s. 14(1)(b) of the *Code*.

[198] Richards J.A. found that objective observers would interpret excerpts of the Bible with an awareness that it contains more than one sort of message, some of which involve themes of love, tolerance and forgiveness. He also found that the meaning and relevance of the specific Bible passages cited in that case could be assessed in a variety of ways by different people.

[199] In my view, these comments apply with equal force to the biblical passage paraphrased in Flyers F and G that "[i]f you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea." Whether or not Mr. Whatcott meant this as a reference that homosexuals who seduced young boys should be killed, the biblical reference can also be interpreted as suggesting that anyone who harms Christians should be executed. The biblical passage, in and of itself, cannot be taken as inspiring detestation and vilification of homosexuals. While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be unusual circumstances and context that could transform a simple reading or publication of a religion's holy text into what could objectively be viewed as hate speech.

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[202] Having found the Tribunal's decisions with respect to Flyers F and G unreasonable, I would uphold the Court of Appeal's conclusion that those two flyers do not contravene s. 14(1)(b) of the *Code*.

[The tribunal's compensation awards as regards the flyers D and E were reinstated.]

V. REGULATION OF SEXUALLY EXPLICIT EXPRESSION

The following discussion draws from *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol 1 (Ottawa: Minister of Supply and Services Canada, 1985) at 111-12.

The first general statutory prohibition of obscenity was s 179 of the original *Criminal Code* enacted in 1892, which made it an indictable offence to knowingly and without lawful excuse publicly sell obscene material or expose obscene material for public sale or to public view. It did not define the term "obscene." In applying the section, the courts adopted the so-called *Hicklin* test devised by Cockburn CJ in 1868 in *R v Hicklin* (1868), LR 3 QB 360. That test asked:

Whether the tendency of the matter charged as obscenity is used to deprave and corrupt those whose minds are open to immoral influences, and into whose hands the publication of this sort may fall.

The *Hicklin* test was stringently criticized. The phrase "a tendency to deprave and corrupt" was viewed as unclear and subjective; the requirement to look at the tendency of material to corrupt the most vulnerable individuals unjustifiably impinged on the materials available to others; the test gave no importance to the creator's purpose or to literary, artistic, or scientific value; and material could be found obscene on the basis of isolated passages rather than a consideration of the work as a whole.

Only in 1959 was the *Criminal Code* amended to provide a definition of the word "obscene." That section (now s 163) provides:

- 163(1) Everyone commits an offence who
- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or
 - (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.
- (2) Every one commits an offence who knowingly, without lawful justification or excuse,
- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;
 - (b) publicly exhibits a disgusting object or an indecent show;
 - (c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or
 - (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.
- • •
- (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Over time, confusion over the relevance of the *Hicklin* test was resolved by deciding that the Code provided an exhaustive definition of obscenity. The question of whether a dominant characteristic of a publication was the "undue exploitation of sex" was difficult. The courts settled on a meaning referring to evolving "community standards," moving beyond the offensive or immoral character of such material to the idea that sexually explicit representations sometimes have harmful consequences.

In its 1992 decision in *R v Butler*, immediately below, the Supreme Court of Canada reinterpreted the *Criminal Code* obscenity prohibition as a ban on *harmful* sexual representation and went on to uphold the law as a justified restriction on freedom of expression.

R v Butler

[\[1992\] 1 SCR 452, 1992 CanLII 124](#)

[The accused, Butler, operated a shop that sold and rented what was described as "hard core pornography" in the form of videotapes, magazines, and sexual paraphernalia.]

SOPINKA J (Lamer CJ and La Forest, Cory, McLachlin, Stevenson, and Iacobucci JJ concurring):

... [This] case requires the Court to address one of the most difficult and controversial of contemporary issues, that of determining whether, and to what extent, Parliament may legitimately criminalize obscenity. ...

[Justice Sopinka set out the relevant section of the *Criminal Code*, s 163 (reproduced above) and then indicated that the appeal would deal only with the constitutional validity of s 163(8), the definition of obscenity.]

4. Analysis

B. Judicial Interpretation of s. 163(8)

In order for the work or material to qualify as "obscene," the exploitation of sex must not only be its dominant characteristic, but such exploitation must be "undue." In determining when the exploitation of sex will be considered "undue," the courts have attempted to formulate workable tests. The most important of these is the "community standard of tolerance" test.

In [*Brody, Dansky, Rubin v The Queen*, [1962] SCR 681, 1962 CanLII 80], Judson J. accepted the view espoused notably by the Australian and New Zealand courts that obscenity is to be measured against "community standards." He cited the following passage in the judgment of Fullager J. in *R v. Close*, [1948] V.L.R. 445, at p. 465:

There does exist in any community at all times—however the standard may vary from time to time—a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that today there is any better tribunal than a jury to draw it. ... What is obscene is something which offends against those standards.

The community standards test has been the subject of extensive judicial analysis. ... Our Court was called upon to elaborate the community standards test in *Towne Cinema Theatres Ltd. v. The Queen*, ... [1985] 1 S.C.R. 494. Dickson C.J. reviewed the case law and found (at pp.508–9):

The cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it. ... [Emphasis in original.]

There has been a growing recognition in recent cases that material which may be said to exploit sex in a "degrading or dehumanizing" manner will necessarily fail the community standards test. ...

Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that

otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.

This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole. . . .

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... [T]he artistic defence is the last step in the analysis of whether the exploitation of sex is undue. Even material which by itself offends community standards will not be considered "undue," if it is required for the serious treatment of a theme. . . .

Accordingly, the "internal necessities" test, or what has been referred to as the "artistic defence," has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent "dirt for dirt's sake" but has a legitimate role when measured by the internal necessities of the work itself.

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This review of jurisprudence shows that it fails to specify the relationship of the tests one to another. Failure to do so with respect to the community standards test and the degrading or dehumanizing test, for example, raises a serious question as to the basis on which the community acts in determining whether the impugned material will be tolerated. With both these tests being applied to the same material and apparently independently, we do not know whether the community found the material to be intolerable because it was degrading or dehumanizing, because it offended against morals or on some other basis. In some circumstances a finding that the material is tolerable can be over-ruled by the conclusion by the court that it causes harm and is therefore undue. Moreover, is the internal necessities test dominant so that it will redeem material that would otherwise be undue or is it just one factor? Is this test applied by the community or is it determined by the court without regard for the community? This hiatus in the jurisprudence has left the legislation open to attack on the ground of vagueness and uncertainty. That attack is made in this case. This lacuna in the interpretation of the legislation must, if possible, be filled before subjecting the legislation to *Charter* scrutiny. . . .

Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. Violence in this context includes both actual physical violence and threats of physical violence. Relating these three categories to the terms of s. 163(8) of the Code, the first, explicit sex coupled with violence, is expressly mentioned. Sex coupled with crime, horror or cruelty will sometimes involve violence. Cruelty, for instance, will usually do so. But, even in the absence of violence, sex coupled with crime, horror or cruelty may fall within the second category. As for category (3), subject to the exception referred to below, it is not covered.

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The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of

tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly, evidence as to the community standards is desirable but not essential.

In making this determination with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.

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... How does the "internal necessities" test fit into this scheme? The need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. The portrayal of sex must then be viewed in context to determine whether that is the dominant theme of the work as a whole. Put another way, is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose? Since the threshold determination must be made on the basis of community standards, that is, whether the sexually explicit aspect is undue, its impact when considered in context must be determined on the same basis. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.

C. Does s. 163 Violate s. 2(b) of the Charter?

The majority of the Court of Appeal in this case allowed the appeal of the Crown on the ground that s. 163 does not violate freedom of expression as guaranteed under s. 2(b) of the *Charter*. ...

In my view, the majority of the Manitoba Court of Appeal erred Huband J.A. misinterpreted the distinction between purely physical activity and activity having expressive content. The subject matter of the materials in this case is clearly "physical," but this does not mean that the materials do not convey or attempt to convey meaning such that they are without expressive content. ...

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In light of our recent decision in *R v. Keegstra*, ... [1990] 3 S.C.R. 697, the respondent, and most of the parties intervening in support of the respondent, do not take issue with the proposition that s. 163 of the *Criminal Code* violates s. 2(b) of the *Charter*. ...

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D. Is s. 163 Justified Under s. 1 of the Charter?

(a) Is s. 163 a Limit Prescribed by Law?

The appellant argues that the provision is so vague that it is impossible to apply it. Vagueness must be considered in relation to two issues in this appeal: (1) is the law so vague that it does not qualify as "a limit prescribed by law"; and (2) is it so imprecise that it is not a reasonable limit. Dealing with (1), the test is ... does the law provide "an intelligible standard according to which the judiciary must do its work" (*Irwin Toy* ... at p. 983; adopted in *Osborne v. Canada (Treasury Board)*, [[1991] 2 SCR 69, 1991 CanLII 60], at p. 96).

In assessing whether s. 163(8) prescribes an intelligible standard, consideration must be given to the manner in which the provision has been judicially interpreted. ...

Standards which escape precise technical definition, such as "undue," are an inevitable part of the law. The *Criminal Code* contains other such standards. ... It is within the role of the judiciary to attempt to interpret these terms. If such interpretation yields an intelligible standard, the threshold test for the application of s. 1 is met. In my opinion, the interpretation of s. 163(8) in prior judgments which I have reviewed, as supplemented by these reasons, provides an intelligible standard.

(b) Objective

The respondent argues that there are several pressing and substantial objectives which justify overriding the freedom to distribute obscene materials. Essentially, these objectives are the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes and the public interest in maintaining a "decent society." On the other hand, the appellant argues that the objective of s. 163 is to have the state act as "moral custodian" in sexual matters and to impose subjective standards of morality.

... The *Hicklin* philosophy posits that explicit sexual depictions, particularly outside the sanctioned contexts of marriage and procreation, threatened the morals or the fabric of society In this sense, its dominant, if not exclusive, purpose was to advance a particular conception of morality. ...

... [T]his particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. ... The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.

On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society. ...

... [M]uch of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. In this regard, criminalizing the proliferation of materials which undermine another basic *Charter* right may indeed be a legitimate objective.

In my view, however, the overriding objective of s. 163 is not moral disapprobation but the avoidance of harm to society. ...

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The harm was described in the following way in the *Report on Pornography by the Standing Committee on Justice and Legal Affairs* (MacGuigan Report) (1978) at p. 18:4:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

The appellant argues that to accept the objective of the provision as being related to the harm associated with obscenity would be to adopt the "shifting purpose" doctrine explicitly rejected in *R v. Big M Drug Mart Ltd.*, ... [1985] 1 S.C.R. 295. ...

I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials. ...

A permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test. Community standards as to what is harmful have changed since 1959.

This being the objective, is it pressing and substantial? ... In this regard, it should be recalled that in *Keegstra* ... this Court unanimously accepted that the prevention of the influence of hate propaganda on society at large was a legitimate objective. ...

This Court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression. In my view, the harm sought to be avoided in the case of the dissemination of obscene materials is similar. ... [I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance."

In reaching the conclusion that legislation proscribing obscenity is a valid objective which justifies some encroachment of the right to freedom of expression, I am persuaded in part that such legislation may be found in most free and democratic societies. ...

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Finally, it should be noted that the burgeoning pornography industry renders the concern even more pressing and substantial than when the impugned provisions were first enacted. ... The analysis of whether the measure is proportional to the objective must, in my view, be undertaken in light of the conclusion that the objective of the impugned section is valid only insofar as it relates to the harm to society associated with obscene materials. ... The objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*. ...

(c) Proportionality

(i) General

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In assessing whether the proportionality test is met, it is important to keep in mind the nature of expression which has been infringed. ...

The values which underlie the protection of freedom of expression relate to the search for truth, participation in the political process, and individual self-fulfillment. The Attorney General for Ontario argues that ... only "individual self-fulfillment," and only in its most base aspect, that of physical arousal, is engaged by pornography. On the other hand, the civil liberties groups argue that pornography forces us to question conventional notions of sexuality and thereby launches us into an inherently political discourse. [Here Sopinka J cited the work of American legal scholar Robin West that "[g]ood pornography ... validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture."]

A proper application of the test should not suppress what West refers to as "good pornography." The objective of the impugned provision is not to inhibit the celebration of human sexuality. However, it cannot be ignored that the realities of the pornography industry are far from the picture which the BC Civil Liberties Association would have us paint. ... In my view, the kind of expression which is sought to be advanced does not stand on equal footing with other kinds of expression which directly engage the "core" of the freedom of expression values.

This conclusion is further buttressed by the fact that the targeted material is expression which is motivated, in the overwhelming majority of cases, by economic profit. This Court held in *Rocket v. Royal College of Dental Surgeons of Ontario*, ... [1990] 2 S.C.R. 232, at p. 247, that an economic motive for expression means that restrictions on the expression might "be easier to justify than other infringements."

I will now turn to an examination of the three basic aspects of the proportionality test.

(ii) Rational Connection

The message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda. As the Attorney General of Ontario has argued in its factum, obscenity wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentations.

Accordingly, the rational link between s. 163 and the objective of Parliament relates to the actual causal relationship between obscenity and the risk of harm to society at large. On this point, it is clear that the literature of the social sciences remains subject to controversy. ...

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While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. [Here Sopinka J cited The Meese Commission Report, (US, 1986) which concluded that "the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence." The Report stated that "it would be strange indeed if graphic representations of a form of behavior, especially in a form that almost exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior."]

In the face of inconclusive social science evidence, the approach adopted by our Court in *Irwin Toy* is instructive. In that case, the basis for the legislation was that television advertising directed at young children is *per se* manipulative. The Court made it clear that in choosing its mode of intervention, it is sufficient that Parliament had a reasonable basis[.] ...

Similarly, in *Keegstra* ... the absence of proof of a causative link between hate propaganda and hatred of an identifiable group was discounted as a determinative

factor in assessing the constitutionality of the hate literature provisions of the *Criminal Code*. ...

• • •

... I [find] that Parliament was entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.

Accordingly, I am of the view that there is a sufficiently rational link between the criminal sanction ... and the objective.

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(iii) Minimal Impairment

In determining whether less intrusive legislation may be imagined, this Court [has] stressed ... that it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored in the context of the infringed right[.] ... There are several factors which contribute to the finding that the provision minimally impairs the freedom which is infringed.

First, the impugned provision does not proscribe sexually explicit erotica without violence that is not degrading or dehumanizing. It is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm.

Second, materials which have scientific, artistic or literary merit are not captured by the provision. As discussed above, the court must be generous in its application of the "artistic defence." ...

Third, ... it is legitimate for the court to take into account Parliament's past abortive attempts to replace the definition with one that is more explicit. ... The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail (Bill C-54, 2nd Sess., 33rd Parl.). It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed. In my view, the standard of "undue exploitation" is therefore appropriate. The intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote. ...

Fourth, ... it is only the public distribution and exhibition of obscene materials which is in issue here.

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It is ... submitted [by the intervenors] that there are more effective techniques to promote the objectives of Parliament. For example, if pornography is seen as encouraging violence against women, there are certain activities which discourage it—counselling rape victims to charge their assailants, provision of shelter and assistance for battered women, campaigns for laws against discrimination on the grounds of sex, education to increase the sensitivity of law enforcement agencies and other governmental authorities. In addition, it is submitted that education is an under-used response.

It is noteworthy that many of the above suggested alternatives are in the form of responses to the harm engendered by negative attitudes against women. ... However, given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives which have been suggested. ... Serious social problems such as violence against women require multi-pronged approaches by government. Education and legislation are not

alternatives but complements in addressing such problems. There is nothing in the Charter which requires Parliament to choose between such complementary measures.

(iv) Balance Between Effects of Limiting Measures and Legislative Objective

... The infringement on freedom of expression is confined to a measure designed to prohibit the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing. As I have already concluded, this kind of expression lies far from the core of the guarantee of freedom of expression. It appeals only to the most base aspect of individual fulfillment, and it is primarily economically motivated.

The objective of the legislation, on the other hand, is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.

I therefore conclude that the restriction on freedom of expression does not outweigh the importance of the legislative objective.

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I conclude that while s. 163(8) infringes s. 2(b) of the Charter, freedom of expression, it constitutes a reasonable limit and is saved by virtue of the provisions of s. 1. ...

[Justice Gonthier, L'Heureux-Dubé J concurring, wrote a concurring judgment in which he agreed with Sopinka J's disposition of the case, but differed somewhat in his understanding of s 163 and its constitutional validity. He understood obscene materials as harmful because they

convey a distorted image of human sexuality, by making public and open elements of human nature which are usually hidden behind a veil of modesty and privacy. ... This distorted image of human sexuality often comprises violence, cruelty, infliction of pain, [and] humiliation, among other elements of pornographic imagery.

This conceptualization of the harm of obscene materials led him to a different conclusion than Sopinka J with respect to the issue of whether s 163 captures the third category of materials—explicit sex that is neither violent, degrading, nor dehumanizing. For Gonthier J, some public representations of explicit sexual activity, such as on a billboard rather than in a film or movie, may, because of the manner of the representation, trigger the application of s 163, because they "contribute to the deformation of sexuality, through the loss of its humanity." [Emphasis in original.]

Appeal allowed; new trial ordered.

NOTES AND QUESTIONS

1. *Shifting purpose.* In *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69, it was held that the government, when seeking to justify a restriction under s 1, could not put forward a "pressing and substantial" purpose different from that which originally animated the legislation. In *Butler*, does Sopinka J's reinterpretation of the objective of the obscenity provisions of the *Criminal Code* as the prevention of harm to women and children amount to an impermissible shift in purpose? Or does *Butler* simply involve a permissible shift in emphasis built into the wording of the legislation, as Sopinka J argued? Brenda Cossman has argued

that the "Butler decision and its discourse of harm against women is really just sexual morality in drag." She writes:

First, Sopinka J. tells us that the law is not about morality, but about harm (morality is bad, and distinct from harm). But then he tells us that harm is not actually distinct from morality, so there is no shifting purpose (morality is OK, and related to harm). And, finally, he tells us that the harm intended to be addressed is the harm caused by pornography, which used to be immorality but now is harm to women (morality is bad, and distinct from harm). So morality is bad, except when it is related to harm, in which case it is no longer morality. The Court's effort to cast the objective of s. 163 as something other than moral approbation is, at best, on rather shaky ground.

See Brenda Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the Butler Decision" in Brenda Cossman et al, eds, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 102.

2. *Social science evidence and proof of harm.* In *Butler*, Sopinka J referred to the inconclusive social science evidence concerning the link between pornography and acts of sexual violence. Most of the empirical research concerns changes in the attitudes of men toward rape and sexual violence following exposure to violent pornography in a laboratory setting. However, these studies do not show that an individual's attitudes are changed over the long term or that it is more likely that he will act in a violent way after exposure to violent sexual imagery. The shortcomings of the empirical research are discussed in Daniel Linz, Steven D Penrod & Edward Donnerstein, "The Attorney General's Commission on Pornography: The Gaps Between 'Findings' and 'Facts'" (1987) 4 Am Bar Foundation Research J 713. The authors advocate caution in making generalizations about behaviour on the basis of laboratory experiments. They do say, however, that one of the things the studies show is that nudity is not the problem. Any attitudinal changes that may occur are the result of exposure to images of violence against women who may be naked or clothed.

Because the empirical evidence of harm was not clear-cut, Sopinka J found it necessary to rely on common sense—that it was "reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs"—and to defer to Parliament's reasonable judgment that pornography causes harm to women (even though it is not clear what sort of causal judgment Parliament made when it enacted this provision). When we express ourselves to others, we want to affect their thinking and action. Is the state justified in restricting expression simply because it might persuade others to engage in harmful or wrongful action? Or is there something different about pornography, and the way it affects behaviour, that justifies its restriction?

3. Catherine MacKinnon applauded the Court in *Butler* for having embraced a feminist understanding of pornography:

The Supreme Court of Canada [upheld] the obscenity provision on sex equality grounds. It said that harm to women—which the Court was careful to make "contextually sensitive" and found could include humiliation, degradation, and subordination—was harm to society as a whole. The evidence on the harm of pornography was sufficient for a law against it.

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Although the Canadians consider the U.S. experience on these issues closely in [Keegstra and *Butler*] the striking absence of a U.S.-style political speech litany suggests that taking equality seriously precludes it, or makes it look like the excuse for enforcing inequality that it has become. The decision did not mention the marketplace of ideas. Maybe in Canada, people talk to each other, rather than buy and sell each other as ideas. ... Fundamentally, the Supreme Court of Canada recognized the reality of inequality in the issues before it: this is not the bad state power jumping on poor powerless individual citizen[s], but a law passed to

stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative groups. [Emphasis in original.]

See Catherine MacKinnon, *Only Words* (Cambridge, Mass: Harvard University Press, 1985) at 101-3.

Do you agree that *Butler* can be read as an equality-promoting decision?

4. *Other forms of expression harmful to women.* Why do we continue to focus on sexually explicit imagery? Images of women in television advertising, film, and fashion magazines often have the same structure as sexually explicit pornography and contribute to the social picture of women as subordinate. If the impact of representations of sexual violence or degradation does not depend on the nudity of the persons represented, then is there any reason to focus on sexually explicit material? Does the use of sexual explicitness as an essential element in the definition of the category of restricted material suggest that concerns about offence and public morals continue to affect our thinking about obscenity and pornography? Could the state successfully regulate these other forms of sexist expression, given Charter guarantees?

5. *Post-Butler application of the harm-based model of obscenity.* Does Sopinka J's (re)interpretation of the *Criminal Code*'s obscenity prohibition, as a ban on "harmful" sexual representations, provide a manageable standard for identifying prohibited material? Does the community-standards test help in any way? Do the concepts "degrading" and "dehumanizing" provide sufficient guidance to those administering the law, such as police officers and Customs officials? The Supreme Court of Canada has both affirmed and developed the harm test for obscenity in subsequent decisions, first in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000 SCC 69](#), which dealt with gay and lesbian erotica, and, second, in *R v Labaye*, [2005 SCC 80](#), which involved the interpretation of the related concept of indecency. For a critique of *Butler* and *Labaye*, see Michael Plaxton, "What Butler Did" (2012) 57 SCLR 317. *Little Sisters* is discussed in more detail below.

6. *Child pornography.* Discussing the third category of pornography, explicit sex that is not violent and neither degrading nor dehumanizing, Sopinka J stated that it is "generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production." This suggests that a different understanding of harm will be operative in cases involving child pornography. The Supreme Court addressed this issue nine years later in *R v Sharpe*, [2001 SCC 2](#), discussed below.

NOTE: LITTLE SISTERS BOOK AND ART EMPORIUM V CANADA (MINISTER OF JUSTICE)

Censorship of both hate speech and obscene materials occurs under the *Customs Tariff*, SC 1997, c 36 (formerly RSC 1985, c 41 (3rd Supp)), which governs the importation of goods into Canada and dictates those materials that are not to be allowed entry. Section 136 of the *Customs Tariff* (formerly s 114) prohibits the importation of goods, including goods referred to in Tariff item 9899.00.00 (formerly Code 9956 of Schedule VII of the Act), which reads in part:

Books, printed paper drawings, paintings, prints, photographs, or representations of any kind that:

- (a) are deemed to be obscene under subsection 163(8) of the *Criminal Code*;
 - (b) constitute hate propaganda within the meaning of s. 320(8) of the *Criminal Code*;
 - (c) are of a treasonable character within the meaning of section 46 of the *Criminal Code*;
- or
- (d) are of a seditious character within the meaning of sections 59 and 60 of the *Criminal Code*.

Alleging that it was the victim of a long-standing Canada Customs practice of targeting shipments destined for gay and lesbian bookstores, Little Sisters bookstore in Vancouver and

its owners challenged the provisions of the Customs legislation that prohibited the importation of obscene publications. In *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 [Little Sisters No 1], the Supreme Court, in a judgment written by Binnie J (Iacobucci, Arbour, and LeBel JJ dissenting in part), held that these provisions restricted the appellants' freedom of expression, but that this restriction (with the exception of a reverse onus provision, discussed further below) was justified under s 1. However, the Court also found that the manner in which the legislation had been implemented by customs officials violated the bookstore's rights and could not be justified under s 1.

Under the *Customs Tariff*, Customs officials are empowered to determine whether imported materials are obscene. If material is classified as obscene, the importer may request a redetermination by a specialized Customs unit. A further appeal can be made to the deputy minister or their designate. Once these administrative procedures have been exhausted, the importer can appeal the prohibition to a judge of the superior court in the province where the material was seized, with a further appeal on a question of law to the Federal Court, and a final appeal (with leave) to the Supreme Court of Canada.

Justice Binnie noted that the trial judge had identified high error rates in determinations respecting Little Sisters' imports at all levels of the Customs review procedure and had concluded that "[s]uch high rates of error indicate more than mere differences of opinion and suggest systemic causes" (at para 6). Specifically, the trial judge found (at para 6):

Many publications, particularly books, are ruled obscene without adequate evidence. This highlights perhaps the most serious defect in the present administration of code 9956(a), that is, that classifying officers are neither adequately trained to make decisions on obscenity nor are they routinely provided with the time and the evidence necessary to make such decisions. There is no formal procedure for placing evidence of artistic or literary merit before the classifying officers. Consequently, many publications are prohibited entry into Canada that would likely not be found to be obscene if full evidence were considered by officers properly trained to weigh and evaluate that evidence.

Justice Binnie found that Little Sisters bookstore had been "targeted as importers of obscene materials despite the absence of any evidence to suggest that gay and lesbian erotica is more likely to be obscene than heterosexual erotica, or that the appellants are likely offenders in this regard" and that "[i]n consequence of the targeting, [Little Sisters] have suffered excessive and unnecessary prejudice in terms of delays, cost and other losses in having their goods cleared (if at all) through Canada Customs" (at para 154). He concluded that the Customs authorities had exercised their legislative powers in a way that violated the appellants' s 2(b) rights and could not be justified under s 1. These constitutional violations were traced, in part, to understaffing, inadequate training of Customs officials, the failure to provide proper guides and manuals and develop workable procedures, and the failure to establish internal deadlines.

Little Sisters, however, had sought more than just a declaration of unconstitutional application of the legislation to themselves. They had brought a challenge to the constitutionality of the legislation itself, seeking to have it declared invalid. In this they were largely unsuccessful. Their constitutional challenge to the Customs legislation was based on two grounds. As described by Binnie J, the first argument, or set of arguments, was that the decision in *Butler* to uphold the *Criminal Code* prohibition on obscene materials was incorrect and, "in any event, that [the] approach [taken in *Butler* to determine whether material is obscene] cannot be freely transferred from heterosexual erotica to gay and lesbian erotica" (at para 53). The second argument was that the procedure set out in the Customs legislation was so cumbersome and procedurally defective that it could not be administered in a way that respected the appellant's Charter rights.

Justice Binnie dismissed the first set of arguments concerning *Butler* and its applicability to gay and lesbian material:

[53] ... [Little Sisters bookstore and its owners] argue that in the context of the Customs legislation a "harm-based" approach which utilizes a single community standard across all regions and groups within society is insufficiently "contextual" or sensitive to specific circumstances to give effect to the equality rights of gays and lesbians. The appellants, supported by the interveners LEAF and EGALE, contend that homosexual erotica plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream. Erotica provides a positive celebration of what it means to be gay or lesbian. As such, it is argued that sexual speech in the context of gay and lesbian culture is a core value and *Butler* cannot legitimately be applied to locate it at the fringes of s. 2(b) expression. Erotica, they contend, plays a different role in a gay and lesbian community than it does in a heterosexual community, and the *Butler* approach based, they say, on heterosexual norms, is oblivious to this fact. ...

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[55] The appellants contend that importing a majoritarian analysis into the definition of obscenity (e.g. what the broader Canadian community will tolerate) inevitably creates prejudice against non-mainstream, minority representations of sex and sexuality. They argue that the "national" community is by definition majoritarian and is more likely than the homosexual community itself to view gay and lesbian imagery as degrading and dehumanizing. The whole idea of a community standards test, they say, is incompatible with Charter values that were enacted to protect minority rights. ...

[56] This line of criticism underestimates *Butler*. ... [The community standards] test was adopted to underscore the unacceptability of the trier of fact indulging personal biases A concern for minority expression is one of the principal factors that led to adoption of the national community test in *Butler* in the first place[.] ...

[57] ... [A] person's constitutionally protected space does not shrink by virtue of his or her geographical location or participation in a certain context or community, or indeed by the taste of a particular judge or jury. ...

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[60] The appellants argue that the "degrading or dehumanizing" language in *Butler* is highly subjective and encouraged Customs, for example, to prohibit depictions of anal intercourse long after the Department of Justice advised Customs to the contrary. This argument seems to ignore that the phrase "degrading or dehumanizing" in *Butler* is qualified immediately by the words "if the risk of harm is substantial" (emphasis added). This makes it clear that not all sexually explicit erotica depicting adults engaged in conduct which is considered to be degrading or dehumanizing is obscene. The material must also create a substantial risk of harm which exceeds the community's tolerance. The potential of harm and a same-sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable. Parliament's concern was with behavioural changes in the *voyeur* that are potentially harmful in ways or to an extent that the community is not prepared to tolerate. There is no reason to restrict that concern to the heterosexual community.

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[63] The intervener LEAF took the position that sado-masochism performs an emancipatory role in gay and lesbian culture and should therefore be judged by a different standard from that applicable to heterosexual culture. In support of this position LEAF points out that,

by definition, gender discrimination is not an issue in "same-sex erotica." On the other hand, the intervener Equality Now took the view that gay and lesbian individuals have as much right as their heterosexual counterparts to be protected from depictions of sex with violence or sexual conduct that is dehumanizing or degrading in a way that can cause harm that exceeds community standards of tolerance.

[64] LEAF's argument seems to presuppose that the *Butler* test is exclusively gender-based. Violence against women was only one of several concerns, albeit an important one, that led to the formulation of the *Butler* harm-based test, which itself is gender neutral. While it would be quite open to the appellants to argue that a particular publication does not exceed the general community's tolerance of harm for various reasons, gay and lesbian culture as such does not constitute a general exemption from the *Butler* test.

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[66] ... The trial judge ... relied on the conclusion of Professor Neil M. Malamuth that "homosexual pornography may have harmful effects even if it is distinct in certain ways from heterosexual pornography." Professor Malamuth further observed that:

In recent years, [there] has been increasing scientific research indicating that some of the behaviors that might be related to exposure to some types of pornography are a serious problem within the gay community as well as within the heterosexual one. ... [T]here are studies suggesting that within homosexual interactions the frequency of sexually coercive acts as well as non-sexual aggression between intimates occurs at a frequency quite comparable to heterosexual interactions.

In adopting the *Butler* test to justify the prohibition on the importation of obscene material under s 1, Binnie J also specifically rejected the appellants' argument that the restriction was too vague to satisfy the "prescribed by law" requirement:

[146] Section 163 having been upheld in *Butler*, and the *Customs Tariff* having incorporated s. 163 and the related jurisprudence, it follows that the *Customs Tariff* prohibition is not void for vagueness or uncertainty, and is therefore validly "prescribed by law." The appellants argued that a legal standard which may be intelligible to a judge in a criminal trial surrounded with all the appropriate procedural protections is not necessarily intelligible to a Customs official left to his or her own devices . . . I do not think "intelligibility" varies with the level of procedural sophistication. The standard set out in s. 163(8) of the *Criminal Code* either affords a reasonable guide to well-intentioned individuals seeking to keep themselves within the law or it does not. *Butler* held that it did. The standard is related to the community's tolerance of harm. It is the severity of the potential consequences that requires a judge to preside over a criminal trial, not the intelligibility of the "community tolerance" standard.

Justice Binnie also rejected Little Sisters' second argument that the *Customs* legislation failed to provide adequate procedural safeguards and was therefore unconstitutional:

[71] The appellants say a regulatory structure that is open to the level of maladministration described in the trial judgment is unconstitutionally underprotective of their constitutional rights and should be struck down in its entirety. In effect they argue that Parliament was required to proceed by way of legislation rather than the creation of a delegated power of regulation in s. 164(1)(j), which authorizes the Governor in Council to "make regulations ... generally, to carry out the purposes and provisions of this Act," or by ministerial directive. My colleague Iacobucci J. accepts the propositions that "[t]his Court's precedents demand sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights" and because "the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials" Code 9956 should be struck from the *Customs Tariff*. I do not think there is any constitutional rule that requires

Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.

[72] ... [T]he appellants' complaint is about what Parliament did not enact rather than what it did enact. The imposition on Parliament of a constitutional obligation to deal itself with Charter-sensitive matters rather than by permitting Parliament the option of enacting a delegated regulation-making power has serious ramifications for the machinery of government. I do not agree that Parliament's options are so limited.

Justice Binnie examined the different procedures contained in the Customs legislation and concluded that, with one exception, they did not infringe any Charter rights. In his view, the problem was in the implementation of the legislated rules and procedures.

The one procedural provision that Binnie J found to be unconstitutional was a reverse onus clause. Section 152(3) of the *Customs Tariff*, which was applicable to "any proceeding under this Act," directed the decision-maker to assume that Customs officials were right unless and until the importer proved them to be wrong. In the view of Binnie J:

[101] ... [This] provision cannot constitutionally apply to put on the importer the onus of disproving obscenity. Otherwise entry of expressive materials could be denied by reason of the onus even where the standard of obscenity is not met, as for example, where an importer lacks the resources or the stamina to contest an initial determination. An importer has a Charter right to receive expressive material unless the state can justify its denial. It is not open to the state to put the onus on an individual to show why he or she should be allowed to exercise a Charter right. It is for the state to establish that a limitation on the Charter right is justified.

Justice Iacobucci (dissenting in part) would have struck down the restriction on the importation of obscene material, although he would have suspended the declaration of invalidity for an 18-month period. In his opinion:

[166] ... [T]he current procedures by which Customs enforces s. 163(8) at the border are grossly inadequate. With a few minor exceptions, expressive materials are classified when entering Canada in the same manner as mundane commercial goods. The Customs legislation lacks the most basic procedures necessary for a fair and accurate determination of whether something is obscene. Compounding these legislative deficiencies is the fact that Customs officers, while no doubt well-intentioned and conscientious civil servants, lack the training, time or resources to accomplish the task set for them. In my respectful opinion, the Customs legislation makes no meaningful accommodation for the expressive freedoms raised by this appeal. Such a regime cannot be demonstrably justified in a free and democratic society.

[167] The appropriate remedy for this violation of the appellants' constitutional rights is to strike down [the relevant provision of the Customs legislation]. Particularly in a case like the one before us, where there is an extensive record of the improper detention of non-obscene works, the only choice to ensure full protection of the constitutional rights at stake is to invalidate the legislation and invite Parliament to remedy the constitutional infirmities.

The portions of the judgment dealing with the appropriate remedy are excerpted in Chapter 25, Enforcement of Rights. A second case initiated by the bookstore was unsuccessful when it could not obtain an advance costs award as contemplated in *British Columbia (Ministers of Forests) v Okanagan Indian Band*, 2003 SCC 71. The trial judge granted the advance costs, but his order was ultimately reversed by the Supreme Court of Canada in *Little Sisters*

Book and Art Emporium v Canada (Commissioner of Customs and Revenue), 2007 SCC 2 [Little Sisters No 2]. Justice Bastarache, for the majority, held that there was no *prima facie* evidence that Little Sisters continued to be the subject of targeting by Customs officials that could warrant an order of advanced costs: "The fact that Customs continues to detain a number of titles is not, in itself, *prima facie* evidence of anything" (at para 55).

Justice Binnie (with Fish J), in dissent, saw a pattern of behaviour that warranted the order sought by the bookstore owners and seemed to express some doubt about his decision for the majority in the earlier case:

[114] I differ from my colleagues about what is truly at stake in this appeal and this leads to our disagreement about the appropriate outcome. In my view, the earlier case of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("Little Sisters No. 1"), provides more than "important context" (as my colleagues Bastarache and LeBel JJ. describe it ...). The ramifications of that decision go to the heart and soul of the appellant's present application. Were it not for the findings of serious abuses on the part of Customs authorities in *Little Sisters No. 1*, I doubt if the appellant's request for advance costs in the present follow-up case would have had the legs to make it this far. This case is not the beginning of a litigation journey. It is 12 years into it.

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[120] The present application for advance costs comes before us precisely because the appellant says that the Minister's assurances proved empty in practice, that the systemic abuses established in the earlier litigation have continued, and that (in its view) Canada Customs has shown itself to be unwilling to administer the Customs legislation fairly and without discrimination. ... The question of public importance is this: was the Minister as good as his word when his counsel assured the Court that the appropriate reforms had been implemented? ...

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[129] The government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational business-person is forced to throw in the towel. This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the fight. It takes an unbusinesslike litigant like Little Sisters to elbow aside purely financial considerations (to the extent it can) and carry on what it sees as unfinished *Charter* business against the government. Having done so successfully and at its own expense in *Little Sisters No. 1*, it asks the court for an exceptional order of advance costs to make good the victory it thought it had won in *Little Sisters No. 1*. Little Sisters may be right or it may be wrong in its allegations, but its motive can hardly be financial, and its claim to advance costs should not be assessed on that basis.

NOTE: R V SHARPE

In 1993, the federal government enacted amendments to the *Criminal Code* prohibiting not only the production, sale, and distribution of child pornography, but also its possession. Under s 163.1 of the *Criminal Code*, child pornography is defined as:

- (a) a photographic, film, video, or other visual representation, whether or not it was made by electronic or mechanical means, (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
- (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

An exemption is provided for works that have artistic merit or an educational, scientific, or medical purpose, but the onus is on the accused to prove such.

The Supreme Court of Canada upheld the law in *R v Sharpe*, but it read in two exceptions to its application. Chief Justice McLachlin, writing for the majority, held that the possession of child pornography is a form of expression protected by s 2(b):

[25] ... The possession of [expressive] material allows us to understand the thought of others or consolidate our own thought. Without the right to possess expressive material, freedom of thought, belief, opinion and expression would be compromised.

In her s 1 analysis, McLachlin CJ accepted that the law's objective "to criminalize possession of child pornography that poses a reasoned risk of harm to children" (at para 82) was pressing and substantial. She also found that the means chosen were rationally connected to the law's purpose:

[89] ... The lack of unanimity in scientific evidence is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of. Some studies suggest that child pornography, like other forms of pornography, will fuel fantasies and may incite offences in the case of certain individuals. This reasoned apprehension of harm demonstrates a rational connection between the law and the reduction of harm to children through child pornography.

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[94] ... [T]he social science evidence adduced in this case, buttressed by experience and common sense, amply meets the *Oakes* requirement of a rational connection between the purpose of the law and the means adopted to effect this purpose. Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

However, the Chief Justice found:

[99] ... the law may also capture the possession of material that one would not normally think of as "child pornography" and that raises little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings, created by or depicting the accused, that do not depict unlawful sexual activity and held by the accused exclusively for private use.

[100] Possession of material in these categories is less closely tied to harm to children than the vast majority of material caught by the law. ... [T]he risk [involved in permitting the possession of such material] is small, incidental and more tenuous than that associated with the vast majority of material targeted by s. 163.1(4). ... The bulk of the material in these two problematic classes, while engaging important values underlying the s. 2(b) guarantee, poses no reasoned risk of harm to children.

In applying the third and final step of the proportionality requirement, "the final balance," McLachlin CJ concluded:

[110] ... in broad impact and general application, the limits s. 163.1(4) imposes on free expression are justified by the protection the law affords children from exploitation and abuse. I cannot, however, arrive at the same conclusion in regard to the two problematic

categories of materials described above. The legislation prohibits a person from articulating thoughts in writing or visual images, even if the result is intended only for his or her own eyes. It further prohibits a teenager from possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him- or herself alone or engaged with a partner in lawful sexual activity. The inclusion of these peripheral materials in the law's prohibition trenches heavily on freedom of expression while adding little to the protection the law provides children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of s. 2(b) contemplated by the legislation is not demonstrably justifiable under s. 1.

Instead of nullifying "a law that is valid in most of its applications" (at para 111), McLachlin CJ decided "to read into the law an exclusion of the problematic applications of s. 163.1":

[114] ... [I]n my view the appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1 following *Schachter v. Canada*, ... [1992] 2 S.C.R. 679 [found in Chapter 25]. *Schachter* suggests that the problem of peripheral unconstitutional provisions or applications of a law may be addressed by striking down the legislation, severing of the offending sections ..., reading down or reading in. The Court decides on the appropriate remedy on the basis of "twin guiding principles": respect for the role of Parliament, and respect for the purposes of the Charter. Applying these principles, I conclude that in the circumstances of the case reading in an exclusion is the appropriate remedy.

She thus went on to hold:

[128] ... The guarantees provided in ss. 2(b) and 7 of the *Charter* require the recognition of two exemptions to s. 163.1(4) [and (2)], where the prohibition's intrusion into free expression and privacy is most pronounced and its benefits most attenuated:

- (a) The first exception protects the possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use. This exception protects deeply private expression, such as personal journals and drawings intended solely for the eyes of their creator.
- (b) The second exemption protects a person's possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted.

The portions of McLachlin CJ's decision dealing with the choice of remedy are more fully extracted in Chapter 25. Why do you think that the Court decided to "read in" these exemptions (or "read out" part of the law) instead of simply striking down the law? Was the Court engaging in judicial redrafting of the legislation? What other options did the Court have? According to Kent Roach and David Schneiderman:

Cases such as *Butler, Sharpe*, [and] *Little Sisters* ... are united by a perhaps overly optimistic faith that leaving potentially overbroad laws on the books will not chill freedom of expression and that police and other officials will properly interpret the law as it has been interpreted by the courts. It also means that as in *Little Sisters* any improper application of the law will only result in a s. 24(1) remedy designed to cure specific unconstitutional acts as opposed to the broader legislative framework. As in *Little Sisters*, it is unclear that such remedies will effectively change governmental behavior.

See Kent Roach & David Schneiderman, "Freedom of Expression in Canada," cited above, at 523.

VI. CONTROLS ON ELECTION SPENDING

Yasmin Dawood, "Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality"

(2013) 26 Can JL & Jurisprudence 293 at 293-94, 309 (footnotes omitted)

The right to free speech is generally viewed as the fundamental right in a liberal democratic system. It is seen as essential for the discovery of truth and the full expression of individual autonomy. In addition, the freedom of speech is essential for democracy; indeed, one of the most influential justifications of free speech is that it is a prerequisite for democratic governance. Given the fundamental importance of free speech, there is a strong presumption against state restrictions on speech. This presumption is particularly true for political speech, which is viewed as being the most deserving of constitutional protection.

Yet there is one kind of political speech—speech that takes place within the context of an election—that raises complicated problems for constitutional law. One might think that speech that occurs in the context of an election is the most “political” of political speech and for this reason deserves the greatest constitutional protection from state regulation. Yet many jurisdictions do impose restrictions on electoral speech by engaging in campaign finance regulation. The debate over campaign finance regulation is concerned with the following question: should the state impose rules on the giving and spending of money by private individuals and entities in the context of an election?

There are two main approaches to this debate in the scholarly literature on campaign finance regulation—the libertarian approach and the egalitarian approach, respectively. Proponents of the libertarian approach argue that the state should not restrict electoral speech by imposing limits on independent contributions and expenditures. Advocates of the egalitarian approach, by contrast, argue that the state regulation of speech is required in some instances to support the freedom of speech by preventing the wealthy from monopolizing political discourse. The debate ... is, at heart, a debate about the central values in a democratic system.

In recent years, the debate over electoral speech has become increasingly urgent in light of the considerable resources that are spent during political campaigns. [It is worthwhile to re-examine] the central distinction between the libertarian approach and the egalitarian approach. ... I argue that although the libertarian/egalitarian distinction is usually presented as a binary choice, the laws of a given jurisdiction often simultaneously display both libertarian and egalitarian characteristics. For this reason, I claim that the libertarian/egalitarian distinction is better conceived of as a “libertarian-egalitarian spectrum.” Ideal versions of the libertarian and egalitarian approaches, respectively, serve as the endpoints of the spectrum, while points along the spectrum represent particular combinations of the libertarian and egalitarian approaches.

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The recent approaches by the U.S. Supreme Court and the Supreme Court of Canada, respectively, have privileged one value—liberty or equality—at the expense of the other. Both of these approaches are detrimental to democratic participation and governance. Too great an emphasis on equality can lead to an impairment of free speech liberties of citizens, while too great an emphasis on liberty can lead to vast spending by powerful groups on electoral advertising. For these reasons ... [I claim] that the law that governs electoral speech should simultaneously instantiate the values of liberty and equality despite the irreconcilable tensions between them.

The *Canada Elections Act*, SC 2000, c 9 places limits on expenditures during an election campaign by parties, candidates, and "third parties." When Stephen Harper was president of the National Citizens' Coalition lobby group, he brought a challenge to third-party spending limits in *Harper v Canada (AG)*, immediately below.

Harper v Canada (AG)

2004 SCC 33

McLACHLIN CJ and MAJOR J (Binnie J concurring) (dissenting in part):

[1] This Court has repeatedly held that liberal democracy demands the free expression of political opinion, and affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms*' guarantee of free expression. It has ... observed that the electoral process is the primary means by which the average citizen participates in the public discourse that shapes our polity. The question now before us is whether these high aspirations are fulfilled by a law that effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign.

[2] The law at issue sets advertising spending limits for citizens—called third parties—at such low levels that they cannot effectively communicate with their fellow citizens on election issues during an election campaign. The practical effect is that effective communication during the writ period is confined to registered political parties and their candidates. Both enjoy much higher spending limits. This denial of effective communication to citizens violates free expression where it warrants the greatest protection—the sphere of political discourse. ... It follows that the law is inconsistent with the guarantees of the *Charter* and, hence, invalid.

I. Citizen Spending Limits

A. What the Law Does

[3] The *Canada Elections Act*, S.C. 2000, c. 9, sets limits for spending on advertising for individuals and groups. It limits citizens to spending a maximum of \$3,000 in each electoral district up to a total of \$150,000 nationally. Section 350 provides:

350(1) A third party shall not incur election advertising expenses of a total amount of more than \$150,000 during an election period in relation to a general election.

(2) Not more than \$3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district[.] ...

Section 350(2)(d) is particularly restrictive. It prohibits individuals from spending more than the allowed amounts on any issue with which a candidate is "particularly associated." The candidates in an election are typically associated with a wide range of views on a wide range of issues. The evidence shows that the effect of the limits is to prevent citizens from effectively communicating their views on issues during an election campaign.

[4] The limits do not permit citizens to effectively communicate through the national media. The Chief Electoral Officer testified that it costs approximately \$425,000 for a one-time full-page advertisement in major Canadian newspapers. ...

[5] Nor do the limits permit citizens to communicate through the mail. The Canada Post bulk mailing rate for some ridings amounts to more than \$7,500, effectively

prohibiting citizens from launching a mail campaign in these ridings without exceeding the \$3,000 limit.

[6] The \$3,000 riding limits are further reduced by the national limit of \$150,000, which precludes citizens from spending the maximum amount in each of the 308 ridings in Canada. This effectively diminishes the \$3,000 riding maximum. Quite simply, it puts effective radio and television communication within constituencies or throughout the country beyond the reach of "third party" citizens.

[7] Under the limits, a citizen ... cannot effectively communicate her position to her fellow citizens throughout the country in the ways those intent on communicating such messages typically do—through mail-outs and advertising in the regional and national media. The citizen's message is thus confined to minor local dissemination with the result that effective local, regional and national expression of ideas becomes the exclusive right of registered political parties and their candidates.

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[9] It is therefore clear that the *Canada Elections Act*'s advertising limits prevent citizens from effectively communicating their views on election issues to their fellow citizens, restricting them instead to minor local communication. As such, they represent a serious incursion on free expression in the political realm. The Attorney General raises three reasons why this restriction is justified as a reasonable limit in a free and democratic society under s. 1 of the *Charter*: to ensure the equality of each citizen in elections; to prevent the voices of the wealthy from drowning out those of others; and to preserve confidence in the electoral system. Whether that is so is the question in this appeal.

B. Is the Incursion on Free Speech Justified?

(1) The Significance of the Infringement

[10] One cannot determine whether an infringement of a right is justified without examining the seriousness of the infringement. ... [S]ome restrictions on freedom of expression are easier to justify than others. ...

[11] Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression

[12] The right of the people to discuss and debate ideas forms the very foundation of democracy[.] ...

[13] Section 2(b) of the *Charter* aims not just to guarantee a voice to registered political parties, but an equal voice to each citizen. ...

[14] Permitting an effective voice for unpopular and minority views—views political parties may not embrace—is essential to deliberative democracy. The goal should be to bring the views of all citizens into the political arena for consideration, be they accepted or rejected at the end of the day. Free speech in the public square may not be curtailed merely because one might find the message unappetizing or the messenger distasteful (*Figueroa*, ... at para. 28):

Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions. ... This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

Participation in political debate "is ... the primary means by which the average citizen participates in the open debate that animates the determination of social policy"; see *Figueroa*, at para. 29.

[15] The right to participate in political discourse is a right to effective participation—for each citizen to play a “meaningful” role in the democratic process[.] ...

[16] The ability to engage in effective speech in the public square means nothing if it does not include the ability to attempt to persuade one’s fellow citizens through debate and discussion. This is the kernel from which reasoned political discourse emerges. ...

[17] Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public—as viewers, listeners and readers—have a right to information on public governance, absent which they cannot cast an informed vote . . . Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, ... [1988] 2 S.C.R. 712, at pp. 766-67.

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[19] The *Canada Elections Act* undercuts the right to listen by withholding from voters an ingredient that is critical to their individual and collective deliberation: substantive analysis and commentary on political issues of the day. The spending limits impede the ability of citizens to communicate with one another through public fora and media during elections and curtail the diversity of perspectives heard and assessed by the electorate. Because citizens cannot mount effective national television, radio and print campaigns, the only sustained messages voters see and hear during the course of an election campaign are from political parties.

[20] It is clear that the right here at issue is of vital importance to Canadian democracy. In the democracy of ancient Athens, all citizens were able to meet and discuss the issues of the day in person. In our modern democracy, we cannot speak personally with each of our fellow citizens. We can convey our message only through methods of mass communication. ... The ability to speak in one’s own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens. Pell J.’s observation could not be more apt: “[s]peech without effective communication is not speech but an idle monologue in the wilderness”; see *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), at p. 415.

[21] This is the perspective from which we must approach the question whether the limitation on citizen spending is justified. It is no answer to say that the citizen can speak through a registered political party. The citizen may hold views not espoused by a registered party. The citizen[s] right to communicate those views ... lies at the core of the free expression guarantee. That does not mean that the right cannot be limited. But it does mean that limits on it must be supported by a clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process.

(2) The Law’s Objective: Is It Pressing and Substantial?

[22] ... The Attorney General states that the objective of the legislation is to promote fair elections.

[23] In more concrete terms, the limits are purported to further three objectives: first, to favour equality, by preventing those with greater means from dominating electoral debate; second, to foster informed citizenship, by ensuring that some positions are not drowned out by others (this is related to the right to participate in the political process by casting an informed vote); third, to enhance public confidence by ensuring equality, a better informed citizenship and fostering the appearance and reality of fairness in the democratic process.

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[26] Common sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy, even in the absence of evidence that past elections have been unfair

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C. Proportionality

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[31] The real question in this case . . . is whether the limits go too far in their incursion on free political expression.

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[33] It is impossible to say whether an infringement is carefully tailored to the asserted goals without having some idea of the actual seriousness of the problem being addressed. The yardstick by which excessive interference with rights is measured is the need for the remedial infringement. If a serious problem is demonstrated, more serious measures may be needed to tackle it. Conversely, if a problem is only hypothetical, severe curtailments on an important right may be excessive.

[34] . . . The Attorney General presented no evidence that wealthier Canadians—alone or in concert—will dominate political debate during the electoral period absent limits. It offered only the hypothetical possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimizes the Attorney General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem.

[35] On the other side of the equation, the infringement on the right is severe. We earlier reviewed the stringency of the limits. They prevent citizens from effectively communicating with their fellow citizens on election issues during a campaign. . . . Citizens are limited to 1.3 percent of the expenditures of registered political parties. This is significantly lower than other countries that have also imposed citizen spending limits. It is not an exaggeration to say that the limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period. In actuality, the only space left in the marketplace of ideas is for political parties and their candidates. The right of each citizen to have her voice heard, so vaunted in *Figueroa, supra*, is effectively negated unless the citizen is able or willing to speak through a political party.

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[38] There is no demonstration that limits this draconian are required to meet the perceived dangers of inequality, an uninformed electorate and the public perception that the system is unfair. On the contrary, the measures may themselves exacerbate these dangers. Citizens who cannot effectively communicate with others on electoral issues may feel they are being treated unequally compared to citizens who speak through political parties. The absence of their messages may result in the public being less well informed than it would otherwise be. And a process that bans citizens from effective participation in the electoral debate during an election campaign may well be perceived as unfair. These fears may be hypothetical, but no more so than the fears conjured by the Attorney General in support of the infringement.

[39] This is not to suggest that election spending limits are never permissible. On the contrary, this Court . . . has recognized that they are an acceptable, even desirable, tool to ensure fairness and faith in the electoral process. Limits that permit citizens to conduct effective and persuasive communication with their fellow citizens might well meet the minimum impairment test. The problem here is that the draconian nature of the infringement—to effectively deprive all those who do not or cannot speak

through political parties of their voice during an election period—overshoots the perceived danger. Even recognizing that “[t]he tailoring process seldom admits of perfection” … , and according Parliament a healthy measure of deference, we are left with the fact that nothing in the evidence suggests that a virtual ban on citizen communication through effective advertising is required to avoid the hypothetical evils of inequality, a misinformed public and loss of public confidence in the system.

[Chief Justice McLachlin and Major J then moved to the proportionality branch of the *Oakes* test.]

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[41] Given the unproven and speculative nature of the danger the limits are said to address, the possible benefits conferred by the law are illusory. The smaller the danger, the less the benefit conferred. Yet the infringement is serious. It denies the citizen the right of effective political communication except through a registered party. … The measures may actually cause more inequality, less civic engagement and greater disrepute than they avoid. In the absence of any evidence to the contrary, it cannot be said that the infringement does more good than harm.

[42] Having had the advantage of reviewing the reasons of Bastarache J., we believe it is important to make three observations. First, whether or not citizens dispose of sufficient funds to meet or exceed the existing spending limits is irrelevant. What is important is that citizens have the capacity, should they so choose, to exercise their right to free political speech. The spending limits as they currently stand do not allow this. Instead, they have a chilling effect on political speech, forcing citizens into a Hobson’s choice between not expressing themselves at all or having their voice reduced to a mere whisper. Faced with such options, citizens could not be faulted for choosing the former.

[43] Second, it is important to recognize that the spending limits do not constrain the right of only a few citizens to speak. They constrain the political speech of all Canadians, be they of superior or modest means. Whether it is a citizen incurring expenditures of \$3001 for leafleting in her riding or a group of citizens pooling 1501 individual contributions of \$100 to run a national advertising campaign, the *Charter* protects the right to free political speech.

[44] Finally, even if *were* true that spending limits constrained the political speech rights of only a few citizens, it would be no answer to say, as suggests Bastarache J., at para. 112, that few citizens can afford to spend more than the limits anyway. This amounts to saying that even if the breach of s. 2(b) is not justified, it does not matter because it affects only a few people. *Charter* breaches cannot be justified on this basis. Moreover, one may question the premise that only a few people are affected by the spending limits. Indeed, if so few can afford to spend more than the existing limits, why, one may ask, are they needed?

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BASTARACHE J (Iacobucci, Arbour, LeBel, Deschamps, and Fish JJ concurring):

V. Analysis

A. Third Party Electoral Advertising Regime

[55] Numerous groups and organizations participate in the electoral process as third parties[,] … to achieve three purposes. First, third parties may seek to influence the outcome of an election[.] … Second, third parties may add a fresh perspective or new dimension to the discourse surrounding one or more issues associated with a

candidate or political party. ... Third, they may add an issue to the political debate and in some cases force candidates and political parties to address it.

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[57] Parliament enacted new third party spending limits as part of a larger third party electoral advertising regime in the 2000 *Canada Elections Act*. Part 17 of the Act, ss. 349 to 362, creates a scheme that limits the advertising expenses of individuals and groups who are not candidates or political parties. The scheme also requires such expenses to be reported to the Chief Electoral Officer. ...

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[59] This case represents the first opportunity for this Court to determine the constitutionality of the third party election advertising regime established by Parliament. This Court has however previously considered the constitutionality of limits on independent spending in the regulation of referendums in *Libman*

B. *Libman v. Quebec (Attorney General)*

[60] In *Libman*, the Court was asked to determine the constitutionality of the independent spending limits set out in Quebec's referenda legislation, the *Referendum Act*, R.S.Q., c. C-64.1. ... [The details of the legislation are omitted.]

[61] The Court agreed that the limits on independent spending set out in the *Referendum Act* were not justified. The Court did, however, endorse spending limits as an essential means of promoting fairness in referenda and elections which the Court held were parallel processes: *Libman*, at para. 46. The Court ... endorsed [the following principles (at paras. 47-50)]:

- [1] ... Owing to the competitive nature of elections, ... spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard [equal dissemination of points of view].
- [2] Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties [free and informed vote]. ...
- [3] For spending limits to be fully effective, they must apply to all possible election expenses ...
- [4] The actions of independent individuals and groups can [either] directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. ...
- [5] It is also important to limit independent spending more strictly than spending by candidates or political parties [because of the former's much greater numbers]. ... [Emphasis added.]

[62] The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model ... promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways ... [by providing] a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance

provisions. ... In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.

[63] The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. The regime is clearly structured on the egalitarian model of elections. The overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*.

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C. Election Advertising Expense Limits

(1) Freedom of Expression

[66] The appellant rightly concedes that the limits on election advertising expenses infringe s. 2(b) of the *Charter*. ...

[Justice Bastarache found that the section did not breach s 3 of the Charter, the right to vote.]

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(3) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

[75] The central issue at this stage of the analysis is the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society. ...

[76] This is not the first time the Court has addressed the standard of proof the Crown must satisfy in demonstrating possible harm. Nor is it the first time that the Court has been faced with conflicting social science evidence regarding the problem that Parliament seeks to address. ... The context of the impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1; see *Thomson Newspapers*, at para. 88. As this pivotal issue affects the entire s. 1 analysis, it is helpful to consider the contextual factors at the outset.

(a) Contextual Factors

(i) The Nature of the Harm and the Inability to Measure It

[77] The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm.

[Justice Bastarache then cited *Keegstra*, *Butler*, and *Sharpe*, among others.]

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[79] ... [T]he nature of the harm and the efficaciousness of Parliament's remedy in this case is difficult, if not impossible, to measure scientifically. The harm which Parliament seeks to address can be broadly articulated as electoral unfairness. Several

experts, as well as the Lortie Commission, concluded that unlimited third party advertising can undermine election fairness in several ways. First, it can lead to the dominance of the political discourse by the wealthy Second, it may allow candidates and political parties to circumvent their own spending limits through the creation of third parties Third, unlimited third party spending can have an unfair effect on the outcome of an election Fourth, the absence of limits ... can erode the confidence of the Canadian electorate who perceive the electoral process as being dominated by the wealthy. This harm is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process. In light of these difficulties, logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy.

(ii) Vulnerability of the Group

[80] Third party spending limits seek to protect two groups. First, the limits seek to protect the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote. Generally, the Canadian electorate "must be presumed to have a certain degree of maturity and intelligence"; see *Thomson Newspapers, supra*, at para. 101. Where, however, third party advertising seeks to systematically manipulate the voter, the Canadian electorate may be seen as more vulnerable; see *Thomson Newspapers*, at para. 114.

[Justice Bastarache noted that candidates and political parties are not "vulnerable" (at para 81).]

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(iii) Subjective Fears and Apprehension of Harm

[82] Perception is of utmost importance in preserving and promoting the electoral regime in Canada. ... Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter.

[83] Several surveys indicate that Canadians view third party spending limits as an effective means of advancing electoral fairness. Indeed, in *Libman, supra*, at para. 52, the Court relied on the survey conducted by the Lortie Commission illustrating that 75 percent of Canadians supported limits on spending by interest groups to conclude that spending limits are important to maintain public confidence in the electoral system.

(iv) The Nature of the Infringed Activity: Political Expression

[84] Third party advertising is political expression. ... As such, the election advertising of third parties lies at the core of the expression guaranteed by the Charter and warrants a high degree of constitutional protection. ...

[85] In some circumstances, however, third party advertising will be less deserving of constitutional protection. Indeed, it is possible that third parties having access to significant financial resources can manipulate political discourse to their advantage through political advertising. ...

There is no evidence before the Court that indicates that third party advertising seeks to be manipulative. Nor is there any evidence that third parties wish to use their advertising dollars to smear candidates or engage in other forms of non-political discourse. Nevertheless, the danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted.

[86] ... Further, by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process. Thus, the provisions also enhance a second *Charter* right, the right to vote.

[87] Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. ... The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference. The lower courts erred in failing to do so (*Paperny J.A.*, at para. 135). In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.

[Justice Bastarache rejected the argument that the third-party advertising regime was too vague as to constitute a limit prescribed by law.]

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(c) Is the Objective Pressing and Substantial?

[91] The overarching objective of the third party election advertising limits is electoral fairness. Equality in the political discourse promotes electoral fairness and is achieved, in part, by restricting the participation of those who have access to significant financial resources. The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner. Canadians understandably have greater confidence in an electoral system which ultimately encourages increased participation.

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[94] In this case, the Lortie Report is the central piece of the evidentiary record establishing the possible harm engendered by uncontrolled third party advertising and justifying the limits set by Parliament on the advertising expenses of third parties.

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[100] In my view, the findings of the Lortie Report can be relied upon in this appeal to determine whether the third party advertising limits are justified. ... [Here Bastarache J cited the intention to promote equality in political discourse, to protect integrity of the electoral finance regime, and to maintain confidence in the electoral process.]

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(d) Rational Connection

[104] ... The lower courts erred by demanding too stringent a level of proof, in essence, by requiring the Attorney General to establish an empirical connection between third party spending limits and the objectives of s. 350. There is sufficient evidence establishing a rational connection between third party advertising expense limits and promoting equality in the political discourse, protecting the integrity of the financing regime applicable to candidates and parties, and maintaining confidence in the electoral process. [Bastarache J's elaboration of these points is omitted.]

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(e) Minimal Impairment

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[111] ... In this case, the contextual factors indicate that the Court should afford deference to the balance Parliament has struck between political expression and

meaningful participation in the electoral process. As Berger J.A. in dissent aptly noted, at para. 268, "[t]he Court should not substitute judicial opinion for legislative choice in the face of a genuine and reasonable attempt to balance the fundamental value of freedom of expression against the need for fairness in the electoral process."

[112] The Chief Justice and Major J. assert that short of spending well over \$150,000 nationally and \$3,000 in a given electoral district, citizens cannot effectively communicate their views on election issues to their fellow citizens (para. 9). Respectfully, this ignores the fact that third party advertising is not restricted prior to the commencement of the election period. Outside this time, the limits on third party intervention in political life do not exist. Any group or individual may freely spend money or advertise to make its views known or to persuade others. In fact, many of these groups are not formed for the purpose of an election but are already organized and have a continued presence, mandate and political view which they promote. Many groups and individuals will reinforce their message during an electoral campaign.

[113] The nature of Canada's political system must be considered when deciding whether individuals and groups who engage in election advertising will be affected unduly by the limits set out in s. 350. First, ... there are few obstacles for individuals to join existing political parties or to create their own Still, some will participate outside the party affiliations; this explains why the existence of multiple organizations and parties of varying sizes requires Parliament to balance their participation during the election period. Further, ... the vast majority of Canadian citizens simply cannot spend \$150,000 nationally or \$3,000 in a given electoral district. What prevents most citizens from effectively exercising their right of political free speech ... is a lack of means, not legislative restrictions. ... I do not suggest that since the breach of s. 2(b) only affects a few people, it is therefore justifiable. As discussed, the objective is to ensure the political discourse is not dominated by those who have greater resources. The proper focus is on protecting the right to meaningful participation of the entire electorate. Let me now examine in more detail how this is achieved.

[114] Section 350 minimally impairs the right to free expression. The definition of "election advertising" in s. 319 only applies to advertising that is associated with a candidate or party. Where an issue is not associated with a candidate or political party, third parties may partake in an unlimited advertising campaign.

[115] The \$3,000 limit per electoral district and \$150,000 national limit allow for meaningful participation in the electoral process while respecting the right to free expression. Why? First, because the limits established in s. 350 allow third parties to advertise in a limited way in some expensive forms of media such as television, newspaper and radio. But, more importantly, the limits are high enough to allow third parties to engage in a significant amount of low cost forms of advertising such as computer generated posters or leaflets or the creation of a 1-800 number. In addition, the definition of "election advertising" in s. 319 does not apply to many forms of communication such as editorials, debates, speeches, interviews, columns, letters, commentary, the news and the Internet which constitute highly effective means of conveying information. Thus, as the trial judge concluded, at para. 78, the limits allow for "modest, national, informational campaigns and reasonable electoral district informational campaigns."

[116] Second, the limits set out in s. 350 are justifiably lower than the candidate and political party advertising limits, as recommended by the Lortie Commission. As this Court explained in *Libman, supra*, at paras. 49-50, the third party limit must be low enough to ensure that a particular candidate who is targeted by a third party has sufficient resources to respond. ... The limits must also account for the fact that third parties generally have lower overall expenses than candidates and political parties. The limits

must also appreciate that third parties tend to focus on one issue and may therefore achieve their objective less expensively. Thus, the limits seek to preserve a balance between the resources available to candidates and parties taking part in an election and those resources that might be available to third parties during this period. Professor Fletcher confirmed (in evidence) that the limits set out in s. 350 achieve this goal.

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[118] Certainly, one can conceive of less impairing limits. Indeed, any limit greater than \$150,000 would be less impairing. Nevertheless, s. 350 satisfies this stage of the Oakes analysis. The limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties. The limits preclude the voices of the wealthy from dominating the political discourse, thereby allowing more voices to be heard. The limits allow for meaningful participation in the electoral process and encourage informed voting. The limits promote a free and democratic society.

(f) Proportionality

[119] The final stage of the Oakes analysis requires the Court to weigh the deleterious effects against the salutary effects.

[120] ... By ensuring that affluent groups or individuals do not dominate the political discourse, s. 350 promotes the political expression of those who are less affluent or less capable of obtaining access to significant financial resources and ensures that candidates and political parties who are subject to spending limits are not overwhelmed by third party advertising. Section 350 also protects the integrity of the candidate and political party spending limits by ensuring that these limits are not circumvented through the creation of phony third parties. Finally, s. 350 promotes fairness and accessibility in the electoral system and consequently increases Canadians' confidence in it.

[121] The deleterious effect of s. 350 is that the spending limits do not allow third parties to engage in unlimited political expression. That is, third parties are permitted to engage in informational but not necessarily persuasive campaigns, especially when acting alone. When weighed against the salutary effects of the legislation, the limits must be upheld. As the Court explained in *Libman, supra*, at para. 84:

... Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process. [... emphasis added.]

Accordingly, s. 350 should be upheld as a demonstrably justified limit in a free and democratic society.

[The majority decision upheld other provisions of the *Canada Elections Act*—most notably, the ban on transmitting election advertising on polling day.] [Emphasis in original.]

Appeal allowed.

NOTES AND QUESTIONS

1. Claims that unlimited spending might enable wealthier candidates to “drown out” or “bury” their less wealthy opponents are a familiar part of the case for ceilings. Yet how do the voices of the wealthy “drown out” or “bury” the voices of others? Why does unequal spending matter? How does it translate into unequal campaign influence?

2. In *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877, 1998 CanLII 829, the Supreme Court of Canada struck down the federal ban on the publication of election campaign polls during the final days of the campaign (s 322.1 of the *Canada Elections Act*, RSC 1985, c E-2). The federal government argued that the ban was necessary “to prevent the potentially distorting effect of public opinion survey results that are released late in an election campaign leaving insufficient time to assess their validity” (at para 22).

Justice Bastarache, for the majority, dismissed this argument. He recognized that polls might contain information useful to voters. Late poll results, in particular, might be useful to those who want to vote strategically—that is, to vote for their second choice if their first choice seems to have no chance of winning. In any event, argued Bastarache J, it is up to voters to decide what information they want to take into account when deciding how to vote: “If they feel that their votes are better informed as a result of having this information, then the ban not only interferes with their freedom of expression, but with their perception of the freeness and validity of their vote” (at para 129).

We should not, said Bastarache J, underestimate the capacity of voters to assess polls. Voters are exposed to opinion polls throughout the campaign and are likely to spot a single inaccurate poll result. More generally, a commitment to democracy and to freedom of expression means that we must presume that the Canadian voter “is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information” (at para 112). Canadian voters must be “presumed to have a certain degree of maturity and intelligence” (at para 101). One cannot assume that “Canadians will become so mesmerized by the flurry of polls” (at para 101) in the media that they will forget about the real issues.

Justice Gonthier dissented. In his view, the ban permitted timely discussion and careful scrutiny of all published poll results and so contributed to “the promotion of an informed vote over a misinformed vote” (at para 25).

3. In *R v Bryan*, the Supreme Court of Canada dealt with a s 2(b) challenge to s 329 of the *Canada Elections Act*, SC 2000, c 9, which prohibits the broadcasting of election results on election day until polling stations are closed in all parts of Canada. The facts involved the federal general election of November 27, 2000, during which the appellant transmitted the election results from Atlantic Canada, while polling stations remained open in other parts of Canada, by posting the results on a website. The results were therefore available to the public in every electoral district in Canada. The appellant had made his intention to do so public before the election, and the commissioner of Canada Elections had warned him that such publication would be contrary to s 329 of the *Canada Elections Act*. A majority of the Court held that while s 329 infringed s 2(b), the infringement was justified under s 1. The pressing and substantial purpose of the provision was to ensure “informational equality” and to avoid the perception of unfairness that occurs when some voters have access to information that is not available to others and the possibility that access to that information will affect voter participation or choices. Because of the difficulty of policing social media, s 329 was repealed in 2014: see *Fair Elections Act*, SC 2014, c 12, s 73.

VII. ACCESS TO PUBLIC PROPERTY

Freedom of expression should be open to all, not only to those who can afford to rent halls or buy advertising space. In the United States, the “public forum” doctrine constitutionally permits the use of government-owned property for the exercise of freedom of speech if that property is ordinarily open to the public, such as streets and parks. The state may restrict the content of speech in a public forum only for substantial and compelling reasons and only if the restriction is narrowly drawn. Content-neutral restrictions (time, place, and manner restrictions) will be justified only if they serve an important state interest and leave open alternative channels of communication. In non-public forums, places not ordinarily open to the public, such as government workplaces, restrictions on speech are permissible so long as they are “rational” and are not content-based or directed at particular viewpoints. This grants to government wide discretion to limit expressive activity in non-public forums. Other spaces, which are not traditional public forums, may be “designated” as such by government, in which case government restrictions will be scrutinized more carefully, as if they were traditional public forums: see Cass R Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) at 101–3. In *International Society for Krishna Consciousness, Inc v Lee*, 505 US 672, 112 S Ct 2701 (1992), the US Supreme Court ruled that airports were not public forums for the purposes of the First Amendment because they were not traditional public forums.

Canadian courts have also accepted that freedom of expression must include the right to communicate on state-owned property—that in the absence of any right to communicate on state-owned property, many individuals would be significantly hindered in their ability to communicate with others. Yet the issue of communicative access to state property does not seem to fit neatly into the standard two-step model of freedom of expression adjudication. As you read the following cases, consider why this might be so.

NOTE: COMMITTEE FOR THE COMMONWEALTH OF CANADA V CANADA

In 1984, officials at Dorval Airport in Montreal prevented three members of the Committee for the Republic of Canada from communicating their political views to passersby in the public areas of the airport. The committee members were told that their activities—speaking with passersby and distributing leaflets—violated a federal airport regulation, which provided that “no person shall (1) conduct any business or undertaking, commercial or otherwise, at an airport; (2) advertise or solicit at an airport for the purpose of any business or undertaking” without the authorization of the Minister. The airport management indicated that the only exception made to the regulation was the sale of poppies by veterans every November. The case was appealed to the Supreme Court of Canada. In *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 1991 CanLII 119 all members of the Court agreed that the airport authorities’ interference with the respondents’ communication of political views was a restriction on freedom of expression that could not be justified under s 1. However, three different approaches to the issue of communicative access were put forward by the Court:

1. Chief Justice Lamer took the position that the question of whether an individual has a right to communicate on state-owned property should be resolved under s 2(b) and depend simply on whether the particular communication is consistent or compatible with the state’s use of the property. A restriction that is based on the incompatibility of the particular form of expression with the state’s property use does not violate s 2(b) and so does not require special justification under s 1.
2. Justice McLachlin adopted what she regarded as the reasonable “middle ground” on the issue of communicative access to state property, “between the extremes of the right to expression on all government property and the right to expression on none.”

According to McLachlin J, a restriction on communicative access to state-owned property that is based not on content but on the incompatibility of access with the state's use of its property will violate s 2(b) only if the restricted communication can be shown to advance expression values. Constitutional protection of access should extend "to expression on some but not all government property." Communicative access to certain state-owned properties—"private" state properties such as prison cells, judge's private chambers, private government offices, and publicly owned broadcasting facilities—would not advance the values of democracy, truth, and autonomy. Such places were neither "places of public debate aimed at promoting either the truth or a better understanding of social and political issues," nor related to "the maximization of individual fulfillment and human flourishing." A restriction on communicative access to a private, state-owned property will not violate s 2(b) and so will not require justification under s 1. On the other hand, McLachlin J considered that the purposes of the guarantee of free expression are served by protecting expression in public forums, "which have by tradition of designation been dedicated to public expressions." A restriction on communicative access to a "public forum" will violate s 2(b) and so will require justification under s 1.

3. Justice L'Heureux-Dubé took the view that any time the state restricts expression on its property, it violates s 2(b) and must justify the restriction under s 1. Any restriction of expression on state property must satisfy the rationality, minimal impairment, and proportionality standards of s 1. She suggested, however, that these standards should not be applied strictly in access to public property cases. Instead, she called for a flexible balancing of competing state and individual interests under s 1.

In *Committee for the Commonwealth of Canada*, the Supreme Court of Canada seemed to adopt a version of the public forum doctrine. Why do you think it did so? For an argument that issues related to the location of speech should be dealt with under s 1 of the Charter, see Brian Slattery, "Freedom of Expression and Location: Are There Constitutional Dead Zones?" (2010) 51 SCLR (2d) 245.

NOTE: RAMSDEN V PETERBOROUGH (CITY)

In *Ramsden v Peterborough (City)*, a local musician affixed posters announcing an upcoming performance to hydro poles. He was charged with contravening a municipal by-law that imposed an absolute prohibition on the affixing of posters on any public property. Without resolving the issue of the appropriate test for communicative access to public property, all members of the Court agreed that the by-law was an unjustifiable infringement of freedom of expression. In establishing a violation of freedom of expression, Iacobucci J, writing for the Court, noted that "posters have communicated political, cultural and social information for centuries. Posterizing on public property, including utility poles, increases the availability of those messages, and thereby fosters social and historical decision-making." Reference was made to the evidence of an art historian who testified that

[p]osters have always been a medium of communication of revolutionary and unpopular ideas. They have been called "the circulating libraries of the poor." They have been not only a political weapon but also a means of communicating artistic, cultural, and commercial messages.

In the s 1 analysis, the Court found that the municipality's concerns with litter and aesthetic blight, while legitimate, could be met in a manner far less restrictive than an absolute ban. It referred to such alternatives as

regulating the use of [utility] poles for such purposes by specifying or regulating the location, size of posters, the length of time that a poster might remain on any location, the type of substance used to affix posters, and requiring that the posters be removed after a certain specified time. If necessary, a reasonable fee could be imposed to defray costs of administering such a system.

In the following case, the Court reviewed its prior decisions and attempted to articulate a single test for communicative access to public property. Do you think the Court succeeded?

Montréal (City) v 2952-1366 Québec Inc

2005 SCC 62

McLACHLIN CJ and DESCHAMPS J (Bastarache, LeBel, Abella, and Charron JJ concurring):

1. Introduction

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[2] In light of its scope, art. 9(1) of the *By-law concerning noise*, RBCM 1994, c. B-3 ("By-law"), was validly adopted by the City pursuant to its regulatory powers. Although this provision limits the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter*, the limit is reasonable and can be justified within the meaning of s. 1 of the *Canadian Charter*.

2. Origins of the Case

[3] The respondent operates a club featuring female dancers in a commercial zone of downtown Montréal, in a building fronting Ste-Catherine Street. To attract customers and compete with a similar establishment located nearby, the respondent set up, in the main entrance to its club, a loudspeaker that amplified the music and commentary accompanying the show under way inside so that passers-by would hear them. Around midnight on May 14, 1996, a police officer on patrol on Ste-Catherine Street heard the music from a nearby intersection. The respondent was charged with producing noise that could be heard outside using sound equipment, in violation of arts. 9(1) and 11 of the By-law. These provisions read as follows:

9. In addition to the noise referred to in article 8, the following noises, where they can be heard from the outside, are specifically prohibited:

(1) noise produced by sound equipment, whether it is inside a building or installed or used outside;

• • •

11. No noise specifically prohibited under articles 9 or 10 may be produced, whether or not it affects an inhabited place.

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3. Analysis

3.1 Does the City Have the Power to Adopt Article 9(1) of the By-law?

[The majority held that, despite its general language, the by-law applied only to sounds that stood out over environmental noise.]

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[36] It is not in dispute that the City has the power to define and prohibit nuisances. In adopting art. 9(1) of the By-law, the City was targeting noises that constitute a nuisance. We accordingly conclude that the City had the power to adopt art. 9(1) of the By-law.

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3.2 Does Article 9(1) of the By-law Infringe Section 2(b) of the Canadian Charter?

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3.2.1 Expressive Content

[58] The first question is whether the noise emitted by a loudspeaker from inside the club had expressive content. The answer must be yes. ... Expressive activity is not excluded from the scope of the guarantee because of its particular message. ...

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3.2.2 Excluded Expression

[60] Expressive activity may fall outside the scope of s. 2(b) protection because of how or where it is delivered. ... For instance, this Court has found that violent expression is not protected by the *Canadian Charter*[.] ...

[61] This case raises the question of whether the *location* of the expression at issue causes the expression to be excluded from the scope of s. 2(b): see *Committee for the Commonwealth of Canada v. Canada*, ... [1991] 1 S.C.R. 139, per Lamer C.J. Property may be private or public. Public property is government-owned. In this case, although the loudspeaker was located on the respondent's private property, the sound issued onto the street, a public space owned by the government. One aspect of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers' corner have by tradition become places of protected expression. The question here is whether s. 2(b) of the *Canadian Charter* protects not only what the appellants were doing, but their right to do it *in the place where they were doing it*, namely a public street.

[62] Section 2(b) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*. Public property, however, may be more problematic since, by definition, it implicates the state. Two countervailing arguments, both powerful, are pitted against each other where the issue is expression on public property.

[63] The argument for s. 2(b) protection on all public property focuses on ownership. ... The government as the owner of property controls it. It follows that restrictions on the use of public property for expressive purposes are "government acts." Therefore, it is argued, the government is limiting the right to free expression guaranteed by s. 2(b) of the *Canadian Charter* and must justify this under s. 1.

[64] The argument against s. 2(b) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the

drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.

[65] In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. [Those approaches were discussed in the note above.] ...

[66] In this case, as in *Ramsden v. Peterborough (City)*, ... [1993] 2 S.C.R. 1084, we are satisfied that on any of the tests proposed in *Committee for the Commonwealth of Canada*, the emission of noise onto a public street is protected by s. 2(b). The activity is expressive. The evidence does not establish that ... a building-mounted amplifier emitting noise onto a public street ... impede[s] the function of city streets or fail[s] to promote the values that underlie the free expression guarantee.

[67] This method of expression is not repugnant to the primary function of a public street, on the test of Lamer C.J. Streets provide means of passing and accessing adjoining buildings. They also serve as venues of public communication. However one defines their function, emitting noise produced by sound equipment onto public streets seems not in itself to interfere with it. If sound equipment were being used in a way that prevented people from using the street for passage or communication, the answer might be different However, the evidence here does not establish this.

[68] The method and location of the expression also arguably serve the values that underlie the guarantee of free expression, on the approach advocated by McLachlin J. Amplified emissions of noise from buildings onto a public street could further democratic discourse, truth finding and self-fulfillment. Again, if the evidence showed that the amplification inhibited passage and communication on the street, the situation might be different. Th[at argument rests on content] ... , and cannot be considered in addressing the issue of whether the method or location of the expression itself is inimical to s. 2(b).

[69] Finally, on the analysis of L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada*, the expressive content of the noise mandates the conclusion that it is protected by s. 2(b) and propels the analysis directly into s. 1, where justification is the issue.

[70] It follows that ... it is unnecessary to revisit the question of which of the divergent approaches to the issue of expression on public property should be adopted. However, since we are requested to clarify the test, we offer the following views.

[71] We agree with the view of the majority in *Committee for the Commonwealth of Canada* that the application of s. 2(b) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry

[72] Expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression ... provides a useful analogy. Violent expression ... may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(b) because violent means and methods undermine the values that s. 2(b) seeks to protect. ... Similarly, in determining what public spaces fall outside s. 2(b) protection, we must ask whether free expression in a given place undermines the values underlying s. 2(b).

[73] We therefore propose the following test for the application of s. 2(b) to public property The onus of satisfying this test rests on the claimant.

[74] The basic question ... is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

- (a) the historical or actual function of the place; and
- (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[75] The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.

[76] Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space—the activity going on there—compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.

[77] Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

[78] The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, ... some imprecision is inevitable. ... This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

[79] Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(b) stage The proposed test reflects this. However, it also reflects the reality that some places must remain outside the protected sphere of s. 2(b). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. ... [T]he test must provide a preliminary screening process. Otherwise, uncertainty will prevail Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.

[80] A final concern is whether the proposed test is flexible enough to accommodate future developments. ... Some say, for example, that the increasing privatization of government space will shift the debate to the private sector. Others say that the new spaces for communication created by electronic communication through the Internet will raise new questions on the issue of where the right to free speech applies. We do not suggest how the problems of the future will be answered. But it seems to us that a test that focuses on historical and actual functions as markers for public and private domains, adapted as necessary to accord with new situations and the values underlying the s. 2(b) guarantees, will be sufficiently flexible to meet the problems of the future.

[81] Applying the approach we propose to the case at bar confirms the conclusion ... that the expression at issue in this case falls within the protected sphere of s. 2(b) of the *Canadian Charter*. The content, as already noted, is expressive. Viewed from the perspective of locus, the expression falls within the public domain. Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted. There is nothing to suggest that to permit this medium of expression would subvert the values of s. 2(b).

3.2.3 The Infringement

[82] This brings us to the third step of the *Irwin Toy* test. Having concluded that the expression falls within the protected scope of s. 2(b), we must ask whether the By-law impinges on protected expression, in purpose or effect.

[83] Here, the purpose of the By-law is benign. However, its effect is to restrict expression. Where the effect of a provision is to limit expression, a breach of s. 2(b) will be made out, provided the claimant shows that the expression at issue promotes one of the values underlying the freedom of expression: *Irwin Toy*, at p. 976.

[84] The electronically amplified noise at issue here encouraged passers-by to engage in the leisure activity of attending one of the performances held at the club. Generally speaking, engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing. The disputed value of particular expressions of self-fulfillment, like exotic dancing, does not negate this general proposition: *R v. Butler*, ... [1992] 1 S.C.R. 452, at p. 489. It follows that the By-law has the effect of restricting expression which promotes one of the values underlying s. 2(b) of the *Canadian Charter*.

[85] We conclude that the City's ban on emitting amplified noise constitutes a limit on free expression under s. 2(b) of the *Canadian Charter*.

3.3 Is the Limit Justified Under Section 1 of the Canadian Charter?

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[89] [Applying the test from *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46,] [w]e conclude that the objective of the limitation is pressing and substantial. The Superior Court judge, Boillard J., defined that objective as combatting noise pollution Noise pollution is a serious problem in urban centers, and cities like Montréal are entitled to act reasonably and responsibly in seeking to curb it.

[90] This brings us to proportionality. Proportionality is concerned with the means chosen to meet the objective. Here the City chose a two-pronged attack on noise pollution. First, it prohibited noises exceeding a stipulated degree of loudness: art. 8. Second, it prohibited particular noises—namely noise that can be heard from the outside and is produced by sound equipment, whether it is inside a building or installed or used outside: art. 9. Noise targeted by art. 9 is prohibited regardless of whether it affects an inhabited place: art. 11. It is important, however, to note that

art. 9 does not represent an absolute ban. Unlike *Ramsden*, ... the scheme of the By-law in this case anticipates routine granting of licences as exceptions to the prohibition. ... The City has exercised this authority and granted permits to use sound equipment on hundreds of occasions There is no evidence that it has exercised this authority arbitrarily or to curb democratic discourse. Moreover, as discussed above, in para. 34, a contextual reading of the impugned provision leads to the conclusion that art. 9(1) only captures noise that interferes with the peaceful use and enjoyment of the urban environment. This is the essence of the regulatory scheme the City put in place to deal with noise pollution on its streets.

[91] The first question is whether the limit on noise produced by sound equipment is rationally connected to the City's objective of limiting noise in the streets. Clearly it is[.] ...

[92] The second question, and the most difficult, is whether the measure impairs the right in a reasonably minimal way.

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[94] First, in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way. This is particularly so on environmental issues, where views and interests conflict and precision is elusive

[95] Second, it is far from clear that regulation by degree of loudness would effectively deal with the problem of noise pollution[.] ... Detecting and prosecuting violations could be difficult. Moreover, the regulation of sound levels alone would not prevent the possibility that multiple, simultaneous noises, each within the legal limit, could cumulatively exceed an acceptable sound level.

[96] Regulation by degree of loudness would not achieve the City's goal of eliminating, subject to exceptions, a certain type of sound—that produced by sound equipment. Moreover, regulation by sound level meters has definite limits. While some noises may be capable of being monitored in this way, some, like intermittent noises or random noises, cannot. Moreover, the suggestion was unrealistic. As Chamberland J.A. put it: [TRANSLATION] "[I]t would take a forest of sound level meters and an army of qualified technicians lying in waiting to monitor the noise produced by sound equipment at different times of day and night, everywhere in greater Montréal" (para. 119).

[97] Rights should never be sacrificed to mere administrative convenience. Here, however, the City contends that for a variety of reasons there was really no other practical way to deal with the complex problem it was facing. Accordingly, the City's measures do not go beyond what was reasonably necessary in the circumstances and, as a result, its regulatory plan is entitled to deference.

[98] It remains to consider whether the prejudicial effects on free expression ... are proportionate to the beneficial effects of the regulation. In our view, the test supports the conclusion that the By-law is valid.

[99] The expression limited by the By-law consists of noise produced by sound equipment that interferes with the peaceful use and enjoyment of the urban environment. This limitation therefore goes to the permitted forms of expression on city streets, regardless of content. Against this stand the benefits of reducing noise pollution on the street and in the neighbourhood. We acknowledge that in balancing the deleterious and positive effects of the By-law, account must be taken of the fact that the activity was taking place on a street with an active commercial nightlife in a large and sophisticated city. This does not, however, mean that its residents must necessarily be subjected to abuses of the enjoyment of their environment. As

Chamberland J.A. put it, [TRANSLATION] "the citizens of a city, even a city the size of Montréal, are entitled to a healthy environment. Noise control is unquestionably part of what must be done to improve the quality of this environment" (para. 129). We conclude that the beneficial effects of the By-law outweigh its prejudicial effects. [We therefore conclude that the By-law is constitutional.]

[In a dissenting judgment, Binnie J found that the by-law could not be interpreted as anything other than a ban on noise produced by sound equipment, regardless of its volume. In his view, the by-law breached s 2(b) and could not be justified under s 1 because it went beyond what could be considered minimal impairment.] [Emphasis in original.]

Appeal allowed.

NOTE: GREATER VANCOUVER TRANSPORTATION AUTHORITY V CANADIAN FEDERATION OF STUDENTS

In *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, [2009 SCC 31](#), the Court applied the two-factor *City of Montréal* test in a case where two public transit authorities, TransLink and BC Transit, refused to allow the Canadian Federation of Students—British Columbia Component (CFS) and the British Columbia Teachers' Federation (BCTF) to purchase advertising space on their buses. In anticipation of an upcoming provincial election, the CFS sought to post an advertisement depicting a silhouette of a crowd at a concert with the following text:

Register now. Learn the issues. Vote May 17, 2005.
ROCKTHEVOTEBC.com

The second advertisement was a "banner ad" placed along the top of the bus, which would have read in one long line as follows:

Tuition fees ROCKTHEVOTEBC.com Minimum wage ROCKTHEVOTEBC.com Environment
ROCKTHEVOTEBC.com

The BCTF, which was the exclusive bargaining agent for more than 40,000 public school teachers in British Columbia, sought to voice its concern about changes in the public education system by posting the following message:

2,500 fewer teachers, 114 schools closed.
Your kids. Our students. Worth speaking out for.

The transit authorities refused to accept the paid advertisements. They had identical policies:

2. Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.

• • •

7. No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy.

• • •

9. No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office.

The teachers and students brought an action seeking a declaration that the advertising policies infringed s 2(b) of the Charter. Justice Deschamps, for the majority (McLachlin CJ and LeBel, Abella, Charron, and Rothstein JJ concurring), applied the *City of Montréal* factors as follows:

[42] The question is whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. ... While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use—both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

[43] The second factor from *City of Montréal* is whether other aspects of the place suggest that expression within it would undermine the values underlying the constitutional protection. TransLink submits that its buses should be characterized as private publicly owned property, to which one cannot reasonably expect access. This position is untenable. The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not a private, space. Unlike the activities which occur in certain government buildings or offices, those which occur on a public bus do not require privacy and limited access. The bus is operated on city streets and forms an integral part of the public transportation system. The general public ... are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city. ... Thus, rather than undermining the purposes of s. 2(b), expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment.

• • •

[46] I do not see any aspect of the location that suggests that expression within it would undermine the values underlying free expression. On the contrary, the space allows for expression by a broad range of speakers to a large public audience and expression there could actually further the values underlying s. 2 (b) of the *Charter*.

Justice Deschamps then turned to s 1:

[76] I accept that the policies were adopted for the purpose of providing "a safe, welcoming public transit system" and that this is a sufficiently important objective to warrant placing a limit on freedom of expression. However, like the trial judge, I am not convinced that the limits on political content imposed by articles 2, 7 and 9 are rationally connected to the objective. I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism—regardless of whether it is commercial or political in nature—that the objective of providing a safe and welcoming transit system will be undermined.

[77] Had I found a rational connection between the objective and the limits imposed by articles 2, 7 and 9, I would nevertheless have concluded that the means chosen to implement the objective was neither reasonable nor proportionate to the respondents' interest in disseminating their messages pursuant to their right under s. 2(b) of the *Charter* to freedom of expression. The policies allow for commercial speech but prohibit all political advertising.

In particular, article 2 of the policies limits the types of advertisements that will be accepted to "those which communicate information concerning goods, services, public service announcements and public events," thereby excluding advertisements which communicate political messages. Article 7, on the other hand, refers to prevailing community standards as a measuring stick for whether an advertisement is likely "to cause offence to any person or group of persons or create controversy." While a community standard of tolerance may constitute a reasonable limit on offensive advertisements, excluding advertisements which "create controversy" is unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society. Finally, article 9 ... bans all forms of political content regardless of whether the message actually contributes to an unsafe or unwelcoming transit environment. In sum, the policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression.

Greater Vancouver Transportation Authority also involved a preliminary issue of whether the Charter applied to TransLink and BC Transit. This aspect of the case is discussed in Chapter 18.

NOTE: THE OCCUPY MOVEMENT

Streets and parks seem to be paradigmatic of the sorts of public places available for the conduct of expressive activity. The Occupy movement tested the outer boundaries of this tradition in autumn 2011. Replicating a strategy inaugurated by the Occupy Wall Street Movement, Canadian protestors took to occupying parks and public spaces, setting up tent cities with various amenities including community food kitchens and libraries. Public authorities tolerated most occupations for about thirty days after which municipalities sought to evict the occupiers. This precipitated a series of lower court rulings in Canadian courts in various provinces. For instance, trespass notices were distributed to the Occupy Toronto movement ordering removal of tents, persons, and other structures from St. James Park in downtown Toronto. They were entitled to use the park, the City claimed, but not for the purpose of erecting structures and not between the hours of 12:01 a.m. and 5:30 a.m. Characterizing the occupiers as lawbreakers and engaging in civil disobedience, Justice Brown of the Superior Court of Justice for Ontario [in *Batty v City of Toronto*, 2011 ONSC 6862] admitted that s. 2(b) freedoms were at stake. Likening the case to the noise by-law at issue in *City of Montreal*, Justice Brown granted a measure of latitude to the city under section 1. As a consequence, the interests of other city goers who wished to use the park for dog walking, frisbee throwing, or reading a book, were entitled to as much solicitude as those engaging in constitutionally protected activity. As the municipal by-law did not result in a complete ban, the measures were considered proportionate to the objective of sharing public parks with everyone. The protestor's attempt to monopolize park space for constitutional purposes would have to yield to the multiple pleasures that parks bring to all citizens. "Peace, order, and good government" would prevail, declared Justice Brown. Similar results obtained in applications to enjoin the occupiers in Victoria and Vancouver without any consideration of Charter questions. In an application for injunctive relief against Occupy Calgary, Justice Wittman of the Alberta Court of Queen's Bench weighed freedom of expression rights into the equation but in a less than adequate manner. Beginning with the measure of deference we find in cases involving public protest, Justice Wittman found the City's permit application process was reasonable and proportionate. Moreover, Occupy Calgary "had not proposed any alternative to these limits that would meet the City's objectives," losing sight of the burden of proof at this stage of the justification analysis. It should be

noted that courts in other countries (such as those in the U.S. and U.K.) did not perform much better.

From Kent Roach & David Schneiderman, "Freedom of Expression in Canada," cited above, at 480-81 (footnotes omitted).

NOTES AND QUESTIONS

1. In order to avoid harassment of both workers at abortion clinics and women seeking abortion services, a provincial legislature enacts access to abortion legislation, creating no-protest zones ("bubble zones") around the clinics. All anti-abortion protest activity is prohibited within the bubble zones, including active protesting and sidewalk counselling, as well as silent protests taking the form of displaying a sign. The bubble zones involve a maximum distance of 50 metres from the clinic. Violation of the legislation will result in a fine or imprisonment. Would protesters be able to raise a successful Charter challenge to the legislation on the ground that the public streets and sidewalks outside abortion clinics should be available for their expressive activity, particularly given the symbolic significance of the venue? See *R v Spratt*, [2008 BCCA 340](#), leave to appeal to SCC refused, 33037 (18 June 2009).

2. The materials in this section have largely dealt with situations where a speaker is claiming access to public property as a forum for speech. Another form of access right that may be grounded in freedom of expression is access to information related to the operation of government and issues of public policy. In the clearest application of this principle, s 2(b) has been interpreted as including a *prima facie* right of public access, including the media, to judicial and quasi-judicial proceedings, with the result that legislative provisions for *in camera* proceedings are required to be justified under s 1: see *Re Southam Inc and The Queen (No 1)* [1983 CanLII 1707, 41 OR \(2d\) 113 \(CA\)](#); *Pacific Press Ltd v Canada (Minister of Employment and Immigration)*, [1991] 2 FC 327 (CA); *Canadian Broadcasting Corp v New Brunswick (AG)*, [\[1996\] 3 SCR 480, 1996 CanLII 184](#). In *Canadian Broadcasting Corp v Canada (AG)*, [2011 SCC 2](#), Deschamps J, writing for the Court, laid out the governing principles in this area:

[1] The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

[2] The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfilment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle. Nevertheless, it is sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair.

On the facts of the case, Deschamps J went on to uphold restrictions on media filming and interviewing in the public areas of court houses in Quebec and a rule prohibiting the broadcasting of audio recordings of court proceedings.

The Supreme Court of Canada dealt with the issue of whether s 2(b) might give a right of access to government information in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, [2010 SCC 23](#), discussed below.

3. The leading case on the related issue of publication bans (restrictions on the reporting of court proceedings) is *Dagenais v Canadian Broadcasting Corp*, [\[1994\] 3 SCR 835, 1994 CanLII 39](#). In that case, the Supreme Court of Canada reformulated the common law rule

governing publication bans, taking into account freedom of expression interests. The Court stated that a publication ban should only be ordered when (1) such a ban is necessary in order to prevent a real and substantial risk to the fairness of a trial, because reasonably available alternative measures will not prevent the risk; and (2) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

NOTE: ONTARIO (PUBLIC SAFETY AND SECURITY) V CRIMINAL LAWYERS' ASSOCIATION AND THE ISSUE OF ACCESS TO INFORMATION

Does s 2(b) guarantee access to government information? In *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, in a joint opinion by McLachlin CJ and Abella J, the Court declared (at para 5) that s 2(b)

does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

In this case, the Criminal Lawyers' Association (CLA) had sought documents, pursuant to the Ontario *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 concerning an investigation of alleged police misconduct that exonerated the officers involved for having botched a murder prosecution. Two of the documents sought contained legal advice and a third was a 318-page investigative report. The Minister refused to disclose any of these documents. He was of the opinion that the material fell within exemptions provided for in the Act concerning solicitor-client privilege (s 19) and law enforcement (s 14). A "public interest" exception ("where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption," s 23) did not apply to this class of material. The CLA maintained that the Charter required that a general public interest exception be available. The Court rejected the CLA's argument, concluding:

[59] ... [T]he CLA has not established that [access] is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

[60] If necessity were established, the CLA ... would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As discussed, ss. 14 and 19 are intended to protect documents from disclosure on these very grounds. On the record before us, it is not established that the CLA could satisfy the requirements of the above framework.

[61] ... [T]he impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2 (b) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

Note that the Court declared that the sections prohibiting disclosure, if "properly interpreted, already incorporate consideration of the public interest." The Court appears to have adopted an interpretation of the statute advanced in Lisa Austin & Lorne Sossin, "Is Discretion the Last Refuge of Scoundrels? A Comment on Criminal Lawyers' Assn v Ontario" (2009) 55 Crim LQ 323 at 325.

NOTE: INDIGENOUS BLOCKADES AND EXPRESSIVE FREEDOM

Questions about the limits of the right to protest and the strength of Canada's constitutional commitment to free expression have arisen with respect to a series of injunctions issued against blockades by Indigenous protesters and their supporters. The Supreme Court of Canada in *MacMillan Bloedel Ltd v Simpson*, [1996] 2 SCR 1048, 1996 CanLII 165 ruled that it is within the inherent jurisdiction of courts to "maintain the rule of law" by enforcing injunctions against unnamed protesters—including Indigenous peoples seeking to protect their lands—who blocked logging of old-growth forests at Clayoquot Sound, BC. Over 800 protestors were arrested in the summer and fall of 1993. Justice McLachlin for the Court declared that the case rested on a fundamental conflict

between the right to express public dissent on the one hand, and the exercise of property and contractual rights on the other. Thus the appellants are wrong in asserting that the orders in question are nothing more than "government by injunction" aimed at suppressing public dissent. The respondent is equally wrong in asserting that this case has nothing to do with the public expression of dissenting views and pertains only to private property. This case is about both. In a society that prizes both the right to express dissent and the maintenance of private rights, a way to reconcile both interests must be found. One of the ways this can be done is through court orders like the one at issue in this case.

This ruling should be contrasted with the injunction BC courts declined to issue against Indigenous protestors who interfered with logging operations on Meares Island, BC. In *MacMillan Bloedel Ltd v Mullin*, 1985 CanLII 145, 61 BCLR 145 (BCCA), the BC Court of Appeal was concerned that old-growth forests would be wholly cleared and Indigenous interests in the land permanently destroyed. Consider how this decision anticipates the duty to consult cases discussed in Chapter 14, Indigenous Peoples and the Constitution.

Courts have not been as solicitous of Indigenous interests in a series of more recent cases associated with the grassroots Idle No More movement. Justice Brown of the Ontario Superior Court was the presiding judge in two cases where injunctions put an end to protests involving railroad blockades in Sarnia and Kingston. Blockades were meant to signal opposition to the federal government's omnibus Bill C-45 which, it was alleged, impaired treaty rights to land and to waterways without any consultation having taken place. In the Sarnia case, *CNR v Chief Chris Plain*, 2012 ONSC 7348 [CNR No 1], an emergency and temporary injunction was granted at the request of Canadian National Railways (CN) without hearing representations from Indigenous protestors who were being enjoined from engaging in expressive activity. Justice Brown acknowledged that the "protestors obviously are engaged in a form of expressive activity" and that "persons are free to engage in political protest of that public nature" (at para 23). Nevertheless, he went on to hold:

[23] ... the law does not permit them to do so by engaging in civil disobedience through trespassing on the private property of others, such as CN. Given the alternative locations for expressive conduct open to the protestors, and the economic disruption their expressive activity most probably will have on other industries, the political nature of the message expressed by the protestors carries little weight in the balance of convenience analysis in the particular circumstances of this case.

Similar to his decision with respect to the Occupy movement, Brown J recognized that expressive issues were at stake in the protest but held that other interests, namely protecting private property through trespass law, should prevail.

Six days after the initial order was issued, Brown J issued another ruling continuing the temporary injunction in *CNR v Chief Chris Plain*, 2012 ONSC 7356 [CNR No 2]. He attempted to distinguish two Ontario Court of Appeal decisions (*Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649, 82 OR (3d) 721 (CA) and

Frontenac Ventures Corporation v Ardoch Algonquin First Nation, [2008 ONCA 534](#)) that stressed the need to consider the Crown's duties to consult and other obligations towards Indigenous peoples when granting and enforcing injunctions. Justice Brown distinguished these two Appeal Court rulings on the basis that the Idle No More blockade at Sarnia was part of a general protest toward the policies of the federal government and did not apparently involve an assertion of Indigenous title as had the situations at issue before the Ontario Court of Appeal.

Kent Roach and David Schneiderman doubt that the distinction between public protests and Indigenous claims are as clear cut as Brown J suggests:

It is questionable whether the Ontario Court of Appeal judgments can be so easily distinguished, especially because the protesters were not represented in the proceedings and the nature of their protest appeared to have been gleaned by Justice Brown from the media. The protests were multi-faceted and involved concerns about treaty, land, and constitutional rights that also were the focus of the Ontario Court of Appeal's earlier decisions.

Justice Brown displayed considerable frustration that the Sarnia police had not enforced the injunction and ended the blockade in the six days since the injunction was issued. He stated in CNR II that "it is not the purpose of a court order simply to initiate talks or consultations between the police and those whom the court has found to have breached the law." He warned about the dangers of the police deciding "that the writ of the courts do not run against particular groups or particular political messages." In our view, Justice Brown's approach runs a serious risk of undermining the legitimate role of police and prosecutorial discretion in enforcing injunctions and attempting to reconcile the competing constitutional values at issue, including those of freedom of expression. Moreover, it avoids clear warnings by the Ontario Court of Appeal in Henco about the importance of police and prosecutorial discretion in enforcing injunctions against Aboriginal protests. These warnings should not be limited to cases where claims of Aboriginal title were made but are relevant to a wider range of contexts including those involving all forms of non-violent protest protected by section 2(b) of the Charter.

See Kent Roach & David Schneiderman, "Freedom of Expression in Canada," cited above, at 507-8 (footnotes omitted).

Another emergency injunction was issued by Brown J in early 2013 that was requested by CN against a blockade of its main rail line at Kingston in *Canadian National Railway Company v John Doe*, [2013 ONSC 115](#). Justice Brown was of the view that the Charter's freedom of expression was not relevant:

[11] ... While expressive conduct by lawful means enjoys strong protection in our system of governance and law, expressive conduct by unlawful means does not. No one can seriously suggest that a person can block freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression. The Canadian Charter of Rights and Freedoms does not offer such protection, as I examined at length in *Batty v. Toronto (City)*.

Roach and Schneiderman write that Brown J's

idea that "expressive conduct by unlawful means" is not protected under section 2(b) is clearly erroneous, given the Supreme Court's broad interpretation of freedom of expression as only excluding violence and threats of violence. The suggestion that unlawful conduct can never be protected as freedom of expression ignores the fundamental distinction in a democracy between peaceful civil disobedience and violent protest. It is also inconsistent with Justice Brown's own recognition in the *Batty* case involving the Occupy movement ... that freedom of expression was in play in the construction of shelters to convey a political message.

As in the Sarnia case, Justice Brown's Kingston injunction decision demonstrated considerable impatience with the lack of an immediate and forceful police response to the protest. ... Justice Brown's approach seems to view injunctions against Aboriginal protests simply as a matter of law enforcement and not one involving competing rights, including freedom of expression.

See Kent Roach & David Schneiderman, "Freedom of Expression in Canada," cited above, at 509-10 (footnotes omitted).

VIII. DEFAMATION

The common law jealously guards individual reputation. Under the common law of defamation, defamatory statements are presumed to be false and malicious. No further proof of harm is required to be shown; general damages are presumed to have been suffered. The common law rule then shifts the onus onto the publisher of the defamatory utterance to prove its truthfulness or otherwise show that the statement falls within a limited range of privileged statements. Chief Justice McLachlin described the state of the law in the case of *Grant v Torstar Corp*, discussed further below:

[28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[30] Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions," like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice The[se] defences ... reflect the fact that "common convenience and welfare of society" sometimes requires untrammeled communications[.] ...

[31] In addition to privilege, statements of opinion, a category which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" , may attract the defence of fair comment.

[32] Where statements of fact are at issue, usually only two defences are available: ... the statement was substantially true (justification); and ... the statement was made in a protected context (privilege). The issue in this case is whether the defences to actions for defamatory statements of fact should be expanded, as has been done for statements of opinion, in recognition of the importance of freedom of expression in a free society.

[33] To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. This may be difficult to do. A journalist who has checked sources and is satisfied that a statement is substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.

[34] If the defence of justification fails, generally the only way a publisher can escape liability for an untrue defamatory statement of fact is by establishing that the statement was made on a privileged occasion. However, the defence of qualified privilege has seldom assisted media organizations. One reason is that qualified privilege has traditionally been grounded in special relationships characterized by a "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large. Another reason is the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression. ...

• • •

[37] Despite these tentative forays, the threshold for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege.

Public personalities have repeatedly had recourse to the law of defamation as a means of punishing or thwarting speech tending to impair their reputations. Minister of Human Resources Bill Vander Zalm, in British Columbia, successfully sued the editorial cartoonist of the *Vancouver Sun* for depicting Vander Zalm tearing the wings off of flies: see *Vander Zalm v Times Publishers*, [1979 CanLII 2780, 96 DLR \(3d\) 172 \(BCSC\)](#), rev'd [1980 CanLII 389, 109 DLR \(3d\) 531 \(BCCA\)](#). Former premier of Quebec Jacques Parizeau and Bloc Québécois leader Lucien Bouchard successfully sued a financial analyst who, in his financial bulletin, likened Parizeau and Bouchard to Adolf Hitler: see *Lafferty, Harwood & Partners v Parizeau*, [2003 CanLII 32941, \[2003\] RJQ 2758 \(QCCA\)](#). In the United States, the common law of defamation was modified in *New York Times v Sullivan*. "Erroneous statement is inevitable in free debate," wrote Brennan J, and even these demand protection if freedom of expression is to have its requisite 'breathing space'" (at 271-72). The US Supreme Court modified the common law rule, prohibiting public officials from suing for defamatory falsehoods relating to their official conduct, unless a statement is proven by the plaintiff to have been made with "actual malice"—that is, with knowledge of its falsity or with "reckless disregard as to whether it was false or not" (at 280). With the advent of the Charter's guarantee of freedom of expression, it might have been thought that the common law rule would be modified in Canada as well in accordance with the Charter's "values." In its first opportunity to consider reform of the highly protective rule, in *Hill*, immediately below, the Supreme Court of Canada declined to do so.

NOTE: HILL V CHURCH OF SCIENTOLOGY OF TORONTO

In *Hill*, a jury awarded \$1.6 million in damages to Crown Prosecutor Casey Hill for defamatory statements made by the Church of Scientology. The Church, acting through its representatives, falsely alleged that Hill had misled a Supreme Court of Ontario Judge and breached orders regarding the sealing of Scientology documents obtained under a search warrant. Justice Cory, writing for six of the seven justices, noted:

[21] Long before he gave advice to the OPP in connection with the search and seizure of documents which took place on March 3 and 4, 1983, Casey Hill had become a target of Scientology's enmity. Over the years, he had been involved in a number of matters concerning Scientology's affairs. As a result, it kept a file on him. This was only discovered when the production of the file was ordered during the course of this action. The file disclosed that from approximately 1977 until at least 1981, Scientology closely monitored and tracked Casey Hill and had labelled him an "Enemy Canada." Casey Hill testified that from his experience, persons viewed by Scientology as its enemies were "subject to being neutralized."

Justice Cory held that the common law of defamation was not inconsistent with the constitutional right to freedom of expression:

[137] The *New York Times v. Sullivan* decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

The Court also rejected the intermediate position of a defence of reasonable publication. The High Court of Australia in *Theophanous v Herald & Weekly Times*, [1994] HCA 46, 182 CLR 104 held that defendants could escape liability for defamatory statements concerning political matters if "circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false" (at 19). This modification of the common law rule would enable publication of urgent political matters in circumstances where there was no opportunity for further investigation or fact checking. In *Hill*, Cory J wrote:

[139] ... First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in *Theophanous* ... are also not raised in this case and need not be considered.

[140] Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

[141] In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it.

NOTES AND QUESTIONS

1. Prosecutor Casey Hill was promoted to the Ontario Superior Court in the midst of the proceedings. Recall that the law of defamation presumes damages are suffered in a case of falsity. Did it matter that Hill likely did not suffer any decline in reputation? Justice Cory thought not:

[177] ... [A]t the time the libellous statement was made, Casey Hill was a young lawyer in the Crown Law office working in the litigation field. For all lawyers their reputation is of paramount importance. Clients depend on the integrity of lawyers, as do colleagues. Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administration of justice depends upon counsel's reputation for integrity. Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer. It matters not that subsequent to the publication of the libel, Casey Hill received promotions, was elected a bencher and eventually appointed a trial judge in the General Division of the Court of Ontario. As a lawyer, Hill would have no way of knowing what members of the public, colleagues, other lawyers and judges may have been affected by the dramatic presentation of

the allegation that he had been instrumental in breaching an order of the court and that he was guilty of criminal contempt.

[178] This nagging doubt and sense of hurt must have affected him in every telephone call he made and received in the course of his daily work, in every letter that he sent and received and in every appearance that he made before the courts of the province of Ontario. He would never know who, as a result of the libellous statement, had some lingering suspicion that he was guilty of misconduct which was criminal in nature. He would never know who might have believed that he was a person without integrity who would act criminally in the performance of his duties as a Crown counsel. He could never be certain who would accept the allegation that he was guilty of a criminal breach of trust which was the essential thrust of the libel.

2. There is no mention in *Hill* of the chilling effect (or “libel chill”), a concern that animated the US Supreme Court decision in *New York Times v Sullivan*. Justice Brennan wrote (at 300):

We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury’s evaluation of the speaker’s state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.

The Supreme Court of Canada may now be more interested in chilling effects, in the light of its reasons in *Grant v Torstar Corp*, immediately below.

Grant v Torstar Corp

2009 SCC 61

[Unlike *Hill*, this case involved the media and political commentary. Grant brought an action for defamation against a newspaper and a reporter for having published a story about a “proposed private golf course development on [his] lakefront estate” (at para 4). The story aired the views of local residents who were critical of the development’s environmental impact and suspicious that Grant was exercising political influence behind the scenes to secure government approval for the new golf course. The reporter, an experienced journalist named Bill Schiller, attempted to verify the allegations in the article, including asking Grant for comment, which Grant chose not to provide. The subsequent article, entitled “Cottagers teed off over golf course—Long-time Harris backer awaits Tory nod on plan,” discussed Grant’s ties to Premier Harris and the Progressive Conservative Party, explained the background to the controversy, and gave voice to the cottagers’ concerns over the development itself and the possibility of political interference. It noted that Grant had refused to comment and mentioned that one of Grant’s employees had “tried to drive the photographer’s vehicle off a public road” (at para 16). The article included the following paragraph, which became the centrepiece of this litigation (at para 16):

“Everyone thinks it’s a done deal because of Grant’s influence—but most of all his Mike Harris ties,” says Lorrie Clark, who owns a cottage on Twin Lakes.

At trial, the plaintiffs were awarded damages totalling \$1.475 million.]

McLACHLIN CJ (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, and Cromwell JJ concurring):

[2] ... [F]reedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation. However, if the defences available to a publisher are too narrowly defined, the result may be "libel chill," undermining freedom of expression and of the press.

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[7] For the reasons that follow, I conclude that the common law should be modified to recognize a defence of responsible communication on matters of public interest. In view of this new defence, as well as errors in the jury instruction on fair comment, a new trial should be ordered.

[Chief Justice McLachlin's review of the current law has been reproduced above, at the beginning of the materials on defamation.]

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[38] Two related arguments are presented in support of broadening the defences available to public communicators, such as the press, in reporting matters of fact.

[39] The first argument is grounded in principle. It asserts that the existing law is inconsistent with the principle of freedom of expression as guaranteed by s. 2(b) of the *Charter*. In the modern context, it is argued, the traditional rule has a chilling effect that unjustifiably limits reporting facts, and strikes a balance too heavily weighted in favour of protection of reputation. ...

[40] The second argument is grounded in jurisprudence. This argument points out that many foreign common law jurisdictions have modified the law of defamation to give more protection to the press While different countries have taken different approaches, the trend is clear. Recent Canadian cases, most notably the decision of the Ontario Court of Appeal in [*Cusson v Quan*, 2007 ONCA 771], have affirmed this trend.

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[44] ... The common law, though not directly subject to *Charter* scrutiny where disputes between private parties are concerned, may be modified to bring it into harmony with the *Charter*. As Cory J. put it in *Hill v. Church of Scientology of Toronto*, ... [1995] 2 S.C.R. 1130, at para. 97, "Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary."

[45] The argument that the *Charter* requires modification of Canadian defamation law was considered in *Hill*. Writing for a unanimous Court on this point, Cory J. declined to adopt the American "actual malice" rule from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) Cory J. did, however, undertake a modest expansion of the recognized qualified privilege for reports on judicial proceedings.

[46] While *Hill* stands for a rejection of the *Sullivan* approach and an affirmation of the common law of defamation's general conformity with the *Charter*, it does not close the door to further changes in specific rules and doctrines. As Iacobucci J. observed in *R. v. Salituro*, ... [1991] 3 S.C.R. 654, at p. 670, "[j]udges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country." It is implicit in this duty that the courts will, from time to time, take a

fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of *Charter* values.

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[62] The protection offered by a new defence based on conduct is meaningful for both the publisher and those whose reputations are at stake. If the publisher fails to take appropriate steps having regard to all the circumstances, it will be liable. The press and others engaged in public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defence based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. As Kirby P. stated in *Ballina Shire Council v. Ringland* (1994), 33 N.S.W.L.R. 680 (C.A.), at p. 700: "The law of defamation is one of the comparatively few checks upon [the media's] great power." The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose.

[Chief Justice McLachlin then looked to recent comparative developments, beginning with the United Kingdom and the test of responsible journalism inaugurated by the House of Lords in *Reynolds v Times Newspapers Ltd*, [1999] 3 WLR 1010, [1999] 4 All ER 609. That case gave rise to what are known as "the *Reynolds* factors"—a list of considerations to determine whether a publication should be covered by responsible journalism. She then turned to Australia, New Zealand, and South Africa, all of which had developed and refined the reasonableness test from *Reynolds*.]

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[98] This brings us to the substance of the test for responsible communication. In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

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[102] How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. ... Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

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[105] To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached[.]" ... Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

[106] Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure," as in the American jurisprudence since *Sullivan*. Both qualifications

cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

[Chief Justice McLachlin ruled that the question whether the publication is a matter of public interest is for the judge to decide because this is primarily a question of law; the question whether the publication was responsible is, by contrast, a matter for the jury. A jury must consider numerous factors, including the seriousness of the allegation, the public importance of the matter, the status and reliability of the source, and whether the plaintiff's side of the story was sought and accurately reported. On the facts of the case, McLachlin CJ found that the many errors made by the trial judge in instructing the jury, including a failure to instruct them on the defence of responsible communication, required a new trial.

Justice Abella would have made the second issue—responsible reporting—a question for the judge as well:

[145] By adopting the responsible communication defence, we are recognizing the sophistication and constitutional complexity of defamation cases involving communications on matters of public interest. What is most important is protecting the integrity of the interests and values at stake in such cases. This defence is a highly complex legal determination with constitutional dimensions. That takes it beyond the jury's jurisdiction and squarely into judicial territory.]

NOTES AND QUESTIONS

1. The companion case of *Quan v Cusson*, 2009 SCC 62 concerned the curious instance of an Ontario provincial police constable, Cusson, who, with his pet dog, Ranger, rushed to Manhattan's "Ground Zero" to help out in 9/11 rescue operations, even though the OPP's official offer of assistance had been declined by New York authorities. Although Cusson was first lauded as a hero in the press, the *Ottawa Citizen* later reported that it had learned of allegations that Cusson had "misled New York State police into thinking he was a fully trained K 9 handler with the RCMP." At trial, the jury awarded \$100,000 in damages. Chief Justice McLachlin ordered a new trial so that the defendants (principally, the *Ottawa Citizen*) could avail themselves of the new defence. She found as follows:

[31] In this case, the public interest test is clearly met. The Canadian public has a vital interest in knowing about the professional misdeeds of those [entrusted to protect] public safety. ... When Cst. Cusson represented himself ... as an OPP or RCMP officer, he sacrificed any claim to be engaged in a purely private matter. News of his heroism was already a matter of public record; there is no reason that legitimate questions about the validity of this impression should not have been publicized too.

[32] That being the case, the defendants' liability hinges on whether they were diligent in trying to verify the allegations prior to publication. ... [I]t will be for the jury at a new trial to decide whether the articles met the standard of responsibility articulated in *Grant*.

2. Consider that the defence of responsible communication on matters of public interest was devised originally to protect traditional journalism. Will it also protect those engaging in non-traditional forms of journalism, such as "citizen journalism," blogging, Facebook posts, or tweets? Contrariwise, does the defence grant too much leeway to journalists and others to act on a single weak source, even innuendo? On the impact the new defence may have had on Toronto municipal politics, see Ivor Tossell, "The Story Behind the Rob Ford Story," *The Walrus* (17 February 2014).

3. Why does the majority in *Grant* insist that the defence of responsible communication should be a matter for a jury and not a judge? Do you agree with Abella J's dissent on this point?

4. In *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9, Malhab sought damages on behalf of all Arabic and Creole speaking Montreal taxi drivers for on-air defamatory comments made by Quebec City "shock jock" radio host André Arthur. Although Deshamps J, for the majority, admitted that Arthur's comments were "racist" (at para 82), the group was too heterogeneous and Arthur's comments too "general and vague" to give rise to liability under Quebec's *Civil Code*, SQ 1991, c 64 (at para 88). Justice Abella, in dissent, concluded (at para 119) that the

group was defined with sufficient precision and the statements specific enough to be harmful to the reputations of each of its members. If Mr. Arthur had named an individual taxi driver and accused him or her of similar corruption and incompetence, there seems to me to be little doubt that an ordinary person would find those comments to be defamatory and therefore injurious.

Do you think that group defamation claims are likely to succeed in Canada? Consider the case of *Beauharnais v Illinois*, 343 US 250, 72 S Ct 725 (1952), where the US Supreme Court upheld under the First Amendment an Illinois group defamation statute. Chief Justice Dickson suggested in *Keegstra* that the *Beauharnais* decision has probably been overtaken by later cases.

5. In *Doré v Barreau du Québec*, 2012 SCC 12, the Supreme Court exhibited little interest in protecting the freedom of expression of lawyers. Relying on the "need to ensure civility in the profession" (at para 66), the Court held that lawyers could be disciplined for insults directed at a judge in private correspondence (in this instance, in response to derogatory remarks made by the judge in the course of criminal proceedings). Justice Abella, for the Court, wrote:

[68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

Applying a more deferential administrative law standard of review, rather than the *Oakes* test, the Court was satisfied that the "discipline committee's decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with 'objectivity, moderation and dignity' with the lawyer's expressive rights" (at para 8). Note that Abella J adopted a stricter test for review of administrative tribunal determinations where Charter rights are at stake in her reasons in *Loyola High School v Quebec (AG)*, 2015 SCC 12, excerpted in Chapter 19.

IX. ACCESS TO SOCIAL MEDIA

Following a riot at the US Capitol on January 6, 2021, the social media giant Facebook, on January 7, 2021, restricted then President Donald Trump's access to posting content on both his Facebook page and Instagram account for an indefinite period. Facebook concluded that Trump, by sending encouraging messages to his supporters who had breached the Capitol buildings, had offended Facebook's Community Standards, which, in part, prohibit praise or support of people engaged in violence. Facebook's decision was reviewed by its Oversight

Board, an independent body comprised of 40 diverse experts who are empowered to review content decisions made by Facebook. The purpose of the Board, Facebook declares, is to "promote free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook company content policy." The Board can select specific cases for "review" and can "uphold or reverse Facebook's content decisions." Once a decision is selected for review, it is assigned to a panel who will "receive information to help with their in-depth review."

Facebook Oversight Board Case Decision

2021-001-FB-FBR (5 May 2021)

Full case decision

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8. Oversight Board analysis

8.1 Compliance with content policies

The Board agrees with Facebook's decision that the two posts by Mr. Trump on January 6 violated Facebook's Community Standards and Instagram's Community Guidelines. Facebook's Community Standard on Dangerous Individuals and Organizations says that users should not post content "expressing support or praise for groups, leaders, or individuals involved in" violating events. Facebook designated the storming of the Capitol as a "violating event" and noted that it interprets violating events to include designated "violent" events.

At the time the posts were made, the violence at the Capitol was underway. Both posts praised or supported people who were engaged in violence. The words "We love you. You're very special" in the first post and "great patriots" and "remember this day forever" in the second post amounted to praise or support of the individuals involved in the violence and the events at the Capitol that day.

The Board notes that other Community Standards may have been violated in this case, including the Standard on Violence and Incitement. Because Facebook's decision was not based on this Standard and an additional finding of violation would not affect the outcome of this proceeding, a majority of the Board refrains from reaching any judgment on this alternative ground. ...

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8.3 Compliance with Facebook's human rights responsibilities

The Board's decisions do not concern the human rights obligations of states or application of national laws, but focus on Facebook's content policies, its values and its human rights responsibilities as a business. The UN Guiding Principles on Business and Human Rights, which Facebook has endorsed ... establish what businesses should do on a voluntary basis to meet these responsibilities. This includes avoiding causing or contributing to human rights harms, in part through identifying possible and actual harms and working to prevent or address them (UNGPrinciples 11, 13, 15, 18). These responsibilities extend to harms caused by third parties (UNGPrinciple 19).

Facebook has become a virtually indispensable medium for political discourse, and especially so in election periods. It has a responsibility both to allow political expression and to avoid serious risks to other human rights. Facebook, like other

digital platforms and media companies, has been heavily criticized for distributing misinformation and amplifying controversial and inflammatory material. Facebook's human rights responsibilities must be understood in the light of those sometimes competing considerations.

The Board analyzes Facebook's human rights responsibilities through international standards on freedom of expression and the rights to life, security, and political participation. Article 19 of the ICCPR [International Covenant on Civil and Political Rights] sets out the right to freedom of expression. Article 19 states that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The Board does not apply the First Amendment of the U.S. Constitution, which does not govern the conduct of private companies. However, the Board notes that in many relevant respects the principles of freedom of expression reflected in the First Amendment are similar or analogous to the principles of freedom of expression in ICCPR Article 19.

Political speech receives high protection under human rights law because of its importance to democratic debate. The UN Human Rights Committee provided authoritative guidance on Article 19 ICCPR in General Comment No. 34, in which it states that "free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential" (para. 20).

Facebook's decision to suspend Mr. Trump's Facebook page and Instagram account has freedom of expression implications not only for Mr. Trump but also for the rights of people to hear from political leaders, whether they support them or not. Although political figures do not have a greater right to freedom of expression than other people, restricting their speech can harm the rights of other people to be informed and participate in political affairs. However, international human rights standards expect state actors to condemn violence (Rabat Plan of Action), and to provide accurate information to the public on matters of public interest, while also correcting misinformation (2020 Joint Statement of international freedom of expression monitors on COVID-19).

International law allows for expression to be limited when certain conditions are met. Any restrictions must meet three requirements—rules must be clear and accessible, they must be designed for a legitimate aim, and they must be necessary and proportionate to the risk of harm. The Board uses this three-part test to analyze Facebook's actions when it restricts content or accounts. First Amendment principles under U.S. law also insist that restrictions on freedom of speech imposed through state action may not be vague, must be for important governmental reasons and must be narrowly tailored to the risk of harm.

I. Legality (clarity and accessibility of the rules)

In international law on freedom of expression, the principle of legality requires that any rule used to limit expression is clear and accessible. People must be able to understand what is allowed and what is not allowed. Equally important, rules must be sufficiently clear to provide guidance to those who make decisions on limiting expression, so that these rules do not confer unfettered discretion [or] ... result in selective application ... In this case, these rules are Facebook's Community Standards and Instagram's Community Guidelines. ...

The clarity of the Standard against praise and support of Dangerous Individuals and Organizations leaves much to be desired, as the Board noted in a prior decision (case 2020-005-FB-UA). ... As the Board has noted previously in case 2020-003-FB-UA,

there may be times in which certain wording may raise legality concerns, but as applied to a particular case those concerns are not warranted. ... The January 6 riot at the Capitol fell squarely within the types of harmful events set out in Facebook's policy, and Mr. Trump's posts praised and supported those involved at the very time the violence was going on, and while Members of Congress were calling on him for help. In relation to these facts, Facebook's policies gave adequate notice to the user and guidance to those enforcing the rule.

With regard to penalties for violations, the Community Standards and related information about account restrictions are published in various sources, including the Terms of Service, the introduction to the Community Standards, the Community Standard on Account Integrity and Authentic Identity, the Facebook Newsroom, and the Facebook Help Center. As noted in case 2020-006-FB-FBR the Board reiterates that the patchwork of applicable rules makes it difficult for users to understand why and when Facebook restricts accounts, and raises legality concerns.

While the Board is satisfied that the Dangerous Individuals and Organizations Standard is sufficiently clear [in this case] ... , Facebook's imposition of an "indefinite" restriction is vague and uncertain. "Indefinite" restrictions are not described in the Community Standards and it is unclear what standards would trigger this penalty or what standards will be employed to maintain or remove it. Facebook provided no information of any prior imposition of indefinite suspensions in any other cases. The Board recognizes the necessity of some discretion on Facebook's part to suspend accounts in urgent situations like that of January, but users cannot be left in a state of uncertainty for an indefinite time.

The Board rejects Facebook's request for it to endorse indefinite restrictions, imposed and lifted without clear criteria. Appropriate limits on discretionary powers are crucial to distinguish the legitimate use of discretion from possible scenarios around the world in which Facebook may unduly silence speech not linked to harm or delay action critical to protecting people.

II. Legitimate aim

The requirement of legitimate aim means that any measure restricting expression must be for a purpose listed in Article 19, para. 3 of the ICCPR, and this list of aims is exhaustive. Legitimate aims include the protection of public order, as well as respect for the rights of others, including the rights to life, security, and to participate in elections and to have the outcome respected and implemented. An aim would not be legitimate where used as a pretext for suppressing expression, for example, to cite the aims of protecting security or the rights of others to censor speech simply because it is disagreeable or offensive (General Comment No. 34, paras. 11, 30, 46, 48). Facebook's policy on praising and supporting individuals involved in "violating events," violence or criminal activity was in accordance with the aims above.

III. Necessity and proportionality

The requirement of necessity and proportionality means that any restriction on expression must, among other things, be the least intrusive way to achieve a legitimate aim (General Comment No. 34, para. 34).

The Board believes that, where possible, Facebook should use less restrictive measures to address potentially harmful speech and protect the rights of others before resorting to content removal and account restriction. At a minimum, this would mean developing effective mechanisms to avoid amplifying speech that poses risks of imminent violence, discrimination, or other lawless action, where possible and proportionate, rather than banning the speech outright.

Facebook stated to the Board that it considered Mr. Trump's "repeated use of Facebook and other platforms to undermine confidence in the integrity of the election (necessitating repeated application by Facebook of authoritative labels correcting the misinformation) represented an extraordinary abuse of the platform." The Board sought clarification from Facebook about the extent to which the platform's design decisions, including algorithms, policies, procedures and technical features, amplified Mr. Trump's posts after the election and whether Facebook had conducted any internal analysis of whether such design decisions may have contributed to the events of January 6. Facebook declined to answer these questions. This makes it difficult for the Board to assess whether less severe measures, taken earlier, may have been sufficient to protect the rights of others.

The crucial question is whether Facebook's decision to restrict access to Mr. Trump's accounts on January 6 and 7 was necessary and proportionate to protect the rights of others. To understand the risk posed by the January 6 posts, the Board assessed Mr. Trump's Facebook and Instagram posts and off-platform comments since the November election. In maintaining an unfounded narrative of electoral fraud and persistent calls to action, Mr. Trump created an environment where a serious risk of violence was possible. On January 6, Mr. Trump's words of support to those involved in the riot legitimized their violent actions. Although the messages included a seemingly perfunctory call for people to act peacefully, this was insufficient to defuse the tensions and remove the risk of harm that his supporting statements contributed to. It was appropriate for Facebook to interpret Mr. Trump's posts on January 6 in the context of escalating tensions in the United States and Mr. Trump's statements in other media and at public events.

As part of its analysis, the Board drew upon the six factors from the Rabat Plan of Action to assess the capacity of speech to create a serious risk of inciting discrimination, violence, or other lawless action:

- **Context:** The posts were made during a time of high political tension centered on the unfounded claim that the November 2020 presidential election had been stolen. [Courts consistently rejected these claims.] ... Mr. Trump nonetheless continued to assert these claims on social media, including Facebook and Instagram, using his authoritative status as head of state to lend them credibility. He encouraged supporters to come to the nation's capital on January 6 to "StoptheSteal," suggesting that the events would be "wild." On January 6, ... [a]t the time of the posts, severe violence was continuing. When the restrictions were extended on January 7, the situation remained volatile. Among other indicators of the context, the District of Columbia took steps to warn of a heightened risk of violence surrounding the events at the Capitol.
- **Status of the speaker:** Mr. Trump's identity as president of the United States and a political leader gave his Facebook and Instagram posts a high degree of influence. ... Mr. Trump's status as head of state with a high position of trust not only imbued his words with greater force and credibility but also created risks that his followers would understand they could act with impunity.
- **Intent:** The Board is not in a position to conclusively assess Mr. Trump's intentions. ... [T]he Board considered that he likely knew or should have known that these communications would pose a risk of legitimizing or encouraging violence.
- **Content and form:** The two posts on January 6 praised and supported rioters, even though they called on them to go home peacefully. The posts also reiterated the unfounded claim that the election was stolen. Reports suggest that this claim was understood by some of the rioters as legitimizing their actions.

The evidence here shows that Mr. Trump used the communicative authority of the presidency [to support the attackers and stop the lawful counting of electoral votes].

- **Extent and reach:** Mr. Trump had a large audience, with a following of at least 35 million accounts on Facebook and at least 24 million accounts on Instagram. Importantly, these social media posts are frequently picked up and shared more broadly through mass media channels as well as by high profile supporters of Mr. Trump with large audiences, greatly increasing their reach.
- **Imminence of harm:** The posts were made during a dynamic and fluid period of ongoing violence. There was a clear immediate risk of harm to life, electoral integrity, and political participation. The violence at the Capitol started within an hour of the rally organized through the use of Facebook and other social media. Indeed, even as Mr. Trump was posting, the rioters were rampaging through the halls of Congress and Members of Congress were expressing fear by calling on the White House and pleading for the president to calm the situation. The riot directly interfered with Congress's ability to discharge its constitutional responsibility of counting electoral votes, delaying this process by several hours.

Analyzing these factors, the Board concludes that the violation in this case was severe in terms of its human rights harms. Facebook's imposition of account-level restrictions on January 6 and the extension of those restrictions on January 7 was necessary and proportionate.

[The Oversight Board, while concluding that the ban was necessary and proportionate, concluded that the penalty imposed was arbitrary (at 33):

However, it was not appropriate for Facebook to impose an indefinite suspension.

Facebook did not follow a clear published procedure in this case. Facebook's normal account-level penalties for violations of its rules are to impose either a time-limited suspension or to permanently disable the user's account. The Board finds that it is not permissible for Facebook to keep a user off the platform for an undefined period, with no criteria for when or whether the account will be restored.

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Facebook must, within six months of this decision, reexamine the arbitrary penalty it imposed on January 7 and decide the appropriate penalty. This penalty must be based on the gravity of the violation and the prospect of future harm. It must also be consistent with Facebook's rules for severe violations which must in turn be clear, necessary, and proportionate.]

NOTES AND QUESTIONS

1. Because the First Amendment to the US Constitution declares that "Congress shall make no law abridging the freedom of speech" (binding on both federal and state action), the US constitution did not apply to Facebook's actions. Did the Oversight Board, nonetheless, undertake a constitutional analysis?
2. Consider that the US Supreme Court typically applies categorical rules, rather than a proportionality analysis, in determining whether a government decision offends the First Amendment. Does the Oversight Board's decision resemble more the performance of Canadian courts under s 2(b) of the Charter?
3. The Oversight Board declared that it is not a "legitimate aim" to circumscribe speech that is "disagreeable" or "offensive." Is this consistent with the Canadian jurisprudence under s 2(b)?

4. Facebook declined to respond to the Oversight Board request that it provide information about how its platform design decisions may have amplified Trump's posts both before and after January 6. Should the Oversight Board have drawn a negative inference from this failure to respond, as did the Supreme Court of Canada in *RJR-MacDonald*, where the Government of Canada refused to produce evidence of less restrictive alternatives by preferring to rely upon the cloak of Cabinet confidentiality?

5. The Oversight Board found the Facebook standard was unclear, but vagueness concerns did not arise "as applied" to Trump's posts. It has been said, in US constitutional law circles, that a challenge to a law "as applied" to a litigant, rather than a challenge to the law on its face, should not typically be available in free speech cases: see Richard Fallon, "As-Applied and Facial Challenges and Third-Party Standing" (2000) 113:6 Harvard L Rev 1321-1370. Why do you think courts should be reluctant to use an as applied rule to these cases?

6. Facebook responded in June 2021 by adopting many of the Oversight Board's recommendations, including a determination that Trump's suspension will be limited to two years, after which Facebook will assess whether the "risk to public safety has receded."

Trump has since launched a class action lawsuit against Facebook, Twitter, and Google for violating the right to freedom of speech under the US Constitution. The odds of success do not appear to favour Trump.

In Canada, documentary film maker and law professor Joel Bakan, together with the marketing firm "Cool World," have launched legal challenges regarding Twitter's decision not to accept promotional tweets for the film *The New Corporation*. These paid tweets were comprised mainly of a link to a trailer for the film, which offers a stinging critique of how corporations, including large social media conglomerates, brand their activities as socially conscious while posing dangers to democracy. Twitter, on six separate occasions, rejected a request to advertise the film via a paid tweet and, each time, offered a different justification, including reliance on a Twitter policy that bars "political" ads. Two separate legal proceedings were launched: the first against Twitter and the second against the Government of Canada. This is how both sets of pleadings describe the freedom of expression issue at stake (at 4-6):

(a) This case arises at a moment of revolutionary change in communications in Canada and worldwide. Over the last two decades, the social media platform operated by the Respondents, Twitter, which hosts hundreds of millions of users across the globe, has become a central **public arena** for democratic dialogue and debate among citizens, organizations, and governments. Twitter is widely regarded, and promotes itself, as a forum for expressive activity, open to all. It is where heads of state, politicians, and public institutions make significant statements, communicate with citizens and media, and relay critical information. Moreover, Twitter is a platform for citizens to engage with political decision-makers and each other. Because of its role as a public arena for political and social speech, Twitter is unique among companies, including traditional media outlets and other social media platforms.

(b) Within Canada, Twitter is the principal social media platform for government communications. Prime Minister Trudeau has 5.6M Twitter followers (@JustinTrudeau), and makes all of his important announcements there. Official accounts now exist for federal, provincial and territorial ministers and departments. The Supreme Court of Canada (@SCC_eng and @CSC_fra), the Ontario Court of Appeal (@ONCA_en), the Superior Court of Justice (Ontario) (@SCJOntario_en) and the Ontario Court of Justice (@OntarioOn) all have accounts on Twitter. The COVID-19 pandemic has cemented Twitter's role as the social media platform of choice for Canadian public institutions: for example, the Superior Court relied on Twitter to issue a historically unprecedented number of Notices to the Profession to adapt court operations and procedures.

(c) Twitter's substantial power over democratic dialogue and debate is widely regarded as a matter of urgent public concern that is intrinsically tied to the fate of democracy itself. The reason is the absolute power of Twitter to censor at will the political and social expression

which takes place on its platform, through exercise of its ownership rights. Twitter wields its power as owner to ban ("de-platform") users, suspend tweets, hide tweets, and refuse to promote tweets at its discretion. There is little to no transparency to the processes that lead to these decisions, many of which are automated through the use of artificial intelligence. In addition, Twitter's decisions to censor speech in Canada are mainly made from its corporate headquarters in California.

(d) As the Supreme Court has observed, "access to ... social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy." (*Douez v. Facebook*, 2017 SCC 33 at para. 56). The United States Supreme Court has likewise stated that social media platforms are a "quintessential forum for the exercise of First Amendment rights," and that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular" (*Packingham v. North Carolina*, 582 US _ (2017) at 5).

(e) Nevertheless, Canada has not regulated Twitter to protect freedom of expression. By default, in the absence of government regulation, Twitter is governed by the online standard form agreement (the "**User Agreement**"), a contract of adhesion in relation to which there is no negotiation, it has entered with its hundreds of millions of users worldwide, including millions of users in Canada.

(f) The fundamental question raised by this Application is: how must the common law of contracts evolve to respond to Twitter, a platform that, while privately owned, has become a public arena for democratic dialogue and debate that has powerful sway over core constitutional values of freedom of expression and democracy? [Emphasis in original.]

The first legal proceeding relies upon contract law, arguing that its doctrine should be developed in conformity with Charter values. "[T]wo contextual factors should shape the development of the common law of contract to comport with the *Charter*," they argue: "first, Twitter's role as a public arena, and second the fact that Twitter's policies and/or actions have banned high value social and political expression" (at 10, emphasis in original).

In the second proceeding, the plaintiffs seek a declaration under s 2(b) of the Charter requiring the Government of Canada "to introduce legislation and promulgate regulations that protects constitutional freedom of expression values and interests on Twitter and other social media platforms similarly functioning as **public arenas** for political, social, governmental and democratic expressive activity" (at 3, emphasis in original). It is claimed that Canada has a "constitutional duty under s. 2(b) of the *Charter* to protect high value speech on Twitter and other platforms" (at 10). Three reasons are offered in support of this remedy:

(a) "First, by using Twitter as their principal social media platform for official communication, governments have given Twitter a public character that triggers *Charter* obligations to protect, on that platform, citizens' rights to communicate with government, to receive communications from government, and to engage in dialogue and debate relevant to governmental decisions and public policy in general. The United States Court of Appeals for the Second Circuit held that President Trump's Twitter account created a public forum, and therefore subjected him to First Amendment duties—in that case, the obligation not to block users who disagreed with him: *Knight First Amdt. Inst. at Columbia Univ. v. Trump*, 928 F. 3d 226 (2019). By extension, Canadian public institutions have collectively created on Twitter a digital public arena for debating and deliberating over politics, which triggers a *Charter* duty on Canada to keep that public arena open to all Canadians to engage in expressive activity that would, if in a public arena on public property, be protected by section 2(b). Because governments in Canada have effectively created a public arena on a privately owned social media platform, Canada is constitutionally obligated under the *Charter* to ensure that arena is open to all, and to all expression that courts would protect from intrusions by government.

(b) Second, Twitter's Ad Policies restrict social and political speech, such as *The New Corporation* tweet. This expression lies at the core of s. 2(b) and has been afforded the highest level of constitutional protection by courts. Twitter's blanket restrictions on social and political speech, if rooted in state action, would be struck down on the basis of overbreadth at the minimal impairment stage of the *R v. Oakes*, [1986] 1 SCR 103 s. 1 analysis. By extension, the state has a duty to protect such expression on private social media platforms that serve as public arenas, like Twitter.

(c) Third, Twitter's operations, which profoundly impact Canadian expressive activity and democracy, are directed by its parent company in the United States. The effect of Canada's failure to regulate Twitter to protect users' rights of freedom of expression is to cede authority over Canadians' high value expression to a foreign corporation, which operates in the American constitutional system, where governments have limited power to regulate speech on social media platforms (either to restrict or protect), and do not have constitutional duties to do so.

NOTES AND QUESTIONS

1. Can you reconcile this argument with Charter application doctrine? In *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 1993 CanLII 58 at 1039, L'Heureux-Dubé J stated that "in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. ... [F]or example ... legislative intervention aimed at preventing certain conditions which muzzle expression." Justice Rothstein favorably cited this passage (at para 26) in *Baier v Alberta*, 2007 SCC 31 in addition to *Dunmore v Ontario (AG)*, 2001 SCC 94, a s 2(d) freedom of association case concerning under-inclusive legislation. Justice Rothstein held that there could be a "positive obligation on the government to provide legislative protection" (at para 80) under s 2(b) in cases of exclusion from a statutory regime. The government has enacted the *Broadcasting Act*, SC 1991, c 11; the *Digital Privacy Act*, SC 2015, c 32; the *Telecommunications Act*, SC 1993, c 38; and the *Competition Act*, RSC 1985, c C-34; statutes that authorize agencies, such as the Canadian Radio-television and Telecommunications Commission (CRTC) and the Competition Bureau to regulate aspects of electronic media. The Canadian government, however, has not yet exercised its legislative authority to protect users' freedom of expression on social media platforms.

2. In light of *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793, can it be said that a constitutional duty arises in the case of a legislative vacuum? In what circumstances might the government have a duty to act under the Charter? The applicants argue that the "effect of Canada's failure to regulate Twitter to protect users' rights of freedom of expression is to cede authority over Canadians' high value expression to a foreign corporation" operating under foreign law. Should these circumstances give rise to a constitutional duty?

3. If the Charter does not apply to Twitter, is it appropriate, under the common law, for Twitter to ban "high value" political speech that does not cause harm? Should private parties be free to make these choices, or is Twitter required to behave as if it were, practically speaking, operating a public forum? Consider the *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, where the Supreme Court interpreted the common law as rendering secondary picketing lawful unless it involves "tortious or criminal conduct" (at para 3). Or consider *Grant v Torstar*, where the Supreme Court modified the common law of defamation to recognize a defence of responsible communication on matters of public interest. Should the common law of contracts also be modified to accommodate high value political expression? Should such a modification extend to expression that is of lower value and that is said not to cause harm, such as commercial expression?

4. Is it fair to say that Bakan and Cool World stand on an equal footing to former President Trump? If Trump does not pay for promotional tweets on Twitter, why should Bakan and Cool World be entitled, via government regulation, to do so? Or is it more accurate to say that promoted tweets enable less powerful interests to have their voices heard in ways that compete with more powerful ones, such as former presidents?

5. There is currently a great deal of discussion about whether and how to regulate social media. Should governments do this directly? What are some of the potential benefits, and what are some of the concerns? For discussion, see Carissima Mathen, "Regulating Expression on Social Media" in Emmett MacFarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2021).

CHAPTER TWENTY-ONE

FREEDOM OF ASSOCIATION

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I. INTRODUCTION

The readings in this chapter are a testimony to the fact freedom of association is intimately connected to the history of labour relations in Canada. The common law of employment, generally speaking, is hostile to efforts by employees to improve their terms and conditions of work by collective means. With the rise of collective bargaining legislation, employees became entitled to join together for the purposes of collective bargaining with their employer and, if necessary and under strict conditions, to strike for the purposes of improving their working conditions. Thus, in many ways, the history of labour relations in Canada is a history of efforts by employees to expand their freedom of association. With the enactment of s 2(d) of the Charter, the judiciary became vested with the authority to rule on the constitutionality of laws that regulate relations between employers and employees. The constitutional guarantee of freedom of association raises critical questions concerning the extent to which governments can restrict, or must actually facilitate, the ability of employees to form unions, bargain collectively, and strike. It also raises questions about whether employees can be required to belong or contribute to trade unions and participate in their lawful activities.

Importantly, though freedom of association jurisprudence is mainly concerned with labour relations, associational activity is, in fact, central to individual, communal, and national identities that reach well beyond that context. As you read through the following materials, try to extrapolate from the labour relations setting to other settings, such as the family, religious institutions, political activity, and ethnic and cultural ties. What are the implications of the Court's approach for other spheres of social and political life that manifest associational activity? How should freedom of association relate to other constitutional guarantees, such as equality or freedom of religion?

The following section details a remarkable jurisprudential voyage. In 1987, the Court rendered judgment in a trilogy of cases, known collectively as the *Labour Trilogy*, that cast cold water on the Canadian labour movement's hopes that s 2(d) would extend robust constitutional protection for the rights of workers—*Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 1987 CanLII 88 [Alberta Reference]; *PSAC v Canada*, [1987] 1 SCR 424, 1987 CanLII 89 [Public Service Alliance]; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 1987 CanLII 90 [Saskatchewan Dairy Workers]. In the *Alberta Reference*, the majority of the Court, per McIntyre and Le Dain JJ, defined the scope of freedom of association narrowly, holding that the guarantee enshrines neither a right to strike nor a right to bargain collectively with one's employer. At most, freedom of association protects the right of workers to establish, join, and belong to a trade union. Chief Justice Dickson issued a powerful dissent, holding that

freedom of association not only protects a right of workers to establish, join, and belong to a trade union but also a right to bargain collectively.

Obliquely acknowledging the *Labour Trilogy*'s logical flaws and doctrinal inconsistencies, subsequent cases began to chip away at its holdings. In 2001, in *Dunmore v Ontario (AG)*, [2001 SCC 94](#), the majority adopted some of Dickson CJ's dissenting views in the *Alberta Reference*. In 2007, the dam finally broke in *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, [2007 SCC 27](#) [BC Health Services], in which the Court explicitly overruled the *Labour Trilogy*'s reasoning and much of its result, ushering in an expansive conception of freedom of association in the context of work by holding that freedom of association protects the right of workers to bargain collectively with their employers. More recently, in 2011, the Court explored some of the implications of this dramatic reversal, holding in *Ontario (AG) v Fraser*, [2011 SCC 20](#) that freedom of association guarantees a meaningful process that enables employee associations to make representations to employers, which employers must consider and discuss in good faith. In 2015, a majority of the Court strongly affirmed *Fraser* in *Mounted Police Association of Ontario v Canada (AG)*, [2015 SCC 1](#) and also held that freedom of association guarantees a right to strike in *Saskatchewan Federation of Labour v Saskatchewan*, [2015 SCC 4](#).

II. THE RIGHT TO ASSOCIATE WITH OTHERS

NOTE: THE LABOUR TRILOGY

In *Alberta Reference*, the Government of Alberta had referred three statutes to the Alberta Court of Appeal, the opinion of which the government subsequently appealed to the Supreme Court of Canada. The statutes were the *Public Service Employee Relations Act*, RSA 1980, c P-33; the *Labour Relations Act*, RSA 1980, c L-1.1; and the *Police Officers Collective Bargaining Act*, SA 1983(2), c P-12.05, all of which removed the right to strike of selected government employees—police, firefighters, hospital employees, and public servants—and replaced that right with a scheme of compulsory arbitration. The provisions governing interest arbitration also limited the matters that could be arbitrated and included criteria to guide arbitral decision-making. The issue before the courts was whether the right to strike and the right to bargain collectively are constitutionally protected under s 2(d) of the Charter, which guarantees freedom of association. A majority of the Court of Appeal decided that s 2(d) of the Charter did not include the right to strike and thus declared the three statutes valid.

Justice McIntyre of the Supreme Court of Canada identified freedom of association as "one of the most fundamental rights in a free society," as indicated by

the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed, and rigid controls are imposed to isolate and thus debilitate the individual (at para 148).

In defining the scope of freedom of association under s 2(d) of the Charter, McIntyre J stated:

[154] ... Freedom of association then serves the interest of the individual, strengthens the general social order, and supports the healthy functioning of democratic government.

[155] In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise. ... People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.

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[157] The recognition of this principle in the case at bar is of great significance. The only basis on which it is contended that the *Charter* enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the *Charter* for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association.

Justice McIntyre examined six theories about the meaning of freedom of association. The first is that freedom of association is limited to the right to associate with others, but that neither the objects nor the actions of the group are protected. Under the second approach, freedom of association protects the right to engage collectively in activities that are constitutionally protected for the individual. The third approach protects the organization in doing whatever the individual could lawfully do alone—that is, individuals can do together that which they can lawfully do alone. The fourth approach protects collective activities considered to be fundamental to our culture—for example, marriage or gaining a livelihood. The fifth extends protection to all activities necessary for the association to achieve its lawful goals—this was the approach taken by the Ontario Divisional Court in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home*, [1983 CanLII 1928, 44 OR \(2d\) 392](#), which held that freedom of association included the right to bargain collectively and to strike. The sixth approach is the broadest, encompassing all acts done in association, subject to limitation under s 1 of the Charter.

Justice McIntyre rejected the fourth, fifth, and sixth approaches because he claimed, they did not cohere with conceiving freedom of association as an *individual* right. He then held that the third approach is the only one potentially relevant to the right to strike and that, for the following reasons, it does not encompass the right to strike:

[177] When this [third] definition of freedom of association is applied, it is clear that it does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual. Accepting this conclusion, the appellants argue that freedom of association must guarantee the right to strike because individuals may lawfully refuse to work. This position, however, is untenable for two reasons. First, it is not correct to say that it is lawful for an individual employee to cease work during the currency of his contract of employment. ... The second reason is simply that there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation. The individual has, by reason of the cessation of work, either breached or terminated his contract of employment. It is true that the law will not compel the specific performance of the contract by ordering him back to work as this would reduce "the employee to a state tantamount to slavery" (I. Christie, *Employment Law in Canada* [(Toronto: Butterworths, 1980)], p. 268). But, this is markedly different from a lawful strike. An employee who ceases work does not contemplate a return to work, while employees on strike always contemplate a return to work. In recognition of this fact, the law does not regard a strike as either a breach of contract or a termination of employment. Every province and the federal Parliament has enacted legislation which preserves the employer–employee relationship during a strike.

It was not clear from McIntyre J's opinion in the *Alberta Reference* whether he also had concluded that collective bargaining was not protected by freedom of association. Justice Le Dain (Beetz and La Forest JJ concurring) agreed with McIntyre J's conclusion and viewed it as stating that the right to bargain collectively, as well as the right to strike, was not protected under freedom of association. Justice Le Dain emphasized that freedom of association will

be applied to "a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued" (at para 142), and therefore it is important to be restrained in granting constitutional protection to activities in which associations engage.

Chief Justice Dickson (Wilson J concurring)—whose dissenting opinion would eventually be embraced by the Court (see below)—took a different view of the scope of freedom of association, which he described as "the cornerstone of modern labour relations" (at para 23). He considered two approaches to the scope of the freedom, the constitutive and the derivative, both of which he rejected in favour of an interpretation that recognized that individuals are sometimes able to engage in activities through associations that they are unable to engage in solely as individuals:

[78] A wide variety of alternative interpretations of freedom of association has been advanced in the jurisprudence summarized above and in argument before this Court.

[79] At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's status as a member of an association. It would not protect his or her associational actions.

[80] In the trade union context, then, a constitutive definition would find a *prima facie* violation of s. 2(d) of the *Charter* in legislation such as s. 2(1) of the *Police Officers Act*, which prohibits membership in any organization affiliated with a trade union. But it could find no violation of s. 2(d) in respect of legislation which prohibited a concerted refusal to work. Indeed, a wide variety of trade union activities, ranging from the organization of social activities for its members, to the establishment of union pension plans, to the discussion of collective bargaining strategy, could be prohibited by the State without infringing s. 2(d).

[81] The essentially formal nature of a constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. While the constitutive approach might find a possible violation of s. 2(d) in a legislative enactment which prohibited marriage for certain classes of people, it would hold inoffensive an enactment which precluded the same people from engaging in the activities integral to a marriage, such as cohabiting and raising children together. If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

[82] In my view, while it is unquestionable that s. 2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed. In this respect, it is important to consider the purposive approach to constitutional interpretation mandated by this Court in *R. v. Big M Drug Mart Ltd.* [[1985] 1 SCR 295, 1985 CanLII 69]

[83] A second approach, the derivative approach, prevalent in the United States, embodies a somewhat more generous definition of freedom of association than the formal, constitutive approach. In the Canadian context, it is suggested by some that associational action which relates specifically to one of the other freedoms enumerated in s. 2 is constitutionally protected, but other associational activity is not.

[84] I am unable, however, to accept that freedom of association should be interpreted so restrictively. Section 2(d) of the *Charter* provides an explicit and independent guarantee of freedom of association. In this respect it stands in marked contrast to the First Amendment to the American Constitution. The derivative approach would, in my view, largely make surplausage of s. 2(d). . . . What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities involving independent constitutional rights but, rather, that the express conferral of a freedom of association is

unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms.

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[87] Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. ...

Chief Justice Dickson accepted that the guarantee protects the collective exercise of lawful individual activities but pointed out that there will be situations

when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights (at para 89).

This is the case with the right to strike since, in his view, there is no individual parallel to the collective action of striking.

Finally, Dickson CJ distinguished between associational activity with economic objectives, such as earning a livelihood or dignity in the workplace, and "concerns of an exclusively pecuniary nature" (at para 90), the former of which he believed should receive constitutional protection, while protection of the latter is more debatable. He, therefore, concluded that collective bargaining and the right to strike are encompassed by freedom of association:

[92] The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections and equitable and humane working conditions. ...

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[94] Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. ...

[95] The Woods Task Force Report [Harry D Woods, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968)] at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:

408. Strikes and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.

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[97] I am satisfied, in sum, that whether or not freedom of association generally extends to protecting associational activity for the pursuit of exclusively pecuniary ends—a question on which I express no opinion—collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature. Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*.

Chief Justice Dickson found that the restrictions under the impugned legislation were not justified under s 1 of the Charter because they inadequately defined the essential services that

could be exempted from the right to strike, they were overbroad in their application to certain workers, and the arbitration system was not an adequate replacement for the right to strike. In two companion cases, *Public Service Alliance* and *Saskatchewan Dairy Workers*, Dickson CJ held that restrictions on strikes and collective bargaining imposed limits on s 2(d) but, for the most part, could be upheld under s 1.

NOTES

1. Although it was clear from the decisions rendered in the *Labour Trilogy* that freedom of association did not include a right to strike, the judgments were less clear on the constitutional status of collective bargaining. Yet in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 1990 CanLII 72 [PIPSC], decided three years after the *Labour Trilogy*, a majority of the Court followed the *Labour Trilogy* cases to reach the conclusion that s 2(d) does not protect the right to bargain collectively.

2. In *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 1999 CanLII 649, the Court addressed the constitutionality of a provision in the *Public Service Staff Relations Act*, RSC 1985, c 33 (2nd Supp) that expressly excluded members of the Royal Canadian Mounted Police from the application of the Act, which established a collective bargaining regime for most civil servants and protected the right to form and join a union by prohibiting specific forms of managerial interference. Justice Bastarache, for a majority of the Court (Cory and Iacobucci JJ dissenting), relying on PIPSC, held there to be no violation of freedom of association in the denial of collective bargaining to RCMP members. The decision was heavily criticized, as in the following excerpt:

**Patrick Macklem, "Developments in Employment Law:
The 1990-91 Term"**

(1992) 3 SCLR (2d) 227 at 239-41 (footnotes omitted)

Justice Sopinka's majority judgment in PIPSC perhaps represents the final curtain on the constitutional guarantee of freedom of association in the context of work. Unless there is a major doctrinal reversal, the combined effect of the *Labour Trilogy* and PIPS is to strip the constitutional guarantee of freedom of association of any substantive meaning in the context of union power. As a result of the *Labour Trilogy*, the Charter does not constitutionally recognize the freedom of workers to collectively withdraw their labour even when they are under no contractual obligation to continue to work for an employer. As a result of [PIPSC], the Charter does not recognize the freedom of employees to band together for the purpose of bargaining collectively with their employers. In the words of Justice Cory: "The fact that the people who form the association (the union) may still meet together without interference from the state has no meaning if this association cannot be recognized under the relevant labour legislation."

As stated, the invocation of Justice McIntyre's test in the *Labour Trilogy* was defended by reference to an individualistic vision of constitutional guarantees. By the time [PIPSC] was decided, the test was a matter of precedent and was presented as an incontrovertible feature of the constitutional landscape. The indeterminacy of the guarantee was made to disappear. Alternative visions of freedom of association were not even introduced for discussion. Even Chief Justice Dickson accepted the now-dominant understanding of the guarantee. The interpretive function took on

an apolitical, objective veneer. Moreover, in applying the test that now has fixed the meaning of freedom of association, arguments were ignored that would have led to the protection of the very activity that the court excluded from section 2(d). As a result of the *Labour Trilogy* and [PIPSC], freedom of association is rendered barren, protecting nothing of positive importance to the union movement.

Whatever one thinks of the institutional competence of the judiciary in second-guessing substantive policy choices of legislatures, or of the progressive potential of Charter litigation, the combined effect of the *Labour Trilogy* and [PIPSC] is a national embarrassment. As stated previously, scholars disagree on the reasons why freedom of association is valuable in a democratic state. Some stress the fact that associational activity is critical to the self-realization of the individual, in that it is necessary in many cases to combine together to secure sufficient power to offset countervailing institutional forces that threaten individual autonomy and freedom. Others view associational activity as part of what it means to be human, in that an important component of human personality only obtains expression by association with others, and that such activity ought to be cherished and protected against the individuating tendencies of the modern state. Whatever the reason ultimately underpinning commitments to freedom of association, the important fact is that this freedom ought to be valued highly as a critical component of a democratic state.

Blinded by individualism, the Court treats freedom of association as though it potentially amounts to a threat to democracy. In contrast to the "large and liberal" approach to defining the scope and content of constitutional guarantees that the Court has been proud to articulate in relation to other constitutional rights, the Court appears determined to provide as minimal a content to freedom of association as possible. *Alberta Reference's* premise and conclusion is that the Constitution does not protect the essential purposes of some associations from state interference, yet no argument that does more than reiterate this view is given by the Court. In [PIPSC], no argument is necessary: precedent rules the day. The real reason for the Court's position appears to be a combination of conservatism and fear. It cannot be denied that groups can be powerful, nor can it be denied that the judiciary is not the most competent or legitimate institution to assess the relative merits of different types of associational activity. But these facts should go to the level of deference that the judiciary ought to accord to certain state initiatives, not to the definition of freedom of association itself. Workers deserve more from the judiciary than a jurisprudence of fear.

Dunmore v Ontario (AG)

2001 SCC 94

[In 1994, the Ontario legislature enacted the *Agricultural Labour Relations Act, 1994* [ALRA], which extended trade union and collective bargaining rights to agricultural workers. Prior to the adoption of this legislation, agricultural workers had always been excluded from Ontario's labour relations regime. A year later, following a change in government, the legislature, by virtue of s 80 of the *Labour Relations and Employment Statute Law Amendment Act, 1995* [LRESLA], repealed the ALRA in its entirety. The effect was thus to subject agricultural workers to s 3(b) of the *Labour Relations Act, 1995* [LRA], which excluded them from the labour relations regime set out in the LRA. Section 80 also terminated any certification rights of trade unions under the ALRA, as well as any collective agreements certified thereunder. The

appellants brought an application challenging the repeal of the ALRA and their exclusion from the LRA on the basis that it infringed their rights under ss 2(d) and 15(1) of the Charter. Both the Ontario Court (General Division) and the Ontario Court of Appeal dismissed the constitutional challenge.]

BASTARACHE J (McLachlin CJ and Gonthier, Iacobucci, Binnie, Arbour, and LeBel JJ concurring):

[16] ... [T]he purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test [outlined in *PIPSC*] for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules ... , but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the [*Alberta Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 1987 CanLII 55], such activities may be collective in nature, in that they cannot be performed by individuals acting alone. [This aspect of Dickson CJ's reasons,] which was not explicitly rejected by the majority in the *Alberta Reference* or in *PIPSC*, recognizes that the collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distill their views into a single platform. ... Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union. To limit s. 2(d) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives. At best, it would encourage s. 2(d) claimants to contrive individual analogs for inherently associational activities, a process which this Court clearly resisted in the labour trilogy, in [*Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157, 1997 CanLII 17020] and in its jurisprudence on union security clauses and the right not associate. ...

[17] As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak (see *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals." Rather, the law must recognize that certain union activities—making collective representations to an employer, adopting a majority political platform, federating with other unions—may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d). ... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.

As one author puts it, the *per se* exclusion of collective action reduces employee collectives to mere "aggregate[s] of economically self-interested individuals" rather than "co-operative undertakings where individual flourishing can be encouraged through membership in and co-operation with the community of fellow workers" (see L. Harmer, "The Right to Strike: Charter Implications and Interpretations" (1989), 47 U.T. Fac. L. Rev. 420, at pp. 434-35). This would surely undermine the purpose of s. 2(d), which is to allow the achievement of individual potential through interpersonal relationships and collective action (see, e.g., *[Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68] *per* McLachlin J., at pp. 343-44, *per* La Forest J., at pp. 327-28).

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[19] The content of the freedom to organize having been discussed, the next question that arises is the scope of state responsibility in respect of this freedom. This responsibility is generally characterized as "negative" in nature, meaning that Parliament and the provincial legislatures need only refrain from interfering (either in purpose or effect) with protected associational activity. Conversely, the *Charter* does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms.

[20] However, history has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. Knowing this would foreclose the effective exercise of the freedom to organize, Ontario has provided a statutory freedom to organize in its *LRA* (s. 5), as well as protections against denial of access to property (s. 13), employer interference with trade union activity (s. 70), discrimination against trade unionists (s. 72), intimidation and coercion (s. 76), alteration of working conditions during the certification process (s. 86), coercion of witnesses (s. 87), and removal of Board notices (s. 88). In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(d) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.

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[22] ... Where a group is denied a statutory benefit accorded to others, as is the case in this appeal, the normal course is to review this denial under s. 15(1) of the *Charter*, not s. 2(d) (see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 ("NWAC"); *[Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 1999 CanLII 649]). ... However, it seems to me that ... exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right; it has been held in the s. 2(a) context, for example, that "protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" (see *[R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69] at p. 337). This does not mean that there is a constitutional right to protective legislation *per se*; it means legislation that is *underinclusive* may, in unique contexts, substantially impact the exercise of a constitutional freedom.

[23] This brings me to the central question of this appeal: can excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, constitute a substantial interference with freedom of association? ...

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[28] ... [W]hile it is generally desirable to confine claims of underinclusion to s. 15(1), it will not be appropriate to do so where the underinclusion results in the effective denial of a fundamental freedom such as the right of association itself. This is not to say that such claims will be common: they are constrained by both s. 32 of the *Charter*, which demands a minimum of state action before the *Charter* can be invoked, as well as by the factors discussed above. However, a claim for inclusion should not, in my view, automatically fail a s. 2(d) analysis: depending on the circumstances, freedom of association may, for example, prohibit the selective exclusion of a group from whatever protections are necessary to form and maintain an association, even though there is no constitutional right to such statutory protection *per se*. In this sense, the burden imposed by s. 2(d) of the *Charter* differs from that imposed by s. 15(1): while the latter focuses on the effects of underinclusion on human dignity (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497), the former focuses on the effects of underinclusion on the ability to exercise a fundamental freedom. This distinction is contemplated by the wording of the *Charter* itself and is supported by subsequent jurisprudence of this Court (see, e.g., *Delisle, supra*, at para. 25).

[Justice Bastarache's discussion of *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 1986 CanLII 5, and the application of the *Charter* to private action can be found in Chapter 18, Application.]

[29] ... [T]he above doctrine does not, on its own, oblige the state to act where it has not already legislated in respect of a certain area. One must always guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place. By the same token, it must be remembered why the *Charter* applies to legislation that is underinclusive. Once the state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to *Charter* review. As Dean P. W. Hogg has stated, "[t]he effect of the governmental action restriction is that there is a private realm in which people are not obliged to subscribe to 'state' values, and into which constitutional norms do not intrude. The boundaries of that realm are marked, not by an *a priori* definition of what is 'private,' but by the absence of statutory or other governmental intervention" (see *Constitutional Law of Canada* (loose-leaf ed.), at p. 34-27). I am not prepared to say that the relationship between farmers and their employees falls within that boundary. If, by investigating the effects of a statute that regulates this sphere, this Court is imposing "positive" obligations on the state, that is only because such imposition is justified in the circumstances.

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[Justice Bastarache held that while conflicting claims concerning the meaning of troubling comments in the legislature made it impossible to conclude that the exclusion of agricultural workers from the LRA was intended to infringe their freedom to organize, the exclusion had the effect of infringing those workers' freedom of association. When discussing those effects, he made the following observations.]

[39] The fact that a regime aims to safeguard a fundamental freedom does not, of course, mean that exclusion from that regime automatically gives rise to a *Charter*

violation. ... [A] group that proves capable of associating despite its exclusion ... will be unable to meet the evidentiary burden required of a *Charter* claim. ... In this case, by contrast, the appellants' contend that total exclusion from the *LRA* creates a situation whereby they are substantially incapable of exercising their constitutional right to associate.

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[41] ... Not only have agricultural workers proved unable to form employee associations in provinces which deny them protection but, unlike the RCMP officers in *Delisle*, they argue that their relative status and lack of statutory protection all but guarantee this result. Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted [below] by Sharpe J, agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility" (p. 216). Moreover, unlike RCMP officers, agricultural workers are not employed by the government and therefore cannot access the *Charter* directly It is no wonder, therefore, according to the appellants, that agricultural workers have failed to associate in any meaningful way in Ontario

[42] ... As stated earlier in these reasons, it is only the right to associate that is at issue here, not the right to collective bargaining. Nevertheless, to suggest that s. 2(d) of the *Charter* is respected where an association is reduced to *claiming* a right to unionize would, in my view, make a mockery of freedom of association. The record shows that, but for the brief period covered by the *ALRA*, there has never been an agricultural workers' union in Ontario. Agricultural workers have suffered repeated attacks on their efforts to unionize. Conversely, in those provinces where labour relations rights have been extended to agricultural workers, union density is higher than in Ontario (see Statistics Canada, *Annual Report of the Minister of Industry, Science and Technology under the Corporations and Labour Unions Returns Act, Part II, Labour Unions* (1992), at pp. 38-41). The respondents do not contest this evidence, nor do they deny that legislative protection is absolutely crucial if agricultural workers wish to unionize. Indeed, to suggest otherwise would contradict a widespread consensus among Parliament and the provincial legislatures For these reasons, I readily conclude that the evidentiary burden has been met in this case: the appellants have brought this litigation because there is no possibility for association as such without minimum statutory protection. ...

[43] Their freedom to organize having been substantially impeded by exclusion from protective legislation, it is still incumbent on the appellants to link this impediment to state, not just private action (see *Dolphin Delivery, supra*). On this point, the respondent argues that since agricultural workers are isolated, seasonal and relatively under-educated, this, along with the unfair labour practices of their employers, is what explains the difficulty in creating associations rather than the underinclusiveness of the legislation. On the other hand, the appellants argue that the above conditions are reinforced by [the] legislation

[44] In my view, the appellants' argument must prevail. What the legislature has done by reviving the *LRA* is not simply allow private circumstances to subsist; it has reinforced those circumstances by excluding agricultural workers from the only available channel for associational activity (see [*Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816], at paras. 99-103). ...

[45] The most palpable effect of the *LRESLAA* and the *LRA* is, in my view, to place a chilling effect on non-statutory union activity. By extending statutory protection to just about every class of worker in Ontario, the legislature has essentially discredited the organizing efforts of agricultural workers. This is especially true given the relative status of agricultural workers in Canadian society. In *Delisle, supra*, I linked

RCMP officers' ability to associate to their relative status, comparing them with the armed forces, senior executives in the public service and judges. The thrust of this argument was that if the *PSSRA* sought to discourage RCMP officers from associating, it could not do so in light of their relative status, their financial resources and their access to constitutional protection. By contrast, it is hard to imagine a more discouraging legislative provision than s. 3(b) of the *LRA*. The evidence is that the ability of agricultural workers to associate is only as great as their access to legal protection, and such protection exists neither in statutory nor constitutional form. Moreover, agricultural workers already possess a limited sense of entitlement as a result of their exclusion from other protective legislation related to employment standards and occupational health and safety. ... In this context, the effect of s. 3(b) of the *LRA* is not simply to perpetuate an existing inability to organize, but to exert the precise chilling effect I declined to recognize in *Delisle, supra*. ...

[46] ... It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. As P. Weiler has written, unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law" (*Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at pp. 31-32). In this context, the wholesale exclusion of agricultural workers from a labour relations regime can only be viewed as a stimulus to interfere with organizing activity. The exclusion suggests that workplace democracy has no place in the agricultural sector and, moreover, that agricultural workers' efforts to associate are illegitimate. ...

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[48] In sum, I believe it is reasonable to conclude that the exclusion of agricultural workers from the *LRA* substantially interferes with their fundamental freedom to organize. The inherent difficulties of organizing farm workers, combined with the threats of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by s. 3(b) of the *LRA*, which delegitimizes associational activity and thereby ensures its ultimate failure. Given these known and foreseeable effects of s. 3(b), I conclude that the provision infringes the freedom to organize and thus violates s. 2(d) of the *Charter*.

NOTES AND QUESTIONS

1. With respect to the s 1 analysis, Bastarache J held that the evidence established that many farms in Ontario are family-owned and -operated, and that the protection of the family farm is a pressing enough objective to warrant the infringement of s 2(d) of the *Charter*. The economic objective of ensuring farm productivity is also important, he stated, as agriculture occupies a volatile and highly competitive part of the private sector economy, experiences disproportionately thin profit margins, and, because of its seasonal character, is particularly vulnerable to strikes and lockouts. However, Bastarache J held, the wholesale exclusion of agricultural workers from Ontario's labour relations regime does not minimally impair their right to freedom of association. The categorical exclusion of agricultural workers is unjustified where no satisfactory effort has been made to protect their basic right to form associations, he stated, and the exclusion is overly broad because it denies the right of association to every sector of agriculture without distinction. The reliance on the family farm justification, he continued, ignores an increasing trend in Canada toward corporate farming and complex agribusiness and does not justify the unqualified and total exclusion of all agricultural workers from Ontario's labour relations regime.

2. Justice L'Heureux-Dubé concurred in separate reasons, adding that the occupational status of agricultural workers constitutes an "analogous ground" (at para 170) for the purposes of proving a s 15(1) breach. Justice Major dissented, arguing that s 2(d) does not impose a positive obligation of protection or inclusion on the state.

3. *Dunmore* is noteworthy for the remedy declared by Bastarache J. He declared that the LRESLAA is unconstitutional to the extent that it gives effect to the exclusion clause found in s 3(b) of the LRA, and that the appropriate remedy in this case would be to declare s 3(b) unconstitutional. The declarations were suspended for 18 months, allowing amending legislation to be passed if the legislature saw fit to do so. In Bastarache J's view, s 2(d) of the Charter only requires the legislature to provide a statutory framework that is consistent with the principles established in this case. At a minimum, these principles require that the statutory freedom to organize in s 5 of the LRA be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble; freedom from interference, coercion and discrimination; and freedom to make representations and to participate in the lawful activities of the association. According to Bastarache J, the appropriate remedy does not require or forbid the inclusion of agricultural workers in a full collective bargaining regime, whether it be the LRA or a special regime applicable only to agricultural workers.

4. The Ontario legislature responded by enacting the *Agricultural Employees Protection Act, 2002*, SO 2002, c 16 [AEPA], the details of which are summarized in *Fraser*, excerpted below, in which the Supreme Court of Canada addressed its constitutionality, after it rendered judgment in *BC Health Services*, excerpted immediately below.

5. In *Gosselin v Quebec (AG)*, 2002 SCC 84, excerpted in Chapter 22, The Right to Life, Liberty, and Security of the Person, Arbour J, dissenting, described Bastarache J's judgment in *Dunmore* as providing a three-part test for determining whether a Charter right or freedom gives rise to a positive obligation on the state to legislate for its protection. In Arbour J's view, this test is as follows (at para 365):

1. The claim must be grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime
2. A proper evidentiary foundation must be provided, before creating a positive obligation under the *Charter*, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfillment of a protected right
3. It must be determined whether the state can truly be held accountable for any inability to exercise the right or freedom in question

These criteria were affirmed by a majority of the Court in *BC Health Services*, immediately below. Are these appropriate criteria for determining whether Charter rights and freedoms impose positive obligations on the state to legislate for its protection? What does it mean in terms of s 32 of the Charter, which stipulates that the Charter applies to governmental action, to say that a failure to legislate under certain circumstances violates a Charter right or freedom?

6. *Dunmore* is also noteworthy for its engagement with international labour law. In support of his holdings, Bastarache J referred not only to International Labour Organization (ILO) *Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise*, 67 UNTS 17 (entered into force 4 July 1950), which Canada has ratified, but also *Convention (No 11) concerning the Rights of Association of Agricultural Workers*, 38 UNTS 153 (entered into force 12 November 1921), and *Convention (No 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development*, 58:1 (1975) ILO Official Bulletin, neither of which Canada has ratified. The fact that the latter two instruments did not impose binding international legal obligations on Canada possessed no significance to Bastarache J's reasoning. They lent persuasive force to his conclusion that freedom of association, in some circumstances, requires legislatures to legislate for its protection.

Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia

2007 SCC 27

[The *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2 was designed to restructure labour relations in BC's health care system. Part 2 of the Act introduced changes to transfers and multi-worksit assignment rights (ss 4, 5), contracting out (s 6), the status of contracted-out employees (s 6), job security programs (ss 7, 8), and layoffs and bumping rights (s 9). It gave health care employers greater flexibility to organize their relations with their employees as they see fit and, in some cases, in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force and effectively precluded meaningful collective bargaining on a number of specific issues. Furthermore, s 10 voided any part of a collective agreement, past or future, that was inconsistent with part 2 and any collective agreement purporting to modify these restrictions. The appellants—unions and members of the unions representing the nurses, facilities, or community subsectors—challenged the constitutional validity of part 2 of the Act as a violation of ss 2(d) and 15 of the Charter. Adhering to the precedent of the *Labour Trilogy*, both the trial judge and the Court of Appeal upheld the constitutionality of part 2 of the Act.]

McLACHLIN CJ and LeBEL J (Bastarache, Binnie, Fish, and Abella JJ concurring):

I. Introduction

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[4] The [*Health and Social Services Delivery Improvement Act*] was adopted as a response to challenges facing British Columbia's health care system. Demand for health care and the cost of providing needed health care services had been increasing significantly for years. ... The government characterized the state of affairs in 2001 as a "crisis of sustainability" in the health care system

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[6] The Act was quickly passed. It came into force three days after receiving a first reading as Bill 29 before the British Columbia legislature.

[7] There was no meaningful consultation with unions before it became law. ... The Minister of Health Services telephoned a union representative 20 minutes before Bill 29 was introduced in the legislative assembly to inform the union that the government would be introducing legislation dealing with employment security and other provisions of existing collective agreements. This was the only consultation with unions before the Act was passed. ...

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[10] Only Part 2 of the Act is at issue in the current appeal. It introduced changes to transfers and multi-worksit assignment rights (ss. 4 and 5), contracting out (s. 6), the status of employees under contracting-out arrangements (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9).

[11] Part 2 gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues.

Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. In the words of the Act, s. 10: "Part [2] prevails over collective agreements." It is not open to the employees (or the employer) to contract out of Part 2 or to rely on a collective agreement inconsistent with Part 2.

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III. Analysis

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[19] At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining," as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*: [*Dunmore v Ontario (AG)*, 2001 SCC 94]. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

[20] Our conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining rests on four propositions. ...

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[22] ... We conclude that the grounds advanced in ... earlier decisions for the exclusion of collective bargaining from the *Charter's* protection of freedom of association do not withstand principled scrutiny and should be rejected.

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[24] In [the *Labour Trilogy* and *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 1990 CanLII 72 [PIPSC]], different members of the majorities put forth five main reasons in support of the contention that collective bargaining does not fall within s. 2(d)'s protection.

[25] The first suggested reason was that the rights to strike and to bargain collectively are "modern rights" created by legislation, not "fundamental freedoms" ([*Reference re Public Service Employees Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88], per Le Dain J., writing on behalf of himself, Beetz and La Forest JJ., at p. 391). The difficulty with this argument is that it fails to recognize the history of labour relations in [Canada] developed more thoroughly in the next section of these reasons

[26] The second suggested reason was that recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government regulation of labour relations (*Alberta Reference*, at p. 391). ... This argument again fails to recognize the fact that worker organizations historically had the right to bargain collectively outside statutory regimes and takes an overbroad view of judicial deference. ...

[27] The third suggested reason for excluding collective bargaining from s. 2(d) of the *Charter* rested on the view that freedom of association protects only those activities performable by an individual (see *PIPSC*, per L'Heureux-Dubé and Sopinka JJ.). ...

[28] This narrow focus on individual activities has been overtaken by *Dunmore*, where this Court rejected the notion that freedom of association applies only to

activities capable of performance by individuals. Bastarache J. held that “[t]o limit s. 2(d) to activities that are performable by individuals would ... render futile these fundamental initiatives” (para. 16), since, as Dickson C.J. noted in his dissent in the *Alberta Reference*, some collective activities may, by their very nature, be incapable of being performed by an individual. Bastarache J. provided the example of expressing a majority viewpoint as being an inherently collective activity without an individual analogue (para. 16). He concluded that:

As I see it, the very notion of “association” recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. ... [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be “the lawful activities of individuals.” Rather, *the law must recognize that certain union activities—making collective representations to an employer, adopting a majority political platform, federating with other unions—may be central to freedom of association even though they are inconceivable on the individual level.* This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection ... It is to say, simply, that *certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.* [Emphasis added; para. 17.]

[29] The fourth reason advanced for excluding collective bargaining rights from s. 2(d) was the suggestion of L’Heureux-Dubé J. that s. 2(d) was not intended to protect the “objects” or goals of an association (see *PIPSC*, at pp. 391-93). This argument overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in concert with others as the “object” of that association. Recasting collective bargaining as an “object” begs the question of whether or not the activity is worthy of constitutional protection. ... In our view, it is entirely possible to protect the “procedure” known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process. Thus, the characterization of collective bargaining as an association’s “object” does not provide a principled reason to deny it constitutional protection.

[30] An overarching concern is that the majority judgments in the *Alberta Reference* and *PIPSC* adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The result was to forestall inquiry into the purpose of that *Charter* guarantee. The generic approach of the earlier decisions to s. 2(d) ignored differences between organizations. Whatever the organization—be it trade union or book club—its freedoms were treated as identical. The unfortunate effect was to overlook the importance of collective bargaining—both historically and currently—to the exercise of freedom of association in labour relations.

[31] We conclude that the reasons provided by the majorities in the *Alberta Reference* and *PIPSC* should not bar reconsideration of the question of whether s. 2(d) applies to collective bargaining. This is manifestly the case since this Court’s decision in *Dunmore*

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[33] Second, *Dunmore* correctly advocated a more contextual analysis than had hitherto prevailed. Showing that a legislature has targeted associational conduct because of its “concerted or associational nature” requires a more contextual assessment than found in the early s. 2(d) cases. ...

[34] ... *Dunmore* [also] recognized that, in certain circumstances, s. 2(d) may place positive obligations on governments to extend legislation to particular groups. ...

[The majority referred to the framework laid out in *Dunmore*, excerpted above.]

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[36] In summary, a review of the jurisprudence leads to the conclusion that the holdings in the *Alberta Reference* and *PIPSC* excluding collective bargaining from the scope of s. 2(d) can no longer stand. None of the reasons provided by the majorities in those cases survive scrutiny, and the rationale for excluding inherently collective activities from s. 2(d)'s protection has been overtaken by *Dunmore*.

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[39] The general purpose of the *Charter* guarantees and the language of s. 2(d) are consistent with at least a measure of protection for collective bargaining. The language of s. 2(d) is cast in broad terms and devoid of limitations. However, this is not conclusive. To answer the question before us, we must consider the history of collective bargaining in Canada, collective bargaining in relation to freedom of association in the larger international context, and whether *Charter* values favour an interpretation of s. 2(d) that protects a process of collective bargaining: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, *per* Dickson J. Evaluating the scope of s. 2(d) of the *Charter* through these tools leads to the conclusion that s. 2(d) does indeed protect workers' rights to a process of collective bargaining.

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[40] Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. ...

[41] ... [T]he origin of a right to collective bargaining in the sense given to it in the present case (i.e., a procedural right to bargain collectively on conditions of employment), precedes the adoption of the present system of labour relations in the 1940s. ...

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[63] ... [W]orkers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the *Wagner Act* model [in the 1940s, which authorizes employees to form unions, bargain collectively, and strike], governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the *laissez-faire* era through the use of strikes—the right to collective bargaining with employers.

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[66] Collective bargaining, despite early discouragement from the common law, has long been recognized in Canada. Indeed, historically, it emerges as the most significant collective activity through which freedom of association is expressed in the labour context. In our opinion, the concept of freedom of association under s. 2(d) of the *Charter* includes this notion of a procedural right to collective bargaining.

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[70] Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the *Charter*. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be

presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

[71] The sources most important to the understanding of s. 2(d) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("ICESCR"), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("ICCPR"), and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 ("Convention No. 87"). Canada has endorsed all three of these documents, acceding to both the *ICESCR* and the *ICCPR*, and ratifying *Convention No. 87* in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

[72] The *ICESCR*, the *ICCPR* and *Convention No. 87* extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d).

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[81] Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*.

[82] The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work

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[84] Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees: see *Wallace v. United Grain Growers Ltd.* [(1997) 3 SCR 701, 1997 CanLII 332], per Iacobucci J. ...

Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:

Long ago we stated the reason for labour organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; ...

The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the work place, hours of work, sexual equality, and other aspects of work fundamental to the dignity and personal liberty of employees. [pp. 334-35]

[85] Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to

achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives

[86] We conclude that the protection of collective bargaining under s. 2(d) of the Charter is consistent with and supportive of the values underlying the Charter and the purposes of the Charter as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter.

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[89] ... Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

[90] Section 2(d) of the Charter does not protect all aspects of the associational activity of collective bargaining. ...

[91] The right to collective bargaining ... is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. ... Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial—so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

[92] To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

[93] Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second

inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[94] Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation.

[95] Turning to the first inquiry, the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively ...

[96] While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(d) right of freedom of association. This is because it is difficult to see how interfering with collective bargaining over these matters undermines the capacity of union members to pursue shared goals in concert. Thus, an interference with collective bargaining over these issues is less likely to meet the requirements set out in *Dunmore* for a breach of s. 2(d).

[97] Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining—the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(d), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.

[Chief Justice McLachlin and LeBel J addressed the nature and scope of the duty to bargain in good faith and concluded that one of its basic elements is an obligation to actually meet and commit time to the process. The parties have a duty to engage in meaningful dialogue, exchange and explain their positions, and make a reasonable effort to arrive at an acceptable contract. However, the duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions. In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found and should be clearly supported on the record.

They went on to conclude that ss 4 and 5 of the Act could not be said to amount to a substantial interference with the union's ability to engage in collective bargaining so as to attract the protection under s 2(d) of the Charter. However, they concluded

that the provisions dealing with contracting out, layoffs, and bumping infringe the right to bargain collectively that is protected by s 2(d). These provisions deal with matters central to the freedom of association and amount to substantial interference with associational activities. Furthermore, these provisions did not preserve the processes of collective bargaining. Although the government was facing a situation of exigency, the measures it adopted constituted a virtual denial of the s 2(d) right to a process of good faith bargaining and consultation.

They also held that these infringements are not justified under s 1 of the Charter. While the Act's main objective of improving the delivery of health care services and subordinate objectives was pressing and substantial, and while there was a rational connection between the means adopted by the Act and the objectives, the government had not shown that the Act minimally impaired the employees' s 2(d) right of collective bargaining. There was no evidence that the government considered whether it could reach its goal by less intrusive measures. Ultimately:

160 This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.

Justice Deschamps, dissenting in part, disagreed with the "substantial interference" standard (at para 177) proposed by the majority for determining whether a government measure amounts to an infringement of s 2(d). In her view, a more appropriate test would be:

180 ... Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements.

Justice Deschamps's test would involve two inquiries: first, whether the process of negotiation between employers and employees or their representatives is interfered with in any way; and second, whether the issues involved are significant. Only interference with significant workplace issues would be relevant to s 2(d). She found that ss 4, 5, 6(2), 6(4), and 9 of the Act infringed freedom of association but that, with the exception of s 6(4), they were justified under s 1 of the Charter.]

Appeal allowed in part.

NOTE: ONTARIO (AG) V FRASER

In 2002, the Ontario legislature enacted the AEPA, which excluded farm workers from the LRA, but crafted a separate labour relations regime for farm workers. The AEPA was a response to *Dunmore*, which found that the previous legislative scheme violated s 2(d) of the Charter and declared it constitutionally invalid. It granted farm workers, *inter alia*, the rights to form and join an employees' association, to assemble, to make representations, and to be protected against interference, coercion, and discrimination in the exercise of their rights. The employer was required to receive and consider representations respecting the terms and conditions of employment. The AEPA tasked a tribunal with hearing and deciding disputes about the application of the Act.

After limited efforts to use the new protections under the AEPA, a constitutional challenge was mounted on the basis that the Act infringed farm workers' rights under ss 2(d) and 15 of

the Charter by failing to provide effective protection for the right to organize and bargain collectively and by excluding farm workers from the protections accorded to workers in other sectors. In 2006, the Ontario Superior Court dismissed the application. The Court of Appeal allowed the appeal and declared the AEPA to be constitutionally invalid. It rendered its decision after the release of *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, excerpted above. In *Ontario (AG) v Fraser*, [2011 SCC 20](#), the Superior Court of Canada allowed the appeal and dismissed the constitutional challenge.

Chief Justice McLachlin and LeBel J wrote the reasons on behalf of the five-member majority. Their reasons reaffirmed the holding of *Health Services* that "freedom of association" encompasses a right to collectively bargain; however, they did so in words that seemed narrower than the language of the *Health Services* decision itself:

[40] The majority of the Court in *Health Services* affirmed that bargaining activities protected by s. 2(d) in the labour relations context include good faith bargaining on important workplace issues (para. 94; see also paras. 93, 130, 135). This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer. ...

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[51] In our view, the majority decision in *Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to *make collective representations and to have their collective representations considered in good faith*. (Emphasis added.)

Chief Justice McLachlin and LeBel J reaffirmed the earlier finding that "freedom of association" did not give a right to a particular model of collective bargaining, including the "Wagner" model that is enshrined in the LRA and almost all labour relations statutes in Canada and the United States:

[54] Our colleague [Rothstein J] appears to interpret *Health Services* as establishing directly or indirectly a Wagner model of labour relations. The actual holding of *Health Services*, as discussed above, was more modest. *Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to *make representations and have them considered in good faith by employers*, who in turn must engage in a process of meaningful discussion. ... No particular bargaining model is required. (Emphasis added.)

Chief Justice McLachlin and LeBel J found that the provisions of the AEPA satisfied the collective bargaining requirements first identified in *Health Services*. In so doing, the majority implied into the AEPA a requirement on employers not only to "listen to" (which is all that the statute explicitly provided) or "read" the representations but also to "consider [the] representations in good faith" (at para 101).

There were two sets of concurring reasons, agreeing in the result, but for different reasons. Justice Rothstein, writing for himself and Charron J, strongly advocated for the Supreme Court to overturn the earlier *Health Services* decision. Justice Rothstein argued that *Health Services* had incorrectly expanded the scope of freedom of association:

[125] In my view, s. 2(d) protects the liberty of individuals to associate and engage in associational activities. Therefore, s. 2(d) protects the freedom of workers to form self-directed employee associations in an attempt to improve wages and working conditions. What s. 2(d) does not do, however, is impose duties on others, such as the duty to bargain in good faith on employers.

In the view of Rothstein J, the question of which labour relations regime should apply and what mutual rights and obligations it should contain are matters best left to the legislature.

Justice Deschamps would have expressly narrowed the finding of *Health Services* to its facts. In her view, freedom of association in the employment context should be limited to what was set out in *Dunmore*.

Justice Abella dissented and would have upheld the decision of the Ontario Court of Appeal. In her view, *Health Services* created "a completely different jurisprudential universe" (at para 155). Moreover, she would have found that the AEPA did not include any obligation on the employer to respond; as such, it could not satisfy the good-faith bargaining obligations required by *BC Health Services*.

Of interest is Deschamps J's discussion of s 15 of the Charter. Traditionally, employment status has not been found to be an analogous ground for s 15 purposes. In *Fraser*, the s 15 claim was dismissed. However, rather than dismissing it on the basis that employment status is not an analogous ground, the majority found that the claim was premature. Deschamps J went further, suggesting that s 15 should be interpreted to cover claims such as the one being made in *Fraser*.

Mounted Police Association of Ontario v Canada (AG)

2015 SCC 1

McLACHLIN CJ and LeBel J (Abella, Cromwell, Karakatsanis, and Wagner JJ concurring):

[2] RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the [Public Service Modernization Act, SC 2003, c 22, s 2] *PSLRA* and its predecessor statute since collective bargaining was first introduced in the federal public service in the late 1960s. Instead, there exists a non-unionized labour relations regime with three core components. First, members can advance their workplace concerns through the Staff Relations Representative Program ("SRRP"). Second, members' concerns regarding pay and benefits are communicated to management through the RCMP Pay Council process. Third, RCMP members have created the Mounted Police Members' Legal Fund ("Legal Fund"), a not-for-profit corporation funded through membership dues, which provides legal assistance to RCMP members for employment-related issues.

[3] A little over 15 years ago, this Court held that exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(d): *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. On this appeal we are asked to reconsider that decision as it relates to the *PSLRA*. ...

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[30] The jurisprudence on freedom of association under s. 2(d) of the Charter—which developed mainly with respect to labour relations ... falls into two broad periods. ...

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[46] ... [A]fter an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(d): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

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[54] The purposive approach, adopted by Dickson C.J. in [his dissenting opinion in] the *Alberta Reference*, defines the content of s. 2(d) by reference to the purpose

of the guarantee of freedom of association: "... to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends" (*Alberta Reference*, at p. 365). ... Elaborating on this interpretive approach, Dickson C.J. states that the purpose of the freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict": *Alberta Reference*, at p. 366.

[55] The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups whose members' individual voices may be all too easily drowned out. ...

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[58] ... [A] fundamental purpose of s. 2(d) [is] to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

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[62] ... It follows that the associational rights protected by s. 2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations. ...

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[67] Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, affirming the central holdings of *Health Services* and *Fraser*. ...

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[70] ... As we have seen, s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

[71] The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). ...

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[81] ... This raises the question—what are the features essential to a meaningful process of collective bargaining under s. 2(d)? ... [W]e conclude that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.

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[83] ... [T]he degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of

the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.

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[97] ... Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.

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[105] This ... case [does not involve] a complete denial of the constitutional right to associate and of its related constitutional guarantees. It is rather a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control, as understood by Dickson C.J. in the *Alberta Reference*. We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(d). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects.

[106] Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day *RCMP Regulations, 2014* continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

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[118] Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. Accordingly, the element of employee choice is almost entirely missing under the present scheme.

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[122] The appellants [also] challenge the exclusion of RCMP members from the application of the *PSLRA* and ask that para. (d) of the definition of "employee" in s. 2(1) of that Act be struck down.

[123] For employees in the federal public service, the *PSLRA* provides the general framework through which they can join and participate in employee associations; these associations can be certified as bargaining agents, and good faith collective bargaining can occur. The *PSLRA* provides for mediation, conciliation and arbitration when problems arise during collective bargaining and provides remedies for unfair labour practices. While being significantly different from private-sector labour

relations models in many ways, the *PSLRA* and its predecessor, the *PSSRA*, are generally referred to as a Wagner Act model of labour relations (C. Rootham, *Labour and Employment Law in the Federal Public Service* (2007), at pp. 19-20).

[124] Paragraph (d) of the definition of "employee" in s. 2(1) of the *PSLRA* excludes RCMP members from the application of the *PSLRA*. This Court in *Delisle* held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(d) of the *Charter*. This raises a threshold question: Should the Court's decision in *Delisle* be reconsidered? In our view, it should

[125] ... [because] *Delisle* was decided before this Court's decisions in *Health Services* and *Fraser*, which marked a shift to a purposive and generous approach to labour relations.

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[136] We conclude that the purpose of the exclusion in s. 2(1) of the *PSLRA* substantially interferes with freedom of association. At this point, we need not consider the effects of the *PSLRA* exclusion independently from those of the imposition of the SRRP as a labour relations regime.

[137] This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. As discussed above, s. 2(d) of the *Charter* does not mandate a particular model of labour relations. Our conclusion with respect to the constitutionality of the *PSLRA* exclusion means only that Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining, unless this interference can be justified under s. 1 of the *Charter*. For example, it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties.

[The majority went on to hold that the limits imposed by the SRRP and the *PSLRA* could not be justified under s 1 of the *Charter*.]

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Appeal allowed.

Saskatchewan Federation of Labour v Saskatchewan

2015 SCC 4

[This case concerns the Saskatchewan *Public Service Essential Services Act*, SS 2008, c P-42.2 [PSESA], which became law on May 14, 2008 (at para 8):

Under the *PSESA*, designated "essential services employees" [were] prohibited from participating in any work stoppage against their public employer. In the event of a strike, those employees were required to continue "the duties of [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement," and [were] prohibited from refusing to continue those duties "without lawful excuse." Contravention of any provision under the *PSESA* was a summary conviction offence.

The trial judge concluded that the prohibition on the right to strike in the *PSESA* substantially interfered with the s 2(d) rights of the affected public sector employees, and that the absolute ban on the right to strike in the *PSESA* was neither minimally impairing nor proportionate under s 1 of the *Charter*. The Saskatchewan Court of

Appeal unanimously allowed the government of Saskatchewan's appeal with respect to the constitutionality of the PSEA, concluding (at para 23) that

[w]hile the Court's freedom of association jurisprudence has evolved in recent years, it has not shifted far enough, or clearly enough, to warrant a ruling by this Court that the right to strike is protected by s. 2(d) of the Charter.

Speaking for a majority of the Supreme Court of Canada, Abella J agreed with the trial judge and allowed the appeal of the Saskatchewan Federation of Labour and other unions. Justices Rothstein and Wagner, in a joint decision, dissented.]

ABELLA J (McLachlin CJ and LeBel, Cromwell, and Karakatsanis JJ concurring):

[2] The question in this appeal is whether a prohibition on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment amounts to a substantial interference with their right to a meaningful process of collective bargaining and, as a result, violates s. 2(d) of the Charter. The question of whether other forms of collective work stoppage are protected by s. 2(d) of the Charter is not at issue here.

[3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple recognized:

The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This—in all its simplicity—is the essence of the matter.

(*Laws Against Strikes* (1972), at p. 8)

The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

[4] This applies too to public sector employees. Those public sector employees who provide essential services undoubtedly have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all. Because Saskatchewan's legislation abrogates the right to strike for a number of employees and provides no such alternative mechanism, it is unconstitutional.

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Analysis

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[32] Given the fundamental shift in the scope of s. 2(d) since the *Alberta Reference* was decided, the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s. 2(d): *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 42.

[33] Dickson C.J.'s dissenting reasons in the *Alberta Reference* were influential in the development of the more "generous approach" in the recent jurisprudence. Recognizing that association "has always been vital as a means of protecting the essential needs and interests of working people" (at p. 368), and that Canada's international human rights obligations required protection for both the formation and essential activities of labour unions, including collective bargaining and the freedom to strike, Dickson C.J. concluded that "effective constitutional protection of the associational interests of employees in the collective bargaining process requires

concomitant protection of their freedom to withdraw ... their services [collectively], subject to s. 1 of the *Charter*" (at p. 371). ...

[34] His views are supported by the history of strike activity in Canada and globally.

[35] This Court referenced this history in *Health Services*:

In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 29-30). [para. 45]

[36] In England in the 19th century, strike action was the subject of criminal sanction This state of affairs continued in England "until the 'legislative settlement' of the 1870s ... lifted the threat of criminal sanctions from all but violent forms of behaviour associated with industrial action": Simon Deakin and Gillian S. Morris, *Labour Law* (6th ed. 2012), at p. 8.

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[38] ... [W]orkers participated in strike activity long before the modern system of labour relations was introduced in Canada. Strikes and collective bargaining were seen to go hand in hand since both "are creatures of working class action: working people turned to these methods to improve their lot in industry from the earliest days of nineteenth century Canadian capitalism": Geoffrey England, "Some Thoughts on Constitutionalizing the Right to Strike" (1988), 13:2 *Queens L.J.* 168, at p. 175. ...

[39] The acceptance of the crucial role of strike activity led to its eventual decriminalization. ...

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[42] In 1935, the *Wagner Act* was adopted in the United States, introducing a model of labour relations that came to inspire legislative schemes across Canada. This model was adopted in Canada because the federal and provincial governments "recognized the fundamental need for workers to participate in the regulation of their work environment," and, in doing so, "confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes—the right to collective bargaining with employers" (*Health Services*, at para. 63). One of the goals of the Wagner model, therefore, was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining.

[43] ... [M]odern labour relations legislation was "designed to secure a greater measure of industrial peace to the public by encouraging collective bargaining and conciliation procedures rather than strikes as a method of resolving industrial disputes" (*Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, at pp. 443-44, per Ritchie J.).

[44] Modern labour relations legislation in Canada accordingly limited certain forms of strike activities and replaced the freedom to collectively engage in the withdrawal of services with statutorily protected rights to organize and engage in collective bargaining. As Judy Fudge and Eric Tucker noted, this model gave workers collective bargaining protection as a trade-off for limitations imposed on the freedom to strike

[45] ... The trade-off in the Wagner labour relations model, limiting the ability to strike in favour of an emphasis on negotiated solutions for workplace issues, remains at the heart of labour relations in Canada. That is not to say it is the only model available, but it is the prevailing model in this country and the one under the s. 2(d) microscope in this case.

[46] It is important to point out, however, that the right to strike is not a creature just of the Wagner model. Most labour relations models include it. ... That is because it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment—in other words, to strike—is an essential component of the process through which workers pursue collective workplace goals. ...

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[53] In *Health Services*, this Court recognized that the Charter values of “[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy” supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(d) (para. 81). And, most recently, drawing on these same values, in *Mounted Police* it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims

to protect the individual from “state-enforced isolation in the pursuit of his or her ends” The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

[54] ... Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[55] Striking—the “powerhouse” of collective bargaining—also promotes equality in the bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. ...

[56] In their dissent, my colleagues suggest that s. 2(d) should not protect strike activity ... because “true workplace justice looks at the interests of all implicated parties” (para. 125), including employers. In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head It drives us inevitably to Anatole France’s aphoristic fallacy: “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

[57] Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. ... But what it does permit is the employees’ ability to engage in negotiations with an employer on a more equal footing (see *Williams v. Aristocratic Restaurants (1947) Ltd.*, [1951] S.C.R. 762, at p. 780; *Mounted Police*, at paras. 70–71).

[58] Moreover, while the right to strike is best analyzed through the lens of freedom of association, expressive activity in the labour context is directly related to the Charter-protected right of workers to associate to further common workplace goals under s. 2(d) of the Charter: *Fraser*, at para. 38; *Alberta (Information and Privacy Commissioner)*, at para. 30. Strike action “bring[s] the debate on the labour conditions with an employer into the public realm”: *Alberta (Information and Privacy Commissioner)*, at para. 28. Cory J. recognized this dynamic in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901:

Often it is only by means of a strike that union members can publicize and emphasize the merits of their position as they see them with regard to the issues in dispute. It is essential that both the labour and management side be able to put forward their position so the public fully understands the issues and can determine which side is worthy of public support. ...

[59] As Dickson C.J. observed, "[t]he very nature of a strike, and its *raison d'être*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual" (*Alberta Reference*, at p. 371).

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[62] Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. ...

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[64] LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."

[65] Given this presumption, Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(d). Canada is a party to two instruments which explicitly protect the right to strike. Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, to which Canada acceded in May 1976, provides that the "States Parties to the present Covenant undertake to ensure ... (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country." (See also affidavit of Prof. Patrick Macklem (Expert Report), sworn December 21, 2010). ...

[Justice Abella also cited the *Charter of the Organization of American States*, Can TS 1990 No 23, article 45(c).]

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[75] This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2(d) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.

[76] In their dissenting reasons, however, my colleagues urge deference to the legislature in interpreting the scope of s. 2(d). ... In the context of constitutional adjudication, deference is a conclusion, not an analysis. It certainly plays a role in s. 1, where, if a law is justified as proportionate, the legislative choice is maintained. But the whole purpose of *Charter* review is to assess a law for constitutional compliance. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?

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[78] The test, then, [for an infringement of s 2(d)] is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in any work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the *Charter*.

[79] The maintenance of essential public services is self-evidently a pressing and substantial objective, as the Unions acknowledge. The Unions also accept the trial judge's further conclusion that the government's objective—ensuring the continued delivery of essential services—is rationally connected to the "basic structure of the legislation, including the sanctions imposed on employees and their unions to ensure compliance with its provisions."

[80] The determinative issue here, in my view, is whether the means chosen by the government are minimally impairing, that is, "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

[81] The trial judge concluded that the provisions of the *PSESA* "go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike." I agree. The *unilateral* authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the trial judge's conclusion that the *PSESA* impairs the s. 2(d) rights more than is necessary.

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[96] Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses, there can be little doubt that the trial judge was right to conclude that the scheme was not minimally impairing. Quite simply, it impairs the s. 2(d) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.

[97] The *Public Service Essential Services Act* is therefore unconstitutional.

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Appeal allowed.

NOTES AND QUESTIONS

1. The Court's substantial broadening of freedom of association since *Dunmore* is dramatic, as is its sharp rebuttal of its earlier reasoning in the *Labour Trilogy*. Still, it is important to ask, have these dramatic changes in Charter law actually benefitted workers? Do workers now have more bargaining power with employers? To what extent can they actually exercise their new constitutional rights to strike and bargain collectively?

In *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 88-96, Joel Bakan argues that even if the Court had followed Dickson CJ's lead and interpreted s 2(d) more generously, it would have had little impact on workers' ability to act collectively because the factors that restrict their freedom of association lay beyond the Charter's reach:

Canadian workers' freedom of association is severely restricted. Workers' capacities to form and join trade unions, bargain collectively and strike have been undermined by political-economic shifts—increased mobility of capital, new workplace technologies, and new

modes of workplace organization—that lie far beyond the reach of the Charter’s right of freedom of association. ... Until quite recently, capitalist production typically took place in large workplaces with relatively consistent shift systems. Substantial numbers of workers would regularly inhabit the same spaces at the same times, an important condition for their developing a sense of common interest and struggle. ... Over the last two decades, new production methods and deindustrialization have had the opposite effect, fragmenting the worksite in time and space and thus creating real obstacles to workers’ development of solidaristic ties. The steady rise of part-time and temporary work arrangements means that the worksite is no longer a temporally cohesive unit. Workers come and go and are unlikely to have contact with the same co-workers for any substantial period of time. Moreover, as they rush from one part-time job to another—all the while, especially if they are women, juggling other obligations, such as care of children and elderly relatives, tasks themselves becoming more time consuming because of cuts in social services)—workers have less contact among themselves. Sharing among workers of concerns, complaints, and aspirations—a necessary basis for creating a sense of common interest (and thus successful union organizing)—is difficult in the absence of regular and consistent contact. Spatial (in addition to temporal) fragmentation of work worsens this situation. Increasingly, firms are “downsizing” and relying on subcontractors to meet production needs previously met within the firm. Large plants may become medium-sized ones and then subcontract with small, specialized firms and even single homeworkers. Workers are thus spread out in space and isolated from each other, geographically dissociated, and thus less able to develop solidaristic ties. Moreover, small firms are prohibitively costly for unions to organize and thus allow for greater resistance by employers to certification. ... [Finally, with economic globalization in full swing] a firm’s threat to relocate is a significant trump for overriding union concerns in the bargaining process, for extracting concessions, for dampening the will of employees to strike, and for getting the union to agree to introduction of “human resource management” policies. High unemployment is the background condition that gives these threats their power. ... [M]uch more than a generous interpretation of the Charter right of freedom of association is necessary to ensure that workers have genuine freedom of association. Ways must be found to resist and overcome the increasing isolation of workers from each other and the weakening of unions’ bargaining power in the new political economy. The solution lies not in the Charter, but in curbing business’s power and capacity to dissociate workers from each other and ignore their collective voice.

Consider Bakan’s arguments in relation to the post-pandemic trend of employers permitting, and often encouraging, employees to work from home (see, for example, Clare O’Hara, “Sun Life Plans to Allow Canadian Employees to Choose Whether to Return to the Office,” *Globe and Mail* (8 July 2021) B2. Might that have the effect of further eroding workers’ freedom of association? And what about the “gig” economy and the way it recasts workers as *not* workers? This is a trend Bakan explores in this excerpt from *The New Corporation: How “Good” Corporations are Bad for Democracy* (Toronto: Penguin Canada, 2020) at 102-3:

The overarching effect of Uber has been to transform a job protected by regulations and employment law—professional driving—into one that is precarious and unprotected. Through its app and algorithms, the company connects drivers to customers, claiming to be nothing more than a matchmaker, not an employer. Its “driver partners” are independent contractors, it claims, in business-to-business relationships with the company and therefore beyond the scope of employment protection. ... Uber is not the only company developing apps that evade the employment relationship. Similar platforms are emerging across sectors (a few examples: Upwork, TaskRabbit, UpCounsel, Postmates, and CrowdMed) and within corporations too. Amazon Flex is an example of the latter. It promises “Great Earnings. Flexible Hours. Be Your Own Boss” for its nonemployee delivery drivers, who use an app to claim delivery shifts, drive their own vehicles to an Amazon warehouse, pick up packages, and then deliver them. The

system is rife with abuse, overwork, and underpayment, all untouched by law because the workers are not technically employees. ... We're quickly moving toward a future where work is no longer organized as employment but instead is broken down into segmented steps that workers are hired to do on a piecemeal basis, brokered by fee-collecting Internet platforms. "The digital economy will sharply erode the traditional employer-employee relationship," states a recent International Monetary Fund report, as we move toward "crowd-based capitalism in which most of the workforce shifts from a full-time job as a talent or labour provider to running a business of one, in effect a microentrepreneur." The proliferation of digital labour platforms across increasing numbers of sectors, both low skilled and professional, means that "nonemployment work arrangements will expand ... possibly taking full-time jobs out of companies and converting them into sets of projects and tasks."

What kinds of legal and policy changes are needed to protect workers' freedom of association in light of the trends discussed in the above two excerpts? Is it possible to interpret the Court's recent cases establishing constitutional rights to bargain collectively and strike as requiring such changes? Assume Uber drivers challenge their exclusion from collective bargaining legislation (which applies only to "employees") on the ground it violates s 2(d). Could an argument be made that *Dunmore* and *Ontario Mounted Police* require they be included? Think about that as you read the following excerpt from *Uber v Aslam*, [2021] UKSC 5, [2021] IRLR 407, a United Kingdom Supreme Court decision:

[1] New ways of working organised through digital platforms pose pressing questions about the employment status of the people who do the work involved. The central question on this appeal is whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber's smartphone application ("the Uber app") work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent. ...

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[87] ... [T]he vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract."

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[101] ... the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill. From the drivers' point of view, the same factors—in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers—mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

The UK Supreme Court held that Uber drivers are workers and therefore enjoy workers' rights. Not long after this decision, and as a direct result of it, Uber officially recognized the GMB union as representing Uber drivers in the United Kingdom.

2. As stated in the introduction to this chapter, the readings thus far illustrate that the nature and scope of freedom of association have been debated largely in the context of labour disputes. Yet a number of cases before both the Supreme Court of Canada and lower courts have addressed the guarantee in non-labour settings, adding greater depth and texture to the developing jurisprudence on freedom of association.

3. In *Black v Law Society of Alberta*, [1989] 1 SCR 591, 1989 CanLII 132 (excerpted in Chapter 10, Federalism and the Economy), for example, the Supreme Court of Canada assessed the constitutionality of two regulations adopted by the Law Society of Alberta that, in effect, prevented the formation of partnerships between resident and non-resident members of the law society. While the majority of the Court held the provisions to be an unjustifiable interference with the respondents' mobility rights as guaranteed under s 6 of the Charter, McIntyre J, dissenting in part, with whom Wilson J concurred, found the restrictions offensive, not with respect to mobility rights but with the respondents' freedom to associate, thereby implicating s 2(d) of the Charter. In McIntyre J's view, the provision preventing the forming of a partnership or association between active member residents and active member non-residents (r 154) amounted to an infringement of s 2(d), which could not be saved under s 1. With respect to r 75B, which prevented members of the society from being partners in more than one firm, McIntyre J found this provision to offend s 2(d) of the Charter but upheld the restriction under s 1 as necessary to ensure and maintain the ethical practice of law in Alberta.

4. In *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157, 1997 CanLII 17020 (also excerpted in Chapter 10, and referred to in *BC Health Services*), the Canadian Egg Marketing Agency sought an injunction to prevent egg producers in the Northwest Territories from selling their eggs in interprovincial trade in the absence of federal quota authorizing such trade. The producers challenged the constitutionality of the federal regulatory scheme, arguing *inter alia* that it violated their freedom of association. Consider the following reasons by Iacobucci and Bastarache JJ for a majority of the Court:

[104] ... Since it is impossible to "market eggs by oneself" (p. 224), considering the legality of the activity if performed alone is an inappropriate litmus test for determining whether this associational activity is comprehended by s. 2(d). If it is necessary to associate with others to do something, then the right in s. 2(d) reaches beyond protecting the act of associating to protect the very activity for which the association is formed, an activity which is described as "foundational" to the association. The problem with this argument is that in this case it is not so much the activity that is foundational to the association as it is the association that is foundational to the activity. It is the activity that the respondents seek to cloak with the protection of s. 2(d); any association with others is merely a means to an end.

[105] The fact that the association is but a means to an end is not immediately fatal to the respondents' case, because associations normally are a means to an end. As McIntyre J. noted in *Reference re Public Service Employee Relations Act (Alta.)*, ... the right protected by s. 2(d) derives from the fact that "the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others" (p. 395). However, underlying the cases on s. 2(d) is the proposition that freedom of association protects only the associational aspect of activities, not the activity itself. If the activity is to be protected by the Constitution, that protection must be found elsewhere than in s. 2(d).

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[109] ... It cannot be said that freedom of contract and trade is a modern notion. Nevertheless, the regulation of trade, and in particular, trade in agricultural commodities, is an exercise that involves a balance of competing interests that requires specialized expertise. Yet the effect of the respondents' submissions would be to constitutionalize all commercial relationships under the rubric of freedom of association. There is no trade or profession that can be exercised entirely by oneself.

III. THE FREEDOM NOT TO ASSOCIATE WITH OTHERS

While most of the freedom of association cases involve the right to associate, the Supreme Court of Canada has also interpreted s 2(d) as including a right not to associate. As you read the following decisions, ask yourself whether the Court's account of the right not to associate is consistent with the reasons it offered in *BC Health Services* in support of its holding that freedom of association includes a right to bargain collectively.

The first case in which the Court squarely addressed the issue of whether freedom of association includes a right not to associate, or what is also described as a negative right of association, was *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68, which involved a challenge to a mandatory dues check-off. The appellant Lavigne taught at a community college in Ontario. The Ontario Public Service Employees Union (OPSEU) was the bargaining agent for community college faculty members, including the appellant. Sections 51, 52, and 53 of the Ontario Colleges Collective Bargaining Act, RSO 1980, c 74 authorized the inclusion of what is known as a "Rand formula"—requiring all employees to pay dues to a trade union regardless of whether they are members of the union—in collective agreements governing terms and conditions of employment at community colleges. The appellant objected to certain expenditures by OPSEU, including contributions to the following: a campaign against cruise missile testing, a campaign opposing the expenditure of municipal funds for the SkyDome stadium in Toronto, the National Union of Mine Workers in the United Kingdom, and the New Democratic Party. He also opposed contributions required by OPSEU's constitution to the National Union of Provincial Government Employees (NUPGE), which in turn pays dues to the Canadian Labour Congress. Both of these organizations also make a number of contributions of an economic, social, and political nature.

The appellant brought an application seeking a declaration that ss 51, 52, and 53 of the Act infringe ss 2(b) and 2(d) of the Charter. Justice White of the Supreme Court of Ontario found in favour of the appellant. The Court of Appeal allowed an appeal. A further appeal was dismissed by a unanimous Supreme Court of Canada.

The issue of the Charter's application is discussed in Chapter 18. Briefly, La Forest J (Sopinka, Gonthier, Cory, and McLachlin JJ concurring) held that the Council of Regents, which is the entity responsible for negotiating a collective agreement with the union, is a part of the government because it is a Crown agent, and the provincial Ministry of Colleges and Universities exercises full control of the council's activities. In his view, the council's agreement to the Rand formula constituted government action sufficient to trigger Charter scrutiny. Justice Wilson (L'Heureux-Dubé J concurring) gave separate concurring reasons substantially similar to the views expressed by La Forest J on this issue.

With respect to the claim that compelled payment of dues interferes with the appellant's freedom of expression, La Forest J (Sopinka and Gonthier JJ concurring) held that the payment of dues to the union does not amount to an attempt to convey meaning, and the union's uses of his dues cannot be regarded as an expression of the appellant's views. Justice Wilson (L'Heureux-Dubé and Cory JJ concurring) essentially agreed with La Forest J on this point, but added that even if compelled payment of dues amounts to an infringement of freedom of expression, it can be justified in the light of its purpose—that is, to foster collective bargaining.

Justices La Forest (Sopinka and Gonthier JJ concurring), Wilson (L'Heureux-Dubé and Cory JJ concurring), and McLachlin also dismissed the argument that compelled payment of dues unjustifiably interferes with freedom of association. Justice McLachlin held that s 2(d) protects against compelled association of an individual with ideas and values to which they do not voluntarily subscribe. In her view, the compelled payment does not violate freedom of association because there is no link between the mandatory payment and conformity with the ideas and values to which the appellant objected.

Justice La Forest (Sopinka and Gonthier JJ concurring) explained that the Rand formula could be challenged only if it interferes with the freedom not to associate with others—that is, the negative aspect of freedom of association. He, therefore, identified the issue as to whether s 2(d) encompasses the freedom not to be forced to associate with others and concluded that it does (at 318-19):

In my view, the answer is clearly yes. Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Instead, it can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. One need only think of the history of social stagnation in Eastern Europe and of the role played in its development and preservation by officially established "free" trade unions, peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic. Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals.

Furthermore, this is in keeping with our conception of freedom as guaranteed by the Charter. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. had this to say, at pp. 336-37:

Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.* One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain or sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. [Emphasis added.]

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added.]

It is clear that a conception of freedom of association that did not include freedom from forced association would not truly be "freedom" within the meaning of the Charter.

This brings into focus the critical point that freedom from forced association and freedom to associate should not be viewed in opposition, one "negative" and the other "positive." These are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations. The bilateral nature of the associational right is explicitly recognized in art. 20 of the United Nations *Universal Declaration of Human Rights*, 1948, which provides as follows:

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

In La Forest J's view, the fact that some aspects of freedom of association may also be protected by other guarantees does not mean that s 2(d) should not be given its full meaning, nor that all forms of association are protected under s 2(d): s 2(d) is not "a right to isolation" (at 320) because "certain associations ... are accepted because they are integral to the very structure of society" (at 321). In considering the test for determining whether there has been an infringement of the right not to associate, La Forest J focused on the role of freedom of

association in enhancing the autonomy of the individual. In Lavigne's case, therefore, it is not sufficient that other people may not assume that he agrees with the union's position on various causes just because he is required to pay dues that are given to those causes. He is entitled to object to his dues being allocated to causes with which he disagrees. Justice La Forest found that the payment of dues (which are used to further the objects of the union) constitutes association. Lavigne had conceded that the requirement he pay dues for collective bargaining purposes is constitutional, and thus the only issue was whether it was constitutional to require him to pay dues to causes not directly related to collective bargaining or the workplace more generally.

After having found that the forced payment of dues constitutes a *prima facie* violation of an individual's rights under s 2(d) of the Charter, La Forest J proceeded to uphold the infringement under s 1. In his view, the fundamental importance of trade unions in democratizing the workplace, as well as their broader societal role in promoting democratic principles, would be undermined if the courts were to find agency shop provisions unconstitutional. Thus, at the minimal impairment stage of the *Oakes* test, he rejected the possibility of an "opting out" formula in the payment of dues as a feasible alternative. Such a formula, he argued, would not only strike at a union's financial base, rendering it less fit to fulfill its role, but would also undermine the solidarity that "is so important to the emotional and symbolic underpinnings of unionism" (at 214). For La Forest J, the agency shop provisions represent a justifiable limit on freedom of association.

Justice Wilson (L'Heureux-Dubé and Cory JJ concurring) disagreed that freedom to associate encompasses a freedom from compelled association. Recognizing a freedom not to associate, in her view, "would be 'to overshoot the actual purpose of the right or freedom in question'" and "would set the scene for contests between the positive associational rights of union members and the negative associational rights of non-members." Thus, "[t]o construe the section in this way would place the court in the impossible position of having to choose whose s. 2(d) rights should prevail" (at 259). Furthermore, an individual who does not wish to associate with a particular group would be able to bring the claim under s 2(b) or s 7 of the Charter. Justice Wilson concluded that Lavigne's positive right to associate had not been contravened and that, even if there were a negative right, it had not been contravened because it would encompass the same narrow scope as the positive right pursuant to the *Alberta Reference*. Accordingly, she held that Lavigne's challenge did not fall within s 2(d).

The application of the negative freedom of association arises not only in the context of dues payment but also, perhaps more directly, in the context of mandatory union membership. The Supreme Court of Canada addressed this issue in its decision in *Advance Cutting & Coring*, in which the Court was divided on the application of the negative right.

R v Advance Cutting & Coring Ltd

2001 SCC 70

[Section 119.1 of the Quebec Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, RSQ, c R-20 required construction workers to obtain a competency certificate before they could work on a project. Before they could obtain a certificate, they had to join one of five union groups. The appellants were contractors and real estate promoters who had hired employees who did not have competency certificates and construction workers who worked without competency certificates. They challenged the legislative provisions on the ground that requiring the workers to become members of the union groups in order to obtain competency certificates breached the freedom *not to associate*. At the Supreme Court of Canada, in an opinion written by Bastarache J, four justices

held that the provisions contravened the Charter and were not justified under s 1 of the Charter; four justices held that the provisions did not contravene the Charter (of whom three, per LeBel J, found that the negative freedom of association was not infringed, and one, L'Heureux-Dubé J, held that s 2(d) did not encompass a negative freedom of association). Because the ninth justice, Iacobucci J, found a contravention, but considered that it was justifiable under s 1, the provisions were upheld by a narrow margin.]

LeBEL J (Gonthier and Arbour JJ concurring):

[163] The case at bar offers the possibility for an evolution in the relationship between the *Charter* and labour law. ... [T]he present case involves an attack on some forms of union security clauses. Under many shapes and forms, such arrangements often provide for an obligation to obtain or maintain union membership in order to retain or obtain employment. They may also address the financing of union activities. They may combine provisions relating to the checking off of union dues with others concerning the maintenance of union membership. A well-known and common form of union security, the Rand formula, which was discussed in [*Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68], has even become a standard part of the labour laws of some provinces, for example, under the Quebec *Labour Code*, R.S.Q., c. C-27, s. 47. Under this formula, union dues are withheld from the pay of an employee, whether or not he or she belongs to the union.

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[205] The present case presents a more difficult problem than the application of the Rand formula canvassed in *Lavigne*. The *Construction Act* imposes an obligation to join one of five unions. The question becomes whether this fact *per se* triggers the negative component and becomes a breach of s. 2(d) of the *Charter* that must be justified under s. 1. If we adopt this route, it might well mean that all forms of compulsory membership provided for or even authorized under statute would be open to challenge under the *Charter*.

[206] A proper analysis of *Lavigne* and of the nature of the constitutional guarantee does not allow for such a result. Although differing in some respects, McLachlin J's and La Forest J's reasons both refused to view the negative right as a simple mirror-image of the positive right of association. Both Justices accepted that the nature of a workplace and the status of the persons participating in its life and experience created associations that became unavoidable or "compelled." The use of the notion of ideological conformity by McLachlin J or La Forest J's concerns for the safeguarding of broad liberty interests acknowledged the need for association, as well as the need to join, which may be required in some aspects of life in the workplace. At the same time, they intended to meet the need to safeguard democratic values and to foster them in the area of labour relations. Their reasons reflect the view that some forms of compelled association might breach s. 2(d) of the *Charter* if the fact of association imposes on an individual values and views of the world antithetical to his or her own.

[207] The Court found a balance in *Lavigne*. This balance is now at stake in the present case. The majority of the Court in *Lavigne* found that there was a negative right not to associate. Although it acknowledged the need for such a right, it accepted a democratic rationale for putting internal limits on the right not to associate. La Forest J regarded the Constitution's presumption of democracy as a reason for concluding that forced associations which flow from the functioning of democracy cannot be severed with the aid of the *Charter* (at pp. 317 and 320-21). Democracy is not primarily about withdrawal, but fundamentally about participation in the life and management of democratic institutions like unions.

[208] An approach that fails to read in some inner limits and restrictions to a right not to associate would deny the individual the benefits arising from an association. This Court has maintained, since the labour law trilogy of 1987, that the right of association intends to foster individual autonomy and attaches to individuals. At the same time, the exercise of the right of association also reinforces the ability of an individual to convey ideas and opinions, through a group voice, as the Court acknowledged in *[Libman v Quebec (AG), [1997] 3 SCR 569, 1997 CanLII 326]*, discussed in Chapter 20, Freedom of Expression, while discussing political and ideological associations. It should not be viewed as an inferior right, barely tolerated and narrowly circumscribed.

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[218] The *Construction Act* imposes an obligation to join a union group. The obligation remains, nevertheless, a very limited one. It boils down to the obligation to designate a collective bargaining representative, to belong to it for a given period of time, and to pay union dues. The Act does not require more. At the same time, the Act provides protection against past, present and potential abuses of union power. ... The law allows any construction worker to change his or her union affiliation, at the appropriate time. As it stands, the law does not impose on construction workers much more than the bare obligation to belong to a union. It does not create any mechanism to enforce ideological conformity.

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[220] ... No witness came forward to assert that he felt or believed that joining a union associated him with activities he disapproved of, or with opinions he did not share. In order to trigger the negative guarantee in this case, ideological conformity or breach of another liberty interest would have to be found in the fact that unions, as other groups belonging to or participating in a democratic society, sometimes engage in public debate, take positions on issues concerning their members, or comment on broad social or political questions.

[221] Our Court would have to presume that, because they take part in social debate, unions in Quebec or elsewhere act in breach of the democratic values of our society, and of the liberty interests and the freedom of opinion and expression of their members. Still, if union members assert such a concern, it may have to be addressed. Accommodation may become necessary to safeguard the democratic character of unions and of the society within which they operate. ...

• • •

[223] No evidence was introduced about union practices that would impose values or opinions on their members. No evidence was offered about the internal life of construction unions or about the constraints they might seek to impose upon members. There was no indication that free expression is limited by union activities of such a nature that forced association would trigger the guarantee of s. 2(d). The nature of a particular legislative or regulatory system, in an important part of the economy like the construction industry, may certainly be subject to criticisms or political discussions. Nevertheless, personal disagreements with the extent of a strict regulatory system do not suffice to mount a successful *Charter* challenge. It should now be clear that the mere fact of compelled association will not, by itself, involve a breach of the *Charter*. More is needed in order to trigger the negative component of s. 2(d).

[Justice LeBel then addressed the issue of whether the Court could infer or presume that workers were subject to ideological coercion.]

[224] May the Court presume ideological coercion from the fact that, at times, Quebec unions, like other groups, have advocated particular causes? ...

[225] In order to reach such a result, the Court would have to take judicial notice of the presumed ideological bent of Quebec unions. The Court would have to judicially notice that ideological orientations or the adoption of social and political causes within the union movement mean that a form of intellectual conformity is being imposed by unions on their members, and that the liberty interests of those members are being jeopardized. Judicial notice certainly has its place in constitutional adjudication. ...

[226] The fact that unions intervene in political social debate is well known and well documented and might be the object of judicial notice. Indeed, our Court acknowledged the importance of this role in the *Lavigne* case. Several ideological currents have criss-crossed the history of the Quebec labour movement. ...

[227] Taking judicial notice of the fact that Quebec unions have a constant ideology, act in constant support of a particular cause or policy, and seek to impose that ideology on their members seems far more controversial. It would require a leap of faith and logic, absent a proper factual record on the question. The assertion seems to rest on the tenuous line that, although we do not have any evidence to this effect, coercion on the individuals should be inferred from "ideological" trends present in the labour movement. This "fact" is unlike issues of notorious discrimination against certain groups in Canadian society, and unlike the disadvantage experienced by women and children after a divorce, both facts of which this Court has taken judicial notice (see *R. v. Williams*, [1998] 1 S.C.R. 1128, and *Willick v. Willick*, [1994] 3 S.C.R. 670). In this case, it cannot be said that some form of politicization and ideological conformity which allegedly flows from the political and social orientation of the labour movement is self-evident. Instead, such views evidence stereotypes about the union movement as authoritarian and undemocratic, and conjure images of workers marching in lock step without any free choice or free will, under the watchful eyes of union bosses and their goon squads.

[228] In fact, democracy undergirds the particular form of union security provided for by the *Construction Act*. Throughout the conflicts and difficulties that marred the history of the construction industry, a critical flaw of the regime appeared to be the lack of participation in the life of unions and the need to reestablish and maintain member control over their affairs. ... Affiliation means that he or she has, at least, gained the ability to influence the life of the association whether or not he or she decides to exercise this right.

[229] In the case of the construction unions, a heightened degree of participation in the life of the associations appeared necessary in order to foster union democracy. At the same time, the legislative formula left workers a choice among the various groups active in the construction industry. These groups had held widely different views on the role of labour unions in society. Their orientations represented a broad spectrum of opinions, both about the orientation of society and about the functions of unions. The legislative solution represented an answer to some of the pressing problems that the Quebec construction industry had been confronted with during several years. The degree of relative peace and equilibrium reached by the time the present case started bears witness to the basic soundness of this legislative choice, which expresses a deep concern for democratic values. One might think that an absolute right to withdraw at will, even with payment of service fees for unions, would not preserve and develop the internal democracy of union groups in the same manner. It would deprive the dues-paying worker of any influence on the life of the union and on the determination of working conditions meant to be extended to the entire industry or a sector thereof, as rules of public order.

[230] Union members seem to act very independently from their union when it comes to the expression of their political choices and, even more so, to their voting

preferences, come election time. Existence of attempted ideological conformity, let alone its realization, seems highly doubtful. ...

[231] In this context, there is simply no evidence to support judicial notice of Quebec unions ideologically coercing their members. Such an inference presumes that unions hold a single ideology and impose it on their rank and file, including the complainants in this case. Such an inference would amount to little more than an unsubstantiated stereotype. ...

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BASTARACHE J (McLachlin CJ and Major and Binnie JJ concurring) (dissenting):

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[3] The test relied upon by LeBel J is based primarily upon the decision of McLachlin J (as she then was) in *Lavigne* [above]. According to LeBel J, for ideological conformity to exist, there must be evidence of an imposition of union values or opinions on the member, evidence of a limitation of the member's free expression, or evidence that the union participates in causes and activities of which the member disapproves. ... In other words, LeBel J's interpretation of ideological conformity is a narrow one where, in order to exist, there must be some impact on the member's moral convictions. This test, as formulated by LeBel J, is, in my opinion, too narrow and results in a negative right that is too constrained. I do not agree that McLachlin J's opinion in *Lavigne* need be interpreted so restrictively. In my view, the interpretation of ideological conformity must be broader and take place in context. In this case, this context would take into account the true nature of unions as participatory bodies holding political and economic roles in society which, in turn, translates into the existence of ideological positions. To mandate that an individual adhere to such a union is ideological conformity.

[Justice Bastarache referred to the concerns about association prior to the Charter as reflected in the Rand formula, whereby a worker will be required to pay union dues but can choose not to join the union that represents the employees in a workplace. The infringement in the current case is more significant, he said, and therefore requires greater justification.]

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[17] ... To suggest that the unions in the present case are not associated with any ideological cause is to ignore the history of the union movement itself. Although it has been accepted that freedom of association protects an activity by an association that is permitted by an individual, this does not mean that there is no distinctive function for an association, or that associational analogues to individual rights need be ignored. The collective character of the right to associate is undeniable because collective activity is not equivalent to the addition of individual activities. It is important, however, that belonging to important social institutions be free; this is how democracy will be enhanced.

[Justice Bastarache then considered whether the negative right is infringed. He discussed the political role played by unions, including their support of the New Democratic Party, their participation in the sovereignty issue in Quebec, and the general political representation of their members.]

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[27] ... Furthermore, membership has meaning. Membership is about sharing values, joining to pursue goals in common, expressing views reflecting the position of a particular group in society. ... It is because of the collective force produced by membership that unions can be a potent force in public debate, that they can influence Parliament and the legislatures in their functions, that they can bargain effectively. This force must be constituted democratically to conform to s. 2(d). ...

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[29] In the present case, workers objected to being forced to join a union and objected generally to the compulsory unionization scheme, which is, in my view, ideological in nature.

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[31] This is a case where the freedom not to associate is markedly infringed. ... This is a clear situation of government coercion, the result of which mandates that workers in the construction industry in Quebec group together in a few unions which are specified and approved by government. The fact that there are five unions from which workers can choose in no way negates this infringement for it remains government-mandated group affiliation. Self-realization of the worker is violated in many ways. He or she must unionize. Within the prescribed regime, democracy is further restricted by limited choice. There is no guarantee that a majority of voters will exercise their right. A default provision can determine the outcome of elections. Those voting for minority associations may be left out of future negotiations.

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[34] As I have said, ideological conformity is engaged in particular because the members of the associations necessarily participate in and indirectly support a system of forced association and state control over work opportunity. This is a situation whereby the democratic rights of workers are taken away. Being forced to accept and participate in a system that severely limits the democratic principle in the area of labour relations is a form of coercion that cannot be segregated totally from ideological conformity. If Parliament provided that a person must belong to a specific political party to work in the public service of Canada, the situation would be analogous. Some would argue that one does not have to believe, simply that one has to belong; ... I believe there would still be clear ideological conformity.

[35] Since ideological conformity is part of the broader test to which I subscribe, I conclude that the challenged statutory provisions infringe the negative right which forms part of s. 2(d).

[36] ... There is also a distinction to be made with the requirements of professional associations such as medical associations and law societies, where the need for protection of the public may require a forced association which is justified under s. 1 of the Charter. In this case, the provisions are not based on the protection of the public by way of assuring the competency of workers. To receive certification, a worker must be a member of one of the five chosen unions; to become a member, he or she must have been a resident of Quebec in the previous year, have worked a set number of hours in that year and must be under 50 years of age. Without having met these requirements, a worker is unable to work in Quebec regardless of his or her actual competence or experience in his or her chosen trade. The conditions related to forced association have nothing to do with the protection of the public. As stated by Bonin J of the Court of Québec, "[TRANSLATION] [t]he certificate's main purpose was to maintain hiring priority." As such, a s. 1 justification is required. Before considering s. 1, however, I turn next to the examination of the positive right which is also part of s. 2(d).

[Justice Bastarache found that s 30 of the Act, which establishes the conditions under which a competency card can be obtained (workers have to be resident in Quebec in the previous year during which they had to have worked 300 hours and be under 50 years old), and the regional quota requirements limiting the right to be placed on the union lists breach the positive right to associate. The conditions affect workers inside and outside Quebec and "severely" restrict their ability to join one of the

unions. He concluded that, under s 1 of the Charter, these requirements were disproportionate to their stated objectives.

Justice Iacobucci agreed that s 2(d) includes a negative right to be free from compelled association. He held that the legislation infringed that right, but that it was justified under s 1 of the Charter. He disagreed with both LeBel and Bastarache JJ, however, that the test for whether the negative right has been infringed relies on a finding of ideological conformity, preferring the test of whether the association poses a threat to a specific liberty interest enunciated by La Forest J in *Lavigne*. Indicating that forced association with respect to professional or skilled organizations will usually be valid because it reflects competence, he found that the forced membership in the construction unions is not contingent on competency. It also impaired the liberty interest of those who are opposed to joining a union and those who would choose a different union than one of the five recognized unions. He adopted LeBel J's s 1 analysis to find the contravention justified.

Justice L'Heureux-Dubé held that *Lavigne* does not support a clear statement of a constitutional right not to associate and that because freedom from ideological conformity can be addressed through s 2(b) or 7 of the Charter, it is not appropriate to develop new constitutional tools. She did not recognize a negative right of association and therefore held that there was no contravention of s 2(d). She further expressed concern (at para 76) that

the impetus for efforts to establish the negative right to association has historically originated with those opposed to the establishment or maintenance of labour associations. Such a tainted pedigree raises the question of whether we should constitutionalize an initiative whose purpose was to defeat the right to associate.]

Appeal dismissed.

NOTE AND QUESTIONS

Compulsion is also an issue with respect to s 2(b) of the Charter, which guarantees freedom of expression. Having regard to Chapter 20, is the Court's approach to compelled expression versus compelled association consistent? In your view, are there relevant differences between the two?

CHAPTER TWENTY-TWO

THE RIGHT TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

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I. INTRODUCTION

Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

When the Charter was enacted in 1982, the scope of the interests in “life, liberty and security of the person” and the meaning of the phrase “principles of fundamental justice” were debatable. At that time, commentators anticipated that the s 7 rights would be interpreted in relation to two other legal ideas.

The first was the American conception of “due process.” The 5th and 14th amendments to the US Constitution provide, among other rights, that no person may be deprived of “life, liberty, or property, without due process of law.” In the landmark case of *Lochner v New York*, 198 US 45, 25 S Ct 539 (1905), the US Supreme Court struck down a New York statute that set maximum hours of work for bakers on the ground that it took away a person’s “liberty” without “due process.” The liberty in question was the liberty of employees to make contracts about hours of work. This case and others like it created a doctrine called “substantive due process,” which protects substantive values such as freedom of contract, in contrast to “procedural due process,” which protects values associated with procedural fairness.

Lochner, like most landmarks, has been interpreted in different ways by different generations. The dominant understanding of *Lochner* has been that the US Supreme Court imposed its own laissez-faire ideology on the law, frustrating the efforts of progressive legislatures to reform working conditions and defying the terms and history of the *Bill of Rights* and the preferences of the majority of Americans. On this reading, the case is a paradigmatic example of the need for judicial restraint and the danger that arises when judges read their own personal economic and social values into the terms of constitutional guarantees. In the 1930s,

the US Supreme Court committed itself to a much more restrained standard of review for economic and social legislation, requiring only a "rational basis" for constitutional validity.

The second relevant legal idea was the administrative law doctrine of "natural justice" or "fairness." According to this doctrine, an individual who will be affected in some distinctive or particular way by a proposed administrative action or decision by the government is entitled to "natural justice"—that is, to have a hearing before officials who are impartial and independent. The phrase "some distinctive or particular way" refers to the effect of a wide range of decisions, all of them contrasted with the making of general policy. For example, if the governing body of a profession proposes to discipline a member for misconduct or negligence, it must do so in a hearing because the decision will affect the member alone. The hearing required for a decision that meets this threshold requirement is a reasonable opportunity to know what is being contemplated and to participate in the decision through the presentation of evidence and arguments. Depending on the context, natural justice may range from an informal interview or written submissions to a formal proceeding that is much like a trial. The requirement of impartiality and independence requires the decision-maker both to be and to appear to be uninfluenced by factors such as a financial interest in the outcome of the decision, personal animosity, or friendship toward a party, and participation in both the prosecution and the adjudication of an issue. This body of doctrine, "natural justice," together with the procedural protections in the criminal law, stands as one of the large elements of the common law protections of constitutional liberty in the British tradition.

How do the American conception of substantive due process and the common law conception of natural justice bear on the nature and scope of s 7? Both were part of the stock of common knowledge of the lawyers who participated in drafting s 7 and of the lawyers and judges who sought to interpret it. It is reasonably apparent that the drafters felt an acute need to avoid the dangers represented by *Lochner*. The word "property," for example, was not included in the phrase "life, liberty and security of the person," and several proposals to include it afterward have perished. The drafters of s 7 also tended to assume, and sometimes expressly stated, that in their view "the principles of fundamental justice" referred only to rules designed to secure procedural fairness or natural justice, as opposed to rules vindicating substantive values that may or may not find expression elsewhere in the Constitution.

Although the courts have been careful to disclaim any attraction to *Lochner's* temptations, we will see that the Supreme Court has interpreted fundamental justice to include substantive as well as procedural protections for life, liberty, and security of the person.

A. THE STRUCTURE OF SECTION 7

The following case, often referred to as the *Motor Vehicle Reference*, was the Supreme Court of Canada's first major decision to address the nature and scope of s 7. At issue was the constitutional validity of s 94(2) of the *Motor Vehicle Act*, RSBC 1979, c 288. Section 94(1) of that Act imposed a fine and a mandatory period of seven days' imprisonment on a driver for driving while their licence was suspended. Section 94(2) explicitly stated that the offence was one of "absolute liability," meaning that an accused would be found guilty once the prohibited act was proved, even if they were in no way at fault in committing the act. An accused who had driven with a suspended licence was guilty of this offence regardless of whether they knew of or had received notice of the suspension and regardless of any due diligence they might have exercised to ensure that the licence was not suspended. Because imprisonment was clearly a deprivation of liberty, much of the decision addressed the meaning of fundamental justice. The decision nonetheless also provides valuable insight on how life, liberty, and security of the person relate to each other, to the principles of fundamental justice, and to other rights and freedoms guaranteed in the Charter.

Re BC Motor Vehicle Act[1985] 2 SCR 486, 1985 CanLII 81

LAMER J (Dickson CJ and Beetz, Chouinard, and Le Dain JJ concurring):

**The Nature and Legitimacy of Constitutional
Adjudication Under the Charter**

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[15] ... [I]n the context of s. 7, and in particular of the interpretation of "principles of fundamental justice" there has prevailed in certain quarters an assumption that all but a narrow construction of s. 7 will inexorably lead the courts to question the wisdom of enactments, to adjudicate upon the merits of public policy.

[16] From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial legislatures and the electorate. ... This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

[17] The concerns with the bounds of constitutional adjudication explain the characterization of the issue in a narrow and restrictive fashion, i.e., whether the term "principles of fundamental justice" has a substantive or merely procedural content. In my view, the characterization of the issue in such fashion preempts an open-minded approach to determining the meaning of "principles of fundamental justice."

[18] The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

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The Principles of Fundamental Justice

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[24] In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, [[1985] 1 SCR 295, 1985 CanLII 69]), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand,

are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

[25] ... As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person

[26] For these reasons, I am of the view that it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice as the Attorney General of British Columbia and others have suggested. To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights

[27] It would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8 to 14 greater content than the general concept from which they originate.

[28] Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. ...

[29] Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section." Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural."

[30] Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice." Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).

[31] It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice." In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent

domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

[32] Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term natural justice, a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.

[33] Whatever may have been the degree of synonymy between the two expressions in the past (which in any event has not been clearly demonstrated by the parties and interveners), as of the last few decades this country has given a precise meaning to the words natural justice for the purpose of delineating the responsibility of adjudicators (in the wide sense of the word) in the field of administrative law.

[34] It is, in my view, that precise and somewhat narrow meaning that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice," the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.

[Justice Lamer then explained why he placed little emphasis on the testimony of federal civil servants from the Department of Justice before the Special Joint Committee of the Senate and House of Commons on the Constitution to the effect that the term "fundamental justice" in s 7 would cover procedural due process and that its meaning would be similar to the concept of natural justice, a concept familiar to the courts. This portion of the judgment is excerpted in Chapter 17, *The Framework of the Charter*.]

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[65] We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frankfurter J. wrote in *McNabb v. United States*, 318 U.S. 332 (1942), at p. 347, "the history of liberty has largely been the history of observance of procedural safeguards." This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots" ("Section 7 of the Charter: Substantive Due Process?" (1984), 18 *U.B.C.L. Rev.* 201, at p. 254).

[Justice Lamer concluded that absolute liability offended fundamental justice, deriving this conclusion from the basic principle that the innocent should not be punished. He also concluded that the absolute liability imposed by s 94(2) of the *Motor Vehicle Act* could not be justified under s 1. Even though it was highly desirable that bad drivers be kept off the road and that drivers who scorned licence requirements be severely punished, the government had not demonstrated that the risk of imprisoning innocent persons was a reasonable limit when weighed against the alternative of a statute that allowed for a defence of due diligence. Section 94(2) was declared of no force or effect. Justices Wilson and McIntyre wrote separate reasons agreeing in the result with Lamer J.]

Appeal dismissed.

The *Motor Vehicle Reference* established the basic structure of a s 7 claim. First, the applicant must show that the law or other state action in question affected their life, liberty, or security of the person: see below, Section I.B. Second, the applicant must show that the effect on their life, liberty, or security of the person violated one or more of the principles of fundamental justice: see below, Section I.C. If the applicant establishes both of these elements, then their s 7 right has been violated. The government may then attempt to show that the violation of s 7 is justified under s 1 of the Charter: see Section IV, below, and Chapter 17.

Although there have been many developments in the interpretation of s 7 since 1985, the basic structure of a s 7 claim remains the same as in the *Motor Vehicle Reference*: the Charter applicant must demonstrate that the state action in question both (1) affects life, liberty, or security of the person; and (2) is inconsistent with an identified principle of fundamental justice. Put another way, state action that affects life, liberty, or security of the person but complies with the principles of fundamental justice does not violate s 7; similarly, state action that is inconsistent with fundamental justice but does not affect life, liberty, or security of the person does not violate s 7 (see, for example, *R v Transport Robert* (1973) Lteeé; *R v 1260448 Ontario Inc.*, [2003 CanLII 7741, 180 CCC \(3d\) 254 \(Ont CA\)](#), where a penal statute of absolute liability was upheld because it did not affect liberty or security of the person).

Some have questioned whether this is the correct way to read s 7. In *Gosselin v Québec (AG)*, [2002 SCC 84](#), Arbour J, dissenting, proposed a different reading:

[338] It is in fact arguable, as Professor Hogg [Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2001) (loose-leaf)] points out (at p. 44-3), "that s. 7 confers two rights": a right, set out in the section's first clause, to "life, liberty and security of the person" full stop (more or less); and a right, set out in the section's second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Wilson J. explicitly considered this interpretation of s. 7 in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 488. Although in that case she expressed misgivings regarding the feasibility of the interpretation, she ultimately left its status undecided. In fact, in *Re B.C. Motor Vehicle Act ...*, at p. 523, which was heard later in the same year, [Justice Wilson] may have overcome her earlier misgivings and impliedly accepted the two-rights interpretation by stating that a deprivation of life, liberty or security of the person would require s. 1 justification even if the principles of fundamental justice were satisfied. Her statement in this regard is consistent with the notion that the first clause in s. 7 affords additional protection, over and above that afforded in the second clause, with the result that mere compliance with the principles of fundamental justice does not in itself guarantee that the rights to life, liberty and security of the person will not be violated.

How would this "two-right" view affect the way that s 7 is applied to government action?

Some scholars have proposed that s 7 should be interpreted so as to require the government to show that any effect on life, liberty, or security of the person is "in accordance with" a specific principle of fundamental justice, rather than requiring the applicant to show a violation of a principle of fundamental justice. How would that approach differ from the majority's holding in the *Motor Vehicle Reference*?

B. THE INTERESTS PROTECTED BY SECTION 7

As noted above, the first step in a s 7 claim is to show that the applicant's life, liberty, or security of the person has been negatively affected by state action. In what follows, we provide an overview of the approach that the courts have taken to defining the content of each of those interests and also include a discussion of the requirement of a causal connection between the negative effect on those interests and state action.

In the early years of the Charter, uncertainty existed about the extent to which s 7 applied outside the criminal law context. For example, in several early s 7 decisions, Lamer CJ expressed the view that s 7 applied only where the interests protected by s 7 were engaged in criminal proceedings and other proceedings involving coercive enforcement of the law by state officials. In the first cases excerpted below in Section II—that is, *Morgentaler* and *Rodriguez*—you will see that Supreme Court was careful to emphasize that its findings of a violation of the security of the person were made in the criminal law context and to caution that it was expressing no opinion on whether deprivations of security of the person would be found outside that context. These concerns about limiting the scope of s 7 have disappeared over time, and the Court has clearly extended the application of s 7 beyond the criminal law context and even beyond contexts connected to the administration of justice: see, for example, *Chaoulli v Quebec (AG)*, [2005 SCC 35](#) and other cases found below in Section III.

1. Life

The interest in life has been found to be engaged by government action that creates a serious threat to an applicant's life by preventing him or her from obtaining access to medical care: see, for example, *Chaoulli*, above, excerpted in Section III.

Imposing the death penalty as a punishment for an offence would also engage the s 7 right to life; however, capital punishment was abolished under the *Criminal Code* in 1976 and under the *National Defence Act* in 1998. Thus, the issue of whether capital punishment would be consistent with fundamental justice has not arisen directly under the Charter. Moreover, if this issue were to arise, it is likely that a court would treat it as a question of cruel and unusual punishment under s 12 of the Charter, rather than as a question of fundamental justice under s 7; see *R v Nur*, [2015 SCC 15](#), which considered the constitutionality of a minimum sentence under s 12 rather than under s 7.

The extradition of persons from Canada to face offences punishable by death in other jurisdictions does engage s 7, although the courts have tended to treat extradition under these circumstances as engaging the interests in liberty and security of the person, rather than the interest in life. Regardless of the interest in question, the Supreme Court of Canada has held that only in exceptional circumstances should Canada extradite someone to face the death penalty. In the case of extradition to US jurisdictions for offences that are punishable by death, the Court has held that, in all but exceptional circumstances, the minister of justice must seek assurances, pursuant to the extradition treaty between Canada and the United States, that the death penalty will not be imposed: *United States v Burns*, [2001 SCC 7](#). Why does fundamental justice require such an approach? What should the minister do if the requesting state cannot or will not provide assurances that the death penalty will not be imposed?

2. Liberty

The *Motor Vehicle Reference* established that the possibility of imprisonment as a consequence of criminal or other penal proceedings always engages the applicant's liberty interest. Therefore, the principles of fundamental justice apply at every stage of the criminal process, including the conduct of criminal investigations, pre-trial proceedings such as bail hearings, the criminal trial itself (including the rules of procedure and evidence), sentencing, and the parole system. Moreover, because the *Motor Vehicle Reference* held that the principles of fundamental justice could include substantive principles of criminal law, the definition of criminal offences is subject to scrutiny under s 7, especially in relation to their fault elements. It is arguable that s 7 has had a greater impact on the criminal justice system than on any other area of Canadian law. Nevertheless, we don't consider this impact in detail here because it is normally dealt with in courses on criminal law, criminal procedure, and evidence.

Detention in non-criminal contexts also engages s 7. For example, detention pursuant to immigration law, involuntary committal under provincial mental health law, and the extradition process all affect the s 7 liberty interest and must therefore comply with the principles of fundamental justice: *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#) (immigration proceedings); *PS v Ontario*, [2014 ONCA 900](#) (involuntary committal); *United States v Burns*, above (extradition).

To what extent does the s 7 interest in liberty extend to the more general interest that everyone has in making their own choices about where to go and what to do? The Supreme Court of Canada has been cautious in extending the liberty interest in this way. In the early days of the Charter, the Court rejected the idea that "liberty" included "freedom of contract." In *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [\[1990\] 1 SCR 1123, 1990 CanLII 105](#) [Prostitution Reference], for example, Lamer CJ stated (at 1171):

I ... reject the application of the American line of cases that suggest that liberty under the Fourteenth Amendment includes liberty of contract. ... [T]hese cases have a specific historical context, a context that incorporated into the American jurisprudence certain *laissez-faire* principles that may not have a corresponding application to the interpretation of the Charter in the present day. There is also a significant difference in the wording of s. 7 and the Fourteenth Amendment. The American provision speaks specifically of a protection of property interests while our framers did not choose to similarly protect property rights.

In *R v Malmo-Levine; R v Caine*, [2003 SCC 74](#), the accused challenged the provisions of the *Controlled Drugs and Substances Act* that criminalized the possession of marijuana. He argued that "smoking marihuana is integral to his preferred lifestyle, and that the criminalization of marihuana in both its possession and trafficking aspects is an unacceptable infringement of his personal liberty" (at para 81). The majority held that this argument did not engage the accused's s 7 liberty interest:

[86] While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, "basic choices going to the core of what it means to enjoy individual dignity and independence" [*Godbout v Longueuil (City)*, [\[1997\] 3 SCR 844, 1997 CanLII 335](#) at para 66].

On the other hand, in *R v Heywood*, [\[1994\] 3 SCR 761, 1994 CanLII 34](#), Cory J, speaking for the majority, held that the criminal prohibition in question affected the liberty interest because it prevented the accused from visiting places "where the rest of the public is free to roam" (at 789), suggesting that s 7 protects everyone's interest in being able to move freely around Canada. And in the following case, the Court recognized a liberty interest in decisions of "fundamental personal importance."

B (R) v Children's Aid Society of Metropolitan Toronto

[\[1995\] 1 SCR 315, 1995 CanLII 115](#)

[A children's aid society obtained an order pursuant to the Ontario *Child Welfare Act*, RSO 1980, c 66, granting it wardship of a child, which gave the society authority to consent to a blood transfusion on the child's behalf. The child's parents were both devout Jehovah's Witnesses. They challenged the wardship order, arguing that it

violated their right to choose medical treatment for their child in accordance with the tenets of their religion, which prohibit blood transfusions. They based their claim on both ss 2(a) and 7 of the Charter. The Supreme Court dismissed the parents' claim for a wide range of reasons. The s 2(a) aspect of the case is discussed in a note in Chapter 19, Section V, "Religious Families, Communities, and Organizations." With respect to the s 7 claim, La Forest J, writing for three members of the Court, found that the parents' right to liberty had been violated, but that fundamental justice had been observed.]

La FOREST J (Gonthier and McLachlin JJ concurring):

... On the one hand, liberty does not mean unconstrained freedom. ... Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. ...

• • •

Where to draw the line between interests and regulatory powers falling within the accepted ambit of state authority will often raise difficulty. But much on either side of the line is clear enough. On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. ... The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. ... Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters, and in particular the Ontario Act, while focusing on the best interest of the child, favour minimal intervention. In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated only when necessity was demonstrated. This only serves to confirm that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

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... This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.

The respondents also argued that the infant's rights were paramount to those of the appellants and, on that basis alone, state intervention was justified. ... Children undeniably benefit from the *Charter*, most notably in its protection of their rights to life and to the security of their person. As children are unable to assert these, our society presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children. If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. In fact, we must accept that parents can, at times, make decisions contrary to their children's wishes—and rights—as long as they do not exceed the threshold dictated by public policy, in its broad conception. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend. However, the state can properly intervene in situations where parental conduct falls below the socially acceptable threshold. But in doing so, the state is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children. ...

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Once it is decided that the parents have a liberty interest, further balancing of parents' and children's rights should be done in the course of determining whether state interference conforms to the principles of fundamental justice, rather than when defining the scope of the liberty interest. Even assuming that the rights of children can qualify the liberty interest of their parents, that interest exists nonetheless. In the case at bar, the application of the Act deprived the appellants of their right to decide which medical treatment should be administered to their infant. In so doing, the Act has infringed upon the parental "liberty" protected in s. 7 of the *Charter*. I now propose to determine whether this deprivation was made in accordance with the principles of fundamental justice.

[Justice La Forest concluded that the general procedure under the *Child Welfare Act* for granting orders of wardship met the standards of fundamental justice. In coming to this conclusion, he stressed the provisions about notice; the hearing before a judge, at which the parents had ample opportunity to present their concerns and preferences; and the onus on the applicant. Justice L'Heureux-Dubé, dissenting on another issue, agreed with this part of La Forest J's reasons. Justice Sopinka finessed the question of whether there was a violation of life, liberty, and security of the person by reasoning that, whether or not there had been a violation, fundamental justice had been observed. Justices Iacobucci and Major (Cory J concurring) found no violation of the parents' right to liberty under s 7. Taking the position that the child's s 7 rights to life and security of the person had to be considered, they found that an exercise of parental liberty that seriously endangers the survival of the child falls outside s 7. Chief Justice Lamer also found that there was no violation of life, liberty, and security of the person but for different reasons, connected to his view that it was inappropriate to expand the scope of the s 7 liberty interest beyond physical liberty.]

Two years later, in *Godbout v Longueuil (City)*, [1997] 3 SCR 844, 1997 CanLII 335, La Forest J, writing for three members of the Court, held that the decision about where to establish one's home was a decision of fundamental personal importance and that a law interfering with that decision engaged the s 7 liberty interest. He characterized the choice of where to live as "a quintessentially private decision going to the very heart of personal or individual autonomy" (at para 66). But a majority of the Court (Lamer CJ and Cory, Iacobucci, Sopinka, Major, and

Gonthier JJ) held that the law in issue unjustifiably violated the Quebec Charter, and thus that there was no need to consider the application of s 7 of the Canadian Charter.

In *Blencoe v British Columbia (Human Rights Commission)*, [2000 SCC 44](#), the applicant sought a stay on both common law and Charter grounds of a human rights inquiry into sexual harassment allegations against him. Bastarache J, writing for a majority of the Court, held that the inquiry in itself did not affect Blencoe's liberty interest in the sense of interfering with a decision of fundamental personal importance:

[86] Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and [as in *R v O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51] the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent in this case, as recognized by Lowry J, at para. 10, is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

Why is the Court so reluctant to give an expansive meaning to the word "liberty" in s 7? Is it true that society would be "ungovernable" under a broader interpretation of "liberty"?

3. Security of the Person

Generally speaking, the s 7 interest in security of the person is engaged by state interferences with bodily integrity and severe state-imposed psychological stress. State interference with bodily integrity can occur in many ways. Generally speaking, whenever the state uses force against a person's body, s 7 will be engaged: see, for example, *R v SA (B)*, [2003 SCC 60](#) (taking bodily samples for forensic DNA analysis); *R v Nasogaluak*, [2010 SCC 6](#) (use of force to carry out an arrest); *AC Manitoba (Director of Child and Family Services)*, [2009 SCC 30](#) (state-imposed medical treatment). Further examples of statutes that affect bodily integrity are illustrated by the cases excerpted in Section II, below.

To what extent is the s 7 right of a child engaged by the right of parents and teachers to use force by way of correction against the child (see s 43 of the *Criminal Code*, RSC 1985, c C-46), given that adults are not in general subject to corrective force? Should this distinction between adults and children be treated as a question of equality rights under s 15 of the Charter instead of, or as well as, an issue of security of the person? See *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004 SCC 4](#).

The Supreme Court of Canada has considered state-imposed psychological stress in a number of cases. In *New Brunswick (Minister of Health and Community Services) v G (J)*, [\[1999\] 3 SCR 46, 1999 CanLII 653](#), the issue was whether indigent parents have a constitutional right to be provided with state-funded counsel when the state seeks a judicial order suspending such parents' custody of their children pursuant to child welfare legislation. The decision not to provide the appellant with legal aid was made pursuant to a policy in force at the time of her application that stipulated that no legal aid certificates would be issued to respondents in custody applications made by the Minister of Health and Community Services. The Court held that the failure to provide the appellant with legal aid violated her right

to security of the person and was not justifiable under s 1 of the Charter. Chief Justice Lamer, for the majority, said:

[59] Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. Dickson C.J. in *[R v Morgentaler*, [1988] 1 SCR 30, 1990 CanLII 90], at p. 56, suggested that security of the person would be restricted through *serious* state-imposed psychological stress (emphasis added). Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. Nor will every violation of a fundamental freedom guaranteed in s. 2 of the *Charter* amount to a restriction of security of the person. I do not believe it can be seriously argued that a law prohibiting certain kinds of commercial expression in violation of s. 2(b), for example, will necessarily result in a violation of the psychological integrity of the person. This is not to say, though, that there will never be cases where a violation of s. 2 will also deprive an individual of security of the person.

[60] For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

[61] I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *[B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 1995 CanLII 115], at para. 83, "an individual interest of fundamental importance in our society." Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

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[63] Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.

[64] While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the injury to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged.

In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, which has been discussed above with respect to the "liberty" interest under s 7, a minister in the government of British Columbia was the subject of allegations of sexual harassment, which led to complaints

of sex discrimination before the BC Human Rights Commission. Following the allegations, Blencoe suffered from severe depression. He did not stand for re-election and considered himself "unemployable" because of the outstanding complaints. He commenced judicial review proceedings to stay the complaints on several grounds, including unreasonable delay. A majority of the BC Court of Appeal held that his rights under s 7 of the Charter were violated by the delay and ordered a stay of proceedings. The commission appealed. The Supreme Court of Canada, per Bastarache J, allowed the appeal on the basis that the harm to Blencoe was neither "state-imposed," because it occurred before the commencement of proceedings before the commission, nor, in Bastarache J's words, "seriously exacerbated by the delays" (at para 71). The following except from Bastarache J's reasons address the seriousness of the threat posed to the respondent's psychological integrity:

[96] I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the Charter covers such emotional effects nor that they can be equated with the kind of stigma contemplated in [Mills v The Queen, [1986] 1 SCR 863, 1986 CanLII 17], of an overlong and vexatious pending criminal trial or in [New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46, 1999 CanLII 653], where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing." The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in G. (J.). There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person."

NOTE: CAUSAL CONNECTION

As noted at the outset of this section, the Charter applicant must show that state action has negatively affected the interests protected by s 7; in other words, there must be a causal connection between the state action and the effect on the applicant's life, liberty, or security of the person. In *Canada (AG) v Bedford*, [2013 SCC 72](#) (excerpted in detail in Section II), McLachlin CJ expressed the required standard of causation as follows:

[74] Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection," adopted by the application judge ... ; (2) a general "impact" approach, adopted by the Court of Appeal ... ; and (3) "active and foreseeable" and "direct" causal connection, urged by the appellant Attorneys General

[75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account.

Although a "sufficient causal connection" is often easy to show (as in a criminal prosecution), the government has sometimes argued that the effects on the applicant's s 7 interests were caused by some other factor, such as the actions of a third party, a natural force, or the applicant's own personal choice. An argument of this kind was accepted in *Blencoe*, above, but failed in *Canada (AG) v PHS Community Services Society*, [2011 SCC 44](#) [PHS]; *Bedford*; and *Rodriguez v British Columbia (AG)*, [\[1993\] 3 SCR 519, 1993 CanLII 75](#) all excerpted below.

C. THE PRINCIPLES OF FUNDAMENTAL JUSTICE

If a law or other state action affects a person's life, liberty, or security of the person, the person's s 7 right will be infringed only if the state action is not in accordance with the principles of fundamental justice. The Charter does not define or list these principles, so it has been left to the courts to develop them. Although the principles of fundamental justice certainly include principles of procedural fairness, as we've seen, in the *Motor Vehicle Reference*, the Supreme Court of Canada held that they also include principles of substantive justice. Since then, the Court has developed a three-part test for determining whether a proposed principle is a principle of fundamental justice for s 7 purposes, originally outlined in *Rodriguez*, excerpted below. In *R v Malmo-Levine; R v Caine*, [2003 SCC 74](#), the majority summarized this test as follows:

[112] In *Re B.C. Motor Vehicle Act* ... , Lamer J. (as he then was) explained that the principles of fundamental justice lie in "the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system" (p. 503). This Court provided further guidance as to what constitutes a principle of fundamental justice for the purposes of s. 7, in [Rodriguez v British Columbia (AG), [1993] 3 SCR 519, 1993 CanLII 75] per Sopinka J. (at pp. 590-91 and 607):

A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is *some consensus* that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being *identified with some precision* and *applied* to situations in a manner which yields an understandable result. They must also, in my view, be *legal principles*.

• • •

While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have *general acceptance among reasonable people*. [Emphasis added.]

[113] The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder *only*": *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

On this standard, the Court held that the "harm principle"—the principle that conduct should not be criminalized unless it is harmful to others—satisfied none of the three criteria and was therefore not a principle of fundamental justice.

The Court has, however, recognized many other principles of fundamental justice, both procedural and substantive. For a description of these principles, see Hamish Stewart, *Fundamental Justice*, 2nd ed (Toronto: Irwin Law, 2019) chs 3, 4. Three related ideas have been of particular importance in recent constitutional litigation. Considered in relation to its own objectives, a law:

1. should not be *arbitrary*,
2. should not be *overbroad*, and
3. should not have a *grossly disproportionate effect* on the s 7 interests.

These three principles of fundamental justice—the norms against arbitrariness, overbreadth, and gross disproportionality—are described in more detail in the cases excerpted in Sections II and III. The relationship between these norms and s 1 of the Charter is briefly discussed in Section IV.

II. SECTION 7 AND BODILY INTEGRITY

The cases in this section are central to the s 7 jurisprudence of the Supreme Court of Canada. All involve criminal prohibitions that affect the bodily integrity of individuals. The cases are presented in chronological order so that you can follow the ongoing development of s 7. When reading these cases, consider how the claimant's bodily integrity engaged s 7 of the Charter, which principles of fundamental justice were invoked, and why these principles were or were not violated.

R v Morgentaler

[1988] 1 SCR 30, 1988 CanLII 90

[Section 251(1) of the *Criminal Code* provided that anyone who took steps to cause an abortion was guilty of an indictable offence and liable to imprisonment for life. Section 251(2) provided that a pregnant woman who sought to cause her own abortion was guilty of an indictable offence and liable to imprisonment for two years. Section 251(4) created an exception to s 251(1) for abortions performed

in an accredited or approved hospital ... if ... the therapeutic abortion committee for that ... hospital ... has by certificate in writing stated that in its opinion the continuation of the pregnancy ... would or would be likely to endanger her life or health,

and if the abortion was performed by "a qualified medical practitioner who was not a member of the committee." (The reference to "an accredited or approved hospital" was to hospitals that had been approved by a provincial minister of health for the purpose of performing abortions and accredited by the Canadian Council on Hospital Accreditation.) The prohibition in s 251(1) had been in the Code since the late 19th century. The exception in s 251(4) was enacted in 1969.

Dr Morgentaler and two colleagues established and operated an abortion clinic in Toronto. Every abortion performed at their clinic violated s 251(1) because the clinic was not an approved or accredited hospital and therefore had no therapeutic abortion committee to issue certificates. Morgentaler and his colleagues were charged with conspiring to commit an offence under s 251(1). Before trial, they moved to quash the indictment on the basis that s 251(1) was unconstitutional, and in particular that it violated s 7 of the Charter. The trial judge dismissed the motion, and the case proceeded to trial. The jury acquitted Morgentaler and his colleagues. The Ontario Court of Appeal allowed the Crown's appeal from the acquittal and ordered a new trial. Morgentaler and his colleagues appealed to the Supreme Court.]

DICKSON CJ (Lamer J concurring):

B. Security of the Person

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances

does the law allow others to make decisions of this nature. Similarly, art. 19 of the *Civil Code of Lower Canada* provides that "The human person is inviolable" and that "No person may cause harm to the person of another without his consent or without being authorized by law to do so." "Security of the person," in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. The above examples are simply illustrative of our respect for individual physical integrity. (See R. Macdonald, "Procedural Due Process in Canadian Constitutional Law" (1987), 39 *U. Fla. L. Rev.* 217 (1987), at p. 248.) Nor is it to say that the state can never impair personal security interests. There may well be valid reasons for interfering with security of the person. It is to say, however, that if the state does interfere with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice.

The appellants submitted that the "security of the person" protected by the *Charter* is an explicit right to control one's body and to make fundamental decisions about one's life. The Crown contended that "security of the person" is a more circumscribed interest and that, like all of the elements of s. 7, it at most relates to the concept of physical control, simply protecting the individual's interest in his or her bodily integrity.

[Chief Justice Dickson then reviewed case law interpreting ss 10 and 11 of the Charter to include protection against serious state-imposed psychological stress and psychological compulsion.]

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It may well be that constitutional protection of the above interests is specific to, and is only triggered by, the invocation of our system of criminal justice. It must not be forgotten, however, that s. 251 of the *Code*, subject to subs. (4), makes it an indictable offence for a person to procure the miscarriage and provides a maximum sentence of two years in the case of the woman herself, and a maximum sentence of life imprisonment in the cases of another person. Like Justice Beetz, I do not find it necessary to decide how s. 7 would apply in other cases.

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

I wish to reiterate that finding a violation of security of the person does not end the s. 7 inquiry. Parliament could choose to infringe security of the person if it did so in a manner consistent with the principles of fundamental justice. The present discussion should therefore be seen as a threshold inquiry and the conclusions do not dispose definitively of all the issues relevant to s. 7. With that caution, I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s. 251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own

priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the Charter to comport with the principles of fundamental justice.

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

[Chief Justice Dickson then reviewed evidence about the relationship between delay in access to abortion and health risks.]

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It is no doubt true that the overall complication and mortality rates for women who undergo abortions are very low, but the increasing risks caused by delay are so clearly established that I have no difficulty in concluding that the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 is an infringement of the purely physical aspect of the individual's right to security of the person. I should stress that the marked contrast between the relative speed with which abortions can be obtained at the government-sponsored community clinics in Quebec and in hospitals under the s. 251 procedure was established at trial. The evidence indicated that at the government-sponsored clinics in Quebec, the maximum delay was less than a week. One must conclude, and perhaps underline, that the delay experienced by many women seeking a therapeutic abortion, be it of one, two, four, or six weeks' duration, is caused in large measure by the requirements of s. 251 itself.

The above physical interference caused by the delays created by s. 251, involving a clear risk of damage to the physical well-being of a woman, is sufficient, in my view, to warrant inquiring whether s. 251 comports with the principles of fundamental justice. However, there is yet another infringement of security of the person. It is clear from the evidence that s. 251 harms the psychological integrity of women seeking abortions. A 1985 report of the Canadian Medical Association, discussed in the Powell Report [*Report on Therapeutic Abortion Services in Ontario* (Toronto: Ontario Ministry of Health, 1987)], at p. 15, emphasized that the procedure involved in s. 251, with the concomitant delays, greatly increases the stress levels of patients and that this can lead to more physical complications associated with abortion.

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In summary, s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria. It must, therefore, be determined whether that infringement is accomplished in accordance with the principles of fundamental justice, thereby saving s. 251 under the second part of s. 7.

C. The Principles of Fundamental Justice

[After describing s 251, Dickson CJ considered its practical operation. He relied heavily on Canada, *The Report of the Committee on the Operation of the Abortion Law* (Ottawa: Ministry of Supply and Services, 1977) (Chair: Robin Badgley) (the Badgley report), made by a committee established by the federal government to determine whether the abortion provisions were operating "equitably." The report demonstrated that the "procedural and administrative requirements" had created substantial inconsistencies and obstacles that greatly limited the number of hospitals performing abortions. Section 251(4) implicitly required at least three doctors for a committee, and because none of them could perform the abortion, a fourth was needed. Only about 75 percent of the hospitals in Canada met this minimum requirement. As well, the accreditation requirement excluded about 60 percent, and only about 50 percent of the remainder had chosen to establish a committee. The combined effect of these constraints was that in 1976 only about 20 percent of the hospitals in Canada performed abortions, and the provinces could, by regulation, impose even more restrictive requirements for approval, and even eliminate the exception provided in s 251(4).]

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A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Sub-section (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the health standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health." The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

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Various expert doctors testified at trial that therapeutic abortion committees apply widely differing definitions of health. For some committees, psychological health is a justification for therapeutic abortion; for others it is not. Some committees routinely refuse abortions to married women unless they are in physical danger, while for other committees it is possible for a married woman to show that she would suffer psychological harm if she continued with a pregnancy, thereby justifying an abortion. It is not typically possible for women to know in advance what standards of health will be applied by any given committee. ...

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It is no answer to say that "health" is a medical term and that doctors who sit on therapeutic abortion committees must simply exercise their professional judgment. A therapeutic abortion committee is a strange hybrid, part medical committee and part legal committee. ...

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When the decision of the therapeutic abortion committee is so directly laden with consequences, the absence of any clear legal standard to be applied by the committee in reaching its decision is a serious procedural flaw.

The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of

fundamental justice. In *Re B.C. Motor Vehicle Act*, [[1985] 2 SCR 486, 1985 CanLII 81] Lamer J. held, at p. 503, that "the principles of fundamental justice are to be found in the basic tenets of our legal system." One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

Consider then the case of a pregnant married woman who wishes to apply for a therapeutic abortion certificate because she fears that her psychological health would be impaired seriously if she carried the foetus to term. The uncontested evidence reveals that there are many areas in Canada where such a woman would simply not have access to a therapeutic abortion. She may live in an area where no hospital has four doctors; no therapeutic abortion committee can be created. Equally, she may live in a place where the treatment functions of the nearby hospitals do not satisfy the definition of "accredited hospital" in s. 251(6). Or she may live in a province where the provincial government has imposed such stringent requirements on hospitals seeking to create therapeutic abortion committees that no hospital can qualify. Alternatively, our hypothetical woman may confront a therapeutic abortion committee in her local hospital which defines "health" in purely physical terms or which refuses to countenance abortions for married women. In each of these cases, it is the administrative structures and procedures established by s. 251 itself that would in practice prevent the woman from gaining the benefit of the defence held out to her in s. 251(4).

[The Crown argued that women could travel to hospitals that performed abortions, but Dickson CJ held that the enormous emotional and financial burden of travelling was itself an obstacle, and one created by the Code. As well, some hospitals imposed geographic limitations.]

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... Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability. But if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice," that structure must be struck down. In the present case, the structure [of] the system regulating access to therapeutic abortions is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available.

I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly. For the reasons given earlier, the deprivation of security of the person caused by s. 251 as a whole is not in accordance with the second clause of s. 7. ...

[Chief Justice Dickson held further that s 251 could not be justified under s 1 of the Charter.]

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... The procedures established to implement the policy of s. 251 impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). In other words, many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

BEETZ J (Estey J concurring):

[Justice Beetz held that the primary purpose of s 251 was "the protection of the foetus."]

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If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

This interpretation of s. 7 of the *Charter* is sufficient to measure the content of s. 251 of the *Criminal Code* against that of the *Charter* in order to dispose of this appeal. While I agree with McIntyre J. that a breach of a right to security must be "based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection," I am of the view that the protection of life or health is an interest of sufficient importance in this regard. Under the *Criminal Code*, the only way in which a pregnant woman can legally secure an abortion when the continuation of the pregnancy would or would be likely to endanger her life or health is to comply with the procedure set forth in s. 251(4). Where the continued pregnancy does constitute a danger to life or health, the pregnant woman faces a choice: (1) she can endeavour to follow the s. 251(4) procedure, which, as we shall see, creates an additional medical risk given its inherent delays and the possibility that the danger will not be recognized by the state-imposed therapeutic abortion committee; or (2) she can secure medical treatment without respecting s. 251(4) and subject herself to criminal sanction under s. 251(2).

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The evidence reveals that the actual workings of s. 251(4) are the source of certain delays which create an additional medical risk for many pregnant women whose medical condition already meets the standard of s. 251(4)(c). Stated simply, when pregnant women suffer from a condition which represents a danger to their life or health, their efforts to conform to the procedure set forth for obtaining lawful

abortions in the *Criminal Code* often create an additional risk to their health. They may have to choose between bearing the burden of these risks by accepting delayed medical treatment, and committing a crime by seeking timely medical treatment outside s. 251(4). Given that the procedure in s. 251(4) is the source of this additional risk, it constitutes a violation of the pregnant woman's security of the person. ...

While only administrative inefficiencies that are caused by the rules in s. 251 are relevant to the evaluation of the constitutionality of the legislation under s. 7 of the *Charter*, the evidence which relates to the availability of therapeutic abortions under the *Criminal Code* reveals three sorts of delay, *all of which can be traced to the requirements of s. 251 itself*: (1) the absence of hospitals with therapeutic abortion committees in many parts of Canada; (2) the quotas which some hospitals with committees impose on the number of therapeutic abortions which they perform; and (3) the committee requirement itself each create delays for pregnant women who seek timely and effective medical treatment.

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The delays which a pregnant woman may have to suffer as a result of the requirements of s. 251(4) must undermine the security of her person in order that there be a violation of this element of s. 7 of the *Charter*. As I said earlier, s. 7 cannot be invoked simply because a woman's pregnancy amounts to a medically dangerous condition. If, however, the delays occasioned by s. 251(4) of the *Criminal Code* result in an additional danger to the pregnant woman's health, then the state has intervened and this intervention constitutes a violation of that woman's security of the person. By creating this additional risk, s. 251 prevents access to effective and timely medical treatment for the continued pregnancy which would or would be likely to endanger her life or health. If an effective and timely therapeutic abortion may only be obtained by committing a crime, then s. 251 violates the pregnant woman's right to security of the person.

The evidence reveals that the delays caused by s. 251(4) result in at least three broad types of additional medical risks. The risk of post-operative complications increases with delay. Secondly, there is a risk that the pregnant woman requires a more dangerous means of procuring a miscarriage because of the delay. Finally, since a pregnant woman knows her life or health is in danger, the delay created by the s. 251(4) procedure may result in an additional psychological trauma. ...

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I turn now to a consideration of the manner in which pregnant women are deprived of their right to security of the person by s. 251. Section 7 of the *Charter* states that everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. As I will endeavour to demonstrate, s. 251(4) does not accord with the principles of fundamental justice.

[Justice Beetz found that the standard expressed in s 251 was not so imprecise as to violate the principles of fundamental justice. He then went on to examine the administrative structure under s 251.]

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In *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 304, La Forest J. explained that the legislator must be accorded a certain latitude to make choices regarding the type of administrative structure that will suit its needs unless the use of such structure is in itself "so manifestly unfair, *having regard to the decisions it is called upon to make* [emphasis added], as to violate the principles of fundamental justice." An administrative structure made up of unnecessary rules, which result in an additional risk to the health of pregnant women, is manifestly unfair and does not conform to the principles of fundamental justice. Section 251(4), taken as a whole, does not accord with the

principles of fundamental justice in that certain of the procedural requirements of s. 251 create unnecessary delays. As will be seen, some of these requirements are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure in s. 251(4). Although connected to Parliament's objectives, other rules in s. 251(4) are manifestly unfair because they are not necessary to assure that the objectives are met.

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Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus. This is undoubtedly the objective of a rule which requires an independent verification of the practising physician's opinion that the life or health of the pregnant woman is in danger. It cannot be said to be simply a mechanism designed to protect the health of the pregnant woman. While this latter objective clearly explains the requirement that the practising physician be a "qualified medical practitioner" and that the abortion take place in a safe place, it cannot explain the necessary intercession of an in-hospital committee of three physicians from which is excluded the practising physician.

While a second medical opinion is very often seen as necessary in medical circles when difficult questions as to a patient's life or health are at issue, the independent opinion called for by the *Criminal Code* has a different purpose. Parliament requires this independent opinion because it is not only the woman's interest that is at stake in a decision to authorize an abortion. The Ontario Court of Appeal alluded to this at p. 378 when it stated that "[o]ne cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate." The presence of the foetus accounts for this complexity. By requiring an independent medical opinion that the pregnant woman's life or health is in fact endangered, Parliament seeks to ensure that, in any given case, only therapeutic reasons will justify the decision to abort. The amendments to the *Criminal Code* in 1969 amounted to a recognition by Parliament, as I have said, that the interest in the life or health of the pregnant woman takes precedence over the interest of the state in the protection of the foetus when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Parliament decided that it was necessary to ascertain this from a medical point of view before the law would allow the interest of the pregnant woman to indeed take precedence over that of the foetus and permit an abortion to be performed without criminal sanction.

I do not believe it to be unreasonable to seek independent medical confirmation of the threat to the woman's life or health when such an important and distinct interest hangs in the balance. ...

The assertion that an independent medical opinion, distinct from that of the pregnant woman and her practising physician, does not offend the principles of fundamental justice would need to be reevaluated if a right of access to abortion is founded upon the right to "liberty" in s. 7 of the *Charter*. I am of the view that there would still be circumstances in which the state interest in the protection of the foetus would require an independent medical opinion as to the danger to the life or health of the pregnant woman. Assuming without deciding that a right of access to abortion can be founded upon the right to "liberty," there would be a point in time at which the state interest in the foetus would become compelling. From this point in time, Parliament would be entitled to limit abortions to those required by therapeutic reasons and therefore require an independent opinion as to the health exception. ...

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Some delay is inevitable in connection with any system which purports to limit to therapeutic reasons the grounds upon which an abortion can be performed lawfully. Any statutory mechanism for ensuring an independent confirmation as to the state of the woman's life or health, adopted pursuant to the objective of assuring the protection of the foetus, will inevitably result in a delay which would exceed whatever delay would be encountered if an independent opinion was not required. Furthermore, rules promoting the safety of abortions designed to protect the interest of the pregnant woman will also cause some unavoidable delay. It is only insofar as the administrative structure creates delays which are unnecessary that the structure can be considered to violate the principles of fundamental justice. ...

[Justice Beetz went on to find that the requirement that abortions be performed in hospitals, the power to appoint a committee of more than three members, and the exclusion of doctors who performed therapeutic abortions from those committees were all unnecessary and consequently manifestly unfair, thus violating the principles of fundamental justice. He conducted a detailed s 1 analysis and concluded that s 251 could not be saved because, being unnecessary to achieve Parliament's objective of protecting the foetus, it was not rationally connected to that objective.]

WILSON J:

At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term. The legislature has proceeded on the basis that she can be so compelled and, indeed, has made it a criminal offence punishable by imprisonment under s. 251 of the *Criminal Code* for her or her physician to terminate the pregnancy unless the procedural requirements of the section are complied with.

My colleagues, the Chief Justice and Justice Beetz, have attacked those requirements in reasons which I have had the privilege of reading. They have found that the requirements do not comport with the principles of fundamental justice in the procedural sense and have concluded that, since they cannot be severed from the provisions creating the substantive offence, the whole of s. 251 must fall.

With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The Right of Access to Abortion

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It seems to me ... that to commence the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and to fail to deal with the right to liberty in the context of "life, liberty and security of the person" begs the central issue in the case. If either the right to liberty or the right to security of the person or a combination of both confers on the pregnant woman the right to decide for herself (with the guidance of her physician) whether or not to have an abortion, then we have to examine the legislative scheme not only from the point of view of

fundamental justice in the procedural sense but in the substantive sense as well. I think, therefore, that we must answer the question: what is meant by the right to liberty in the context of the abortion issue? Does it ... give the pregnant woman control over decisions affecting her own body? If not, does her right to security of the person give her such control? I turn first to the right to liberty.

(a) The Right to Liberty

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The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. ...

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The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty ... is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

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... Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

[Justice Wilson reviewed some American jurisprudence and continued.]

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In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter*. Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the *Charter*." I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does.

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, Lecturer in European Law at the University of Glasgow, has pointed out in her essay on "International Law and Human Rights: The Case of Women's Rights," in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (at 81-82). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] priorities and aspirations." The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

(b) The Right to Security of the Person

Section 7 of the *Charter* also guarantees everyone the right to security of the person. Does this ... extend to the right of control over one's own body?

I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. ... I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with

her physical person as well. She is truly being treated as ... a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person? I believe that s. 251 of the *Criminal Code* deprives the pregnant woman of her right to security of the person as well as her right to liberty.

[Justice Wilson also held that s 251 deprived women of their right to freedom of conscience under s 2(a) of the Charter. She held that the decision to terminate a pregnancy was a moral decision and commented (at 179):

[F]or the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another.

Further, she held that the deprivation of a s 7 right, which has the effect of infringing a right guaranteed elsewhere in the Charter, could not be in accordance with the principles of fundamental justice. Accordingly, s 251 violated s 7 of the Charter. Finally, Wilson J concluded that s 251 was not a reasonable limit under s 1 because it took the decision away from the woman at all stages of her pregnancy and was not sufficiently tailored to its objective.]

McINTYRE J (La Forest J concurring) (dissenting):

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The Right to Abortion and Section 7 of the Charter

The judgment of my colleague, Wilson J., is based upon the proposition that a pregnant woman has a right, under s. 7 of the *Charter*, to have an abortion. The same concept underlies the judgment of the Chief Justice. ... He has not said in specific terms that the pregnant woman has the right to an abortion, whether therapeutic or otherwise. In my view, however, his whole position depends for its validity upon that proposition and that interference with the right constitutes an infringement of her right to security of the person. It is said that a law which forces a woman to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations interferes with security of her person. If compelling a woman to complete her pregnancy interferes with security of her person, it can only be because the concept of security of her person includes a right not to be compelled to carry the child to completion of her pregnancy. This, then, is simply to say that she has a right to have an abortion. It follows, then, that if no such right can be shown, it cannot be said that security of her person has been infringed by state action or otherwise.

All laws, it must be noted, have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene. ...

The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the *Charter* or any other section. While some human rights documents, such as the *American Convention on Human Rights*, 1969 (Article 4(1)), expressly address the question of abortion, the *Charter* is entirely silent on the point. It may be of some significance that the *Charter* uses specific language in dealing with other topics, such as voting rights, religion, expression and

such controversial matters as mobility rights, language rights and minority rights, but remains silent on the question of abortion which, at the time the *Charter* was under consideration, was as much a subject of public controversy as it is today. Furthermore, it would appear that the history of the constitutional text of the *Charter* affords no support for the appellants' proposition. . . .

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It cannot be said that the history, traditions and underlying philosophies of our society would support the proposition that a right to abortion could be implied in the *Charter*. . . .

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There has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any general acceptance of the concept of abortion at will in our society. It is to be observed as well that at the time of adoption of the *Charter* the sole provision for an abortion in Canadian law was that to be found in s. 251 of the *Criminal Code*. It follows then, in my view, that the interpretive approach to the *Charter*, which has been accepted in this Court, affords no support for the entrenchment of a constitutional right of abortion.

As to an asserted right to be free from any state interference with bodily integrity and serious state-imposed psychological stress, I would say that to be accepted, as a constitutional right, it would have to be based on something more than the mere imposition, by the State, of such stress and anxiety. It must, surely, be evident that many forms of government action deemed to be reasonable, and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptable exercises of government power in pursuit of socially desirable goals. . . .

To invade the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection. This, it would seem to me, would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. For the reasons outlined above, the right to have an abortion—given the language, structure and history of the *Charter* and given the history, traditions and underlying philosophies of our society—is not such an interest.

[Justice McIntyre would have rejected the constitutional challenge to s 251 and would have dismissed the appeal.]

Appeal allowed; acquittals restored.

NOTE: ABORTION—SOME OTHER ISSUES

In 1987, a different challenge was made to s 251 by Joseph Borowski. He claimed that the foetus was protected by both ss 7 and 15, and accordingly commenced an action for a declaration that the exception in s 251(4) to the prohibition in s 251(1) was unconstitutional. (In an earlier decision, the Supreme Court of Canada had allowed Borowski to proceed simply as a concerned citizen, both because the issue was an important one and because there was no other reasonably effective way it was likely to be brought to court: for a discussion of standing, see Chapter 2, Judicial Review and Constitutional Interpretation). Both the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal dismissed his claim, holding that the foetus did not come within the meaning of "everyone" in s 7 or within the meaning of "every individual" in s 15. Borowski appealed to the Supreme Court of Canada, but before

the appeal was heard, the Court decided *Morgentaler*. The Court then dismissed Borowski's appeal on the ground of mootness—the basis of his action had disappeared when s 251 was struck down: see *Borowski v Canada (AG)*, [1989] 1 SCR 342, 1989 CanLII 123.

In *Tremblay v Daigle*, [1989] 2 SCR 530, 1989 CanLII 33, a prospective father asked the Quebec courts to prevent the mother, his former partner, from obtaining an abortion. An injunction that was granted by the trial judge and affirmed by the Court of Appeal was set aside on appeal by the Supreme Court, on the ground that neither the foetus nor the father had a right to be protected. The Court held that the foetus was not a "human being" under the Quebec Charter. It did not, though, undertake to answer the question whether the foetus was included in the term "everyone" in s 7 of the Canadian Charter because s 7 did not apply—the action was one between two private individuals. The prospective father, in contrast to the foetus, had no right to participate in the mother's decisions.

The *Morgentaler* judgment left a legislative void with respect to federal regulation of the practice of abortion. In 1990, the government introduced Bill C-43 to replace s 251 (renumbered s 287 in 1988). Proposed s 287(1) read as follows:

Every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened.

"Health" was defined in proposed s 287(2) as including "physical, mental and psychological health." The bill passed the House of Commons but was defeated in the Senate on a tie vote. If the bill had been enacted, would it have survived a challenge under s 7? What about a requirement of a waiting period or, for prospective mothers under the age of 16, parental consent?

Despite being of no force or effect, s 287 was not repealed until 2019.

Provincial legislative power to regulate abortion as a matter of health is circumscribed by federal jurisdiction over the criminal law. Thus, a province cannot enact legislation to reduce or eliminate abortion on the ground that it is morally repugnant. In *R v Morgentaler*, [1993] 3 SCR 463, 1993 CanLII 74, excerpted in Chapter 8, Interpreting the Division of Powers, the Supreme Court of Canada declared *ultra vires* a Nova Scotia statute prohibiting the performance of certain medical procedures, including abortion, outside accredited hospitals, and denying medical insurance coverage to abortions that were performed in contravention of the statute. The province contended that the purpose of the statute was to ensure a single, uniform, high-quality health care system. The Court held that the true object was to prevent the establishment of abortion clinics and that the statute was, in pith and substance, an exercise of criminal law jurisdiction and thus *ultra vires*.

Rodriguez v British Columbia (AG)

[1993] 3 SCR 519, 1993 CanLII 75

[Rodriguez, the appellant, was terminally ill, suffering from amyotrophic lateral sclerosis, or Lou Gehrig's disease, a progressive degeneration of the motor neurons. Although this disease would likely not affect her mind, its ineluctable course would destroy her ability to control her body. Within months or, at most, a few years, she would become bedridden and unable to speak or care for herself. She sought a declaration that she was entitled to have assistance in committing suicide when, in her judgment, her condition became unbearable and if she was then unable to commit suicide without assistance. The obstacle was s 241(b) of the *Criminal Code*, which provided that "[e]very one who ... aids or abets a person to commit suicide, whether

suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years." Her application was dismissed by both the Supreme Court of British Columbia and the BC Court of Appeal. Her further appeal to the Supreme Court of Canada was also dismissed. Justice Sopinka, for the majority, held that Rodriguez's security of the person was restricted by the prohibition on assisted suicide, but that there was no violation of the principles of fundamental justice.]

SOPINKA J (La Forest, Gonthier, Iacobucci, and Major JJ concurring):

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The most substantial issue in this appeal is whether s. 241(b) infringes s. 7 in that it inhibits the appellant in controlling the timing and manner of her death. I conclude that while the section impinges on the security interest of the appellant, any resulting deprivation is not contrary to the principles of fundamental justice. I would come to the same conclusion with respect to any liberty interest which may be involved.

• • •

The appellant argues that, by prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241(b) deprives her of both her liberty and her security of the person. The appellant asserts that her application is based upon (a) the right to live her remaining life with the inherent dignity of a human person; (b) the right to control what happens to her body while she is living; and (c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life. The first two of these asserted rights can be seen to invoke both liberty and security of the person; the latter is more closely associated with only the liberty interest.

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The appellant seeks a remedy which would assure her some control over the time and manner of her death. While she supports her claim on the ground that her liberty and security of the person interests are engaged, a consideration of these interests cannot be divorced from the sanctity of life, which is one of the three Charter values protected by s. 7.

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As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in s. 241(b) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur. ...

I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person. This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by ... [Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993)]) to mean that human life is seen to have a deep intrinsic value of its own.) As members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being, can we incorporate within the Constitution, which embodies our most fundamental values, a right to terminate one's own life in any circumstances? This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of quality of life as well.

Sanctity of life, as we will see, has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.

The appellant suggests that for the terminally ill, the choice is one of time and manner of death rather than death itself since the latter is inevitable. I disagree. Rather it is one of choosing death instead of allowing natural forces to run their course. The time and precise manner of death remain unknown until death actually occurs. There can be no certainty in forecasting the precise circumstances of a death. Death is, for all mortals, inevitable. Even when death appears imminent, seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life as a value is engaged even in the case of the terminally ill who seek to choose death over life.

Indeed, it has been abundantly pointed out that such persons are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection, as will be further set forth.

I do not draw from this that in such circumstances life as a value must prevail over security of person or liberty as these have been understood under the *Charter*, but that it is one of the values engaged in the present case.

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... [T]he judgments of this Court in *Morgentaler* [*R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 123] can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re: ss. 193 and 195.1(1)(c) of Criminal Code (Man.)*, [[1985] 2 SCR 486, 1985 CanLII 105] Lamer J. [as he then was] also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity." There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

The effect of the prohibition in s. 241(b) is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own. She fears that she will be required to live until the deterioration from her disease is such that she will die as a result of choking, suffocation or pneumonia caused by aspiration of food or secretions. She will be totally dependent upon machines to perform her bodily functions and completely dependent upon others. Throughout this time, she will remain mentally competent and able to appreciate all that is happening to her. Although palliative care may be available to ease the pain and other physical discomfort which she will experience, the appellant fears the sedating effects of such drugs and argues, in any event, that they will not prevent the psychological and emotional distress which will result from being in a situation of utter dependence and loss of dignity. That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner

which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is, therefore, engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.

[Justice Sopinka went on to hold that s 241(b) did not violate the principles of fundamental justice.]

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In this case, it is not disputed that in general s. 241(b) is valid and desirable legislation which fulfils the government's objectives of preserving life and protecting the vulnerable. The complaint is that the legislation is over-inclusive because it does not exclude from the reach of the prohibition those in the situation of the appellant who are terminally ill, mentally competent, but cannot commit suicide on their own. It is also argued that the extension of the prohibition to the appellant is arbitrary and unfair as suicide itself is not unlawful, and the common law allows a physician to withhold or withdraw life-saving or life-maintaining treatment on the patient's instructions and to administer palliative care which has the effect of hastening death. The issue is whether, given this legal context, the existence of a criminal prohibition on assisting suicide for one in the appellant's situation is contrary to principles of fundamental justice.

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. ...

• • •

The appellant asserts that it is a principle of fundamental justice that the human dignity and autonomy of individuals be respected, and that to subject her to needless suffering in this manner is to rob her of her dignity. ...

That respect for human dignity is one of the underlying principles upon which our society is based is unquestioned. I have difficulty, however, in characterizing this in itself as a principle of fundamental justice within the meaning of s. 7. While respect for human dignity is the genesis for many principles of fundamental justice, not every law that fails to accord such respect runs afoul of these principles. To state that "respect for human dignity and autonomy" is a principle of fundamental justice, then, is essentially to state that the deprivation of the appellant's security of the person is contrary to principles of fundamental justice because it deprives her of security of the person. This interpretation would equate security of the person with a principle of fundamental justice and render the latter redundant.

I cannot subscribe to the opinion expressed by my colleague, McLachlin J., that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required. ...

Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose. This is, to my mind, essentially the type of analysis which E. Colvin

advocates in his article "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 *Can. Bar Rev.* 560, and which was carried out in *Morgentaler*. That is, both Dickson C.J. and Beetz J. were of the view that at least some of the restrictions placed upon access to abortion had no relevance to the state objective of protecting the foetus while protecting the life and health of the mother. In that regard the restrictions were arbitrary or unfair. It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. ... One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J. at pp. 619-20) "it bears no relation to, or is inconsistent with, the objective that lies behind" the legislation without considering the state interest and the societal concerns which it reflects.

The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

Section 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This policy finds expression not only in the provisions of our *Criminal Code* which prohibit murder and other violent acts against others notwithstanding the consent of the victim, but also in the policy against capital punishment and, until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life. ...

[Justice Sopinka reviewed the history of common law and legislative protection of the terminally ill.]

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What the preceding review demonstrates is that Canada and other western democracies recognize and apply the principle of the sanctity of life as a general principle which is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail. However, these same societies continue to draw distinctions between passive and active forms of intervention in the dying process, and with very few exceptions, prohibit assisted suicide in situations akin to that of the appellant. The task then becomes to identify the rationales upon which these distinctions are based and to determine whether they are constitutionally supportable.

[Justice Sopinka then dealt with the argument that it was arbitrary for the law to prohibit assisted suicide but to allow both withdrawal of life supportive treatment upon the patient's request and the administration of drugs to control pain as part of palliative care treatment with the knowledge that they will hasten death. He held that these distinctions could be supported and were not fundamentally unjust.]

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The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general

acceptance among reasonable people. From the review that I have conducted above, I am unable to discern anything approaching unanimity with respect to the issue before us. Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other, are practically compelling, the fact remains that these distinctions are maintained and can be persuasively defended. To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it.

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... Given the concerns about abuse that have been expressed and the great difficulty in creating appropriate safeguards to prevent these, it cannot be said that the blanket prohibition on assisted suicide is arbitrary or unfair, or that it is not reflective of fundamental values at play in our society. I am thus unable to find that any principle of fundamental justice is violated by s. 241(b).

[Justice McLachlin (L'Heureux-Dubé J concurring) dissented. She held that s 241(b) deprived Rodriguez of her security of the person (by denying her the right to make decisions about her body) in a way that offended the principles of fundamental justice by drawing an arbitrary distinction between suicide and assisted suicide. She went on to hold that this violation of s 7 could not be justified under s 1. While recognizing that the objective of the complete prohibition on assisted suicide was to prevent the killing of those who did not truly consent to death, she found that this objective could be met by ensuring fully informed and free consent and could not justify denying persons in the position of Rodriguez the ability to obtain assistance in ending their lives:

The concern for deaths produced by outside influence or depression centre on the concept of consent. If a person of sound mind, fully aware of all relevant circumstances, comes to the decision to end her life at a certain point, as Sue Rodriguez has, it is difficult to argue that the criminal law should operate to prevent her, given that it does not so operate in the case of others throughout society. The fear is that a person who does not consent may be murdered, or that the consent of a vulnerable person may be improperly procured.

Chief Justice Lamer also dissented, holding that s 241(b) infringed s 15 of the Charter by discriminating on the basis of physical disability and could not be justified under s 1 because it was an absolute prohibition indifferent to individual circumstances. Justice Cory also dissented, agreeing in substance with both Lamer CJ and McLachlin J to find unjustified violations of both ss 7 and 15.]

Appeal dismissed.

Twenty-two years after Rodriguez, the Supreme Court of Canada revisited the constitutionality of s 241(b) in *Carter v Canada (AG)*, [2015 SCC 5](#), excerpted below, with a different result. The intervening years brought many developments in the interpretation of s 7, specifically in the Supreme Court of Canada's understanding of the principles of fundamental justice as shown in the next two cases: *PHS* (often referred to as the "Insite" case) and *Bedford*.

Canada (AG) v PHS Community Services Society

2011 SCC 44

McLACHLIN CJ (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, and Cromwell JJ concurring):

[1] Since 2003, the Insite safe injection facility has provided medical services to intravenous drug users in the Downtown Eastside of Vancouver ("DTES"). Local, provincial and federal authorities came together to create a legal framework for a safe injection facility in which clients could inject drugs under medical supervision without fear of arrest and prosecution. Insite was widely hailed as an effective response to the catastrophic spread of infectious diseases such as HIV/AIDS and hepatitis C, and the high rate of deaths from drug overdoses in the DTES.

[2] In 2008, the federal government failed to extend Insite's exemption from the operation of criminal laws in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"). Faced with the threat that Insite would have to stop offering services, the claimants brought an action for declarations that the CDSA is inapplicable to Insite and that its application to Insite resulted in a violation of the claimants' s. 7 rights under the *Canadian Charter of Rights and Freedoms*, or, in the alternative, that the federal Minister of Health, in refusing to grant an extension of Insite's exemption, had violated the claimants' s. 7 rights.

[3] The question in this appeal is whether Insite is exempt from the federal criminal laws that prohibit the possession and trafficking of controlled substances, either because Insite is a health facility within the exclusive jurisdiction of the Province, or because the application of the criminal law would violate the *Charter*. ...

[The trial judge granted Insite a constitutional exemption. The government's appeal to the BC Court of Appeal was dismissed.]

V. Division of Powers Arguments

[Chief Justice McLachlin held that the CDSA was *intra vires* the federal Parliament and was not inapplicable to Insite by reason of the doctrine of interjurisdictional immunity. This aspect of the decision is discussed in more detail in Chapter 8, Section V, "Applicability: The Interjurisdictional Immunity Doctrine."]

VI. Charter Claims

[74] Three *Charter* claims fall for consideration.

[75] Ms. Tomic, Mr. Wilson and PHS argue that ss. 4(1) and 5(1) of the CDSA, which prohibit possession and trafficking respectively, are invalid because they limit the claimants' s. 7 rights to life, liberty and security of the person and are not in accordance with the principles of fundamental justice.

[76] In the alternative, they assert that their s. 7 rights have been infringed by the Minister's refusal to extend the exemption for Insite from the application of the federal drug laws.

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B. Challenge to Sections 4(1) and 5(1) of the CDSA

[Chief Justice McLachlin held that, without a s 56 exemption, both the staff and the clients of Insite would be guilty of possession of controlled substances; they would not, however, be guilty of trafficking. Therefore, the possession, but not the trafficking, provisions of the CDSA engaged their s 7 liberty interests. However, McLachlin CJ

rejected the argument that the possession provisions were inconsistent with the principles of fundamental justice: "The availability of exemptions [under s 56] acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects" (at para 113). In the process of analyzing the parties' arguments about the constitutionality of the possession provisions, McLachlin CJ made the following comments about the issue of causation.]

(2) Canada's Argument on Choice

[97] Canada argues that any negative health risks drug users may suffer if Insite is unable to provide them with health services, are not caused by the *CDSA*'s prohibition on possession of illegal drugs, but rather are the consequence of the drug users' decision to use illegal drugs.

[98] Canada's position, deconstructed, reveals three distinct strands.

[99] The first strand is that from a factual perspective, personal choice, not the law, is the cause of the death and disease Insite prevents. Canada's difficulty is that this assertion contradicts the uncontested factual findings of the trial judge. The trial judge found that addiction is an illness, characterized by a loss of control over the need to consume the substance to which the addiction relates (para. 87).

[100] This does not negate the fact that some addicts may retain some power of choice. Insite is premised on the assumption that at least some addicts will be capable of making the choice to consume drugs in the safety of the facility and under the supervision of its staff. The range of services offered at the facility, from peer counselling to detox, assume at least a limited capacity on the part of some people to choose not to consume drugs.

[101] The ability to make some choices, whether with the aid of Insite or otherwise, does not negate the trial judge's findings on the record before him that addiction is a disease in which the central feature is impaired control over the use of the addictive substance (para. 142). At trial, Pitfield J. adopted the definition of addiction developed by the Canadian Society of Addiction Medicine:

A primary, chronic disease, characterized by impaired control over the use of a psychoactive substance and/or behaviour. Clinically, the manifestations occur along biological, psychological, sociological and spiritual dimensions. Common features are change in mood, relief from negative emotions, provision of pleasure, pre-occupation with the use of substance(s) or ritualistic behaviour(s); and continued use of the substance(s) and/or engagement in behaviour(s) despite adverse physical, psychological and/or social consequences. Like other chronic diseases, it can be progressive, relapsing and fatal. [para. 48]

That finding was not challenged here. ...

[102] The second strand of Canada's choice argument is a moral argument that those who commit crimes should be made to suffer the consequences. On this point it suffices to say that whether a law limits a *Charter* right is simply a matter of the purpose and effect of the law that is challenged, not whether the law is right or wrong. The morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right.

[103] The third way to view Canada's choice argument is as a matter of government policy. Canada argues that the decision to allow supervised injection is a policy question, and thus immune from *Charter* review.

[104] The answer, once again, is that policy is not relevant at the stage of determining whether a law or state action limits a *Charter* right. The place for such

arguments is when considering the principles of fundamental justice or at the s. 1 stage of justification if a *Charter* breach has been established.

[105] The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter* . . . The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with *Charter*.

[106] I conclude that, whatever form it takes, Canada's assertion that choice rather than state conduct is the cause of the health hazards Insite seeks to address and the claimants' resultant deprivation must be rejected.

[Chief Justice McLachlin then considered the constitutionality of the minister's decision to refuse to renew Insite's exemption.]

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C. Has the Minister's Decision Violated the Claimants' Section 7 Rights?

[116] The main issue, as the appeal was argued, was the constitutionality of the CDSA itself. I have concluded that, properly interpreted, the statute is valid. This leaves the question of the Minister's decision to refuse an exemption. A preliminary issue arises whether the Court should consider this issue. In the special circumstances of this case, I conclude that it should. The claimants pleaded in the alternative that, if the CDSA were valid, the Minister's decision violated their *Charter* rights. The issue was raised at the hearing and the parties afforded an opportunity to address it. It is therefore properly before us and the Attorney General of Canada cannot complain that it would be unfair to deal with it. Most importantly, justice requires us to consider this issue. The claimants have established that their s. 7 rights are at stake. They should not be denied a remedy and sent back for another trial on this point simply because it is the Minister's decision and not the statute that causes the breach when the matter has been pleaded and no unfairness arises.

[117] The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. If the Minister's decision results in an application of the CDSA that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally.

[Chief Justice McLachlin rejected the government's claim that the minister had made no decision that could be reviewed. She found that the minister had in fact decided to reject the application for an exemption and that this decision engaged the claimants' s 7 rights.]

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(3) Does the Minister's Refusal to Grant an Exemption to Insite Accord with the Principles of Fundamental Justice?

[127] The next question is whether the Minister's decision that the CDSA applies to Insite is in accordance with the principles of fundamental justice. On the basis of the facts established at trial, which are consistent with the evidence available to the

Minister at the relevant time, I conclude that the Minister's refusal to grant Insite a s. 56 exemption was arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice.

[128] As noted above, the Minister, when exercising his discretion under s. 56, must respect the rights guaranteed by the *Charter*. This means that, where s. 7 rights are at stake, any limitations imposed by ministerial decision must be in accordance with the principles of fundamental justice. The Minister cannot simply deny an application for a s. 56 exemption on the basis of policy *simpliciter*; insofar as it affects *Charter* rights, his decision must accord with the principles of fundamental justice.

(a) Arbitrariness

[129] When considering whether a law's application is arbitrary, the first step is to identify the law's objectives. Decisions of the Minister under s. 56 of the *CDSA* must target the purpose of the Act. The legitimate state objectives of the *CDSA* (then the *Narcotic Control Act*, R.S.C. 1986, c. N-1) were identified by this Court in *Malmo-Levine* as the protection of health and public safety.

[130] The second step is to identify the relationship between the state interest and the impugned law, or, in this case, the impugned decision of the Minister. The relationship between the general prohibition on possession in the *CDSA* and the state objective was recognized in *Malmo-Levine* [2003 SCC 74] with respect to marihuana:

The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana ... , and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. [para. 136]

The question is whether the decision that the *CDSA* apply to the activities at Insite bears the same relationship to the state objective. As noted above, the burden is on the claimants to establish that the limit imposed by the law is not in accordance with the principles of fundamental justice.

[131] The trial judge's key findings in this regard are consistent with the information available to the Minister, and are those on which successive federal Ministers have relied in granting exemption orders over almost five years, including the facts that: (1) traditional criminal law prohibitions have done little to reduce drug use in the DTES; (2) the risk to injection drug users of death and disease is reduced when they inject under the supervision of a health professional; and (3) the presence of Insite did not contribute to increased crime rates, increased incidents of public injection, or relapse rates in injection drug users. On the contrary, Insite was perceived favourably or neutrally by the public; a local business association reported a reduction in crime during the period Insite was operating; the facility encouraged clients to seek counselling, detoxification and treatment. Most importantly, the staff of Insite had intervened in 336 overdoses since 2006, and no overdose deaths had occurred at the facility. ... These findings suggest not only that exempting Insite from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them.

[132] The jurisprudence on arbitrariness is not entirely settled. In *Chaoulli* [v Quebec (AG), 2005 SCC 35], three justices (*per* McLachlin C.J. and Major J.) preferred an approach that asked whether a limit was "necessary" to further the state objective: paras. 131-32. Conversely, three other justices (*per* Binnie and LeBel JJ.), preferred

to avoid the language of necessity and instead approved of the prior articulation of arbitrariness as where “[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation” (para. 232). It is unnecessary to determine which approach should prevail, because the government action at issue in this case qualifies as arbitrary under both definitions.

(b) Gross Disproportionality

[133] The application of the possession prohibition to Insite is also grossly disproportionate in its effects. Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest: *Malmo-Levine*, at para. 143. Insite saves lives. Its benefits have been proven. There has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation. The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.

(c) Overbreadth

[134] Having found the Minister’s decision arbitrary and its effects grossly disproportionate, I need not consider this aspect of the argument.

[135] I conclude that, on the basis of the factual findings of the trial judge, the claimants have met the evidentiary burden of showing that the failure of the Minister to grant a s. 56 exemption to Insite is not in accordance with the principles of fundamental justice.

(4) Conclusion on the Challenge to Minister’s Decision

[136] The Minister made a decision not to extend the exemption from the application of the federal drug laws to Insite. The effect of that decision, but for the trial judge’s interim order, would have been to prevent injection drug users from accessing the health services offered by Insite, threatening the health and indeed the lives of the potential clients. The Minister’s decision thus engages the claimants’ s. 7 interests and constitutes a limit on their s. 7 rights. Based on the information available to the Minister, this limit is not in accordance with the principles of fundamental justice. It is arbitrary, undermining the very purposes of the *CDSA*, which include public health and safety. It is also grossly disproportionate: the potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite’s premises.

D. Section 1

[137] If a s. 1 analysis were required, a point not argued, no s. 1 justification could succeed. The goals of the *CDSA*, as I have stated, are the maintenance and promotion of public health and safety. The Minister’s decision to refuse the exemption bears no relation to these objectives; therefore they cannot justify the infringement of the complainants’ s. 7 rights. However one views the matter, the Minister’s decision was arbitrary and unsustainable. See *Chaoulli*, at para. 155, *per* McLachlin C.J. and Major J.

[138] Before leaving s. 1, I turn to the Minister’s argument that granting a s. 56 exemption to Insite would undermine the rule of law and that denying an exemption is therefore justified.

[139] Canada submits that exempting Insite from the prohibitions in the *CDSA* "would effectively turn the rule of law on its head by dictating that where a particular individual breaks the law with such frequency and persistence that he or she becomes unable to comply with it, it is unconstitutional to apply the law to that person" (A.F., at para. 101). Canada raises the spectre of a host of exempt sites, where the country's drug laws would be flouted with impunity.

[140] The conclusion that the Minister has not exercised his discretion in accordance with the *Charter* in this case is not a licence for injection drug users to possess drugs wherever and whenever they wish. Nor is it an invitation for anyone who so chooses to open a facility for drug use under the banner of a "safe injection facility." The result in this case rests on the trial judge's conclusions that Insite is effective in reducing the risk of death and disease and has had no negative impact on the legitimate criminal law objectives of the federal government. Neither s. 56 of the *CDSA* nor s. 7 of the *Charter* require condonation of crime. They demand only that, in administering the criminal law, the state not deprive individuals of their s. 7 rights to life, liberty and security of the person in a manner that violates the principles of fundamental justice.

VII. Remedy

[The Court ordered the Minister to grant Insite an exemption pursuant to s 56.]

Appeal and cross-appeal dismissed.

Does *PHS* establish any kind of "positive right" against the state? Would the possession provisions of the *CDSA* be constitutionally valid if the statute contained no procedures for exempting individuals from its prohibitions on medical grounds?

Canada (AG) v Bedford

2013 SCC 72

McLACHLIN CJ (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ concurring):

[1] It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.

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I. The Case

[3] Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are unconstitutional.

[4] The three impugned provisions criminalize various activities related to prostitution. They are primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. [Section 197 defines "common bawdy-house" as a place

used for purposes of prostitution or the practice of acts of indecency.] Section 212(1)(j) makes it an offence to live on the avails of another's prostitution. Section 213(1)(c) makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

[5] ... Under the existing regime, Parliament has confined lawful prostitution to two categories: street prostitution and "out-calls"—where the prostitute goes out and meets the client at a designated location, such as the client's home. This reflects a policy choice on Parliament's part. Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes.

[6] The applicants allege that all three provisions infringe s. 7 of the *Canadian Charter of Rights and Freedoms* by preventing prostitutes from implementing certain safety measures—such as hiring security guards or "screening" potential clients—that could protect them from violent clients. The applicants also allege that s. 213(1)(c) infringes s. 2(b) of the *Charter*, and that none of the provisions are saved under s. 1.

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III. Prior Decisions

[The Ontario Superior Court had granted the application, declaring that each of the impugned *Criminal Code* provisions violated the Charter and could not be saved by s 1. The Ontario Court of Appeal agreed that s 210 (the bawdy-house provision) was an unconstitutional violation of s 7 and ordered that the word "prostitution" be struck from the definition of bawdy house. The Court of Appeal also agreed that s 212(1)(j) (living off the avails of prostitution) was an unconstitutional violation of s 7 and ordered the reading in of words to clarify that the prohibition only applies to those who do so "in circumstances of exploitation." However, the Court of Appeal held that s 213(1)(c) (the communicating provision) did not violate either s 2(b) or s 7.]

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IV. Discussion

[36] The appellant Attorneys General [of Canada and Ontario] appeal from the Court of Appeal's declaration that ss. 210 and 212(1)(j) of the Code are unconstitutional. The respondents cross-appeal on the issue of the constitutionality of s. 213(1)(c), and in respect of the Court of Appeal's remedy to resolve the unconstitutionality of s. 210.

[37] Before turning to the *Charter* arguments before us, I will first discuss two preliminary issues: (1) whether the 1990 decision in the *Prostitution Reference* [*Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 1990 CanLII 105], upholding the bawdy-house and communication prohibitions, is binding on trial judges and this Court; and (2) the degree of deference to be accorded to the application judge's findings on social and legislative facts.

A. Preliminary Issues

(1) Revisiting the Prostitution Reference

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[39] The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.

[40] In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on bawdy-houses and communicating—two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(b) of the *Charter*, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(b), it was a justifiable limit under s. 1 of the *Charter*. ...

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[42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]," creating a record and findings without conducting a legal analysis (I.F., at para. 25).

[44] I agree. ... [H]owever, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[45] It follows that the application judge in this case was entitled to rule on whether the laws in question violated the security of the person interests under s. 7 of the *Charter*. In the *Prostitution Reference*, the majority decision was based on the s. 7 physical liberty interest alone. ... Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case—arbitrariness, overbreadth, and gross disproportionality—have, to a large extent, developed only in the last 20 years.

[46] These considerations do not apply to the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference*. Re-characterizing the type of expression alleged to be infringed did not convert this argument into a new legal issue, nor did the more current evidentiary record or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate.

[47] This brings me to the question of whether this Court should depart from its previous decision on the s. 2(b) aspect of this case. At heart, this is a balancing exercise, in which the Court must weigh correctness against certainty. ... In this case, however, it is not necessary to determine whether this Court can depart from its s. 2(b) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds.

(2) Deference to the Application Judge's Findings on Social and Legislative Facts

[48] The Court of Appeal held that the application judge's findings on social and legislative facts—that is, facts about society at large, established by complex social

science evidence—were not entitled to deference. [In earlier cases, there had been some indication that appellate courts need not defer to this component of the factual record.] With respect I cannot agree. ... [A]ppellate courts should not interfere with a trial judge's findings of fact [whether adjudicative, social, or legislative] absent a palpable and overriding error.

[49] When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case [that is, adjudicative facts].

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[51] First, to do so would require the appeal court to duplicate the sometimes time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the experts, studies and research results. A new set of judges would need to take the hours if not weeks required to intimately appreciate and analyze the evidence. And counsel for the parties would be required to take the appellate judges through all the evidence once again so they could draw their own conclusions. All this would increase the costs and delay in the litigation process. In a review for error—which is what an appeal is—it makes more sense to have counsel point out alleged errors in the trial judge's conclusions on the evidence and confine the court of appeal to determining whether those errors vitiate the trial judge's conclusions.

[52] Second, social and legislative facts may be intertwined with adjudicative facts—that is, the facts of the case at hand—and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.

[53] ... [T]his Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, suggested that legislative fact findings are owed less deference. However, the use of social science evidence in *Charter* litigation has evolved significantly since *RJR-MacDonald* was decided. In the intervening years, this Court has expressed a preference for social science evidence to be presented through an expert witness The distinction between adjudicative and legislative facts can no longer justify gradations of deference.

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B. Section 7 Analysis

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(1) Is Security of the Person Engaged?

[58] Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the [initial] question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the

ambit of, or engaging, s. 7 of the *Charter*. [The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.]

[59] Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution—itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

[60] For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky—but legal—activity from taking steps to protect themselves from the risks.

(a) Sections 197 and 210: Keeping a Common Bawdy-House

[61] It is not an offence to sell sex for money. The bawdy-house provisions, however, make it an offence to do so in any "place" that is "kept or occupied" or "resorted to" for the purpose of prostitution (ss. 197 and 210(1) of the *Code*). The reach of these provisions is broad. "Place" includes any defined space, even if unenclosed and used only temporarily And by definition, it applies even if resorted to by only one person

[62] The practical effect of s. 210 is to confine lawful prostitution to two categories: street prostitution and out-calls In-calls, where the john comes to the prostitute's residence, are prohibited. Out-calls, where the prostitute goes out and meets the client at a designated location, such as the client's home, are allowed. Working on the street is also permitted, though the practice of street prostitution is significantly limited by the prohibition on communicating in public (s. 213(1)(c)).

[63] The application judge found, on a balance of probabilities, that the safest form of prostitution is working independently from a fixed location (para. 300). She concluded that indoor work is far less dangerous than street prostitution—a finding that the evidence amply supports ... [and] concluded that out-call work is not as safe as in-call work

[64] First, the prohibition prevents prostitutes from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations, especially given the current prohibition on hiring drivers or security guards. This, in turn, prevents prostitutes from having a regular clientele and from setting up indoor safeguards like receptionists, assistants, bodyguards and audio room monitoring, which would reduce risks Second, it interferes with provision of health checks and preventive health measures. Finally ... the bawdy-house prohibition prevents resort to safe houses, to which prostitutes working on the street can take clients. In Vancouver, for example, "Grandma's House" was established to support street workers in the Downtown Eastside, at about the same time as fears were growing that a serial killer was prowling the streets—fears which

materialized in the notorious Robert Pickton. Street prostitutes ... were able to bring clients to Grandma's House. However, charges were laid under s. 210

[65] I conclude, therefore, that the bawdy-house provision negatively impacts the security of the person of prostitutes and engages s. 7 of the *Charter*.

(b) Section 212(1)(j): Living on the Avails of Prostitution

[66] Section 212(1)(j) criminalizes living on the avails of prostitution of another person, wholly or in part. While targeting parasitic relationships ... , it has a broad reach. As interpreted by the courts, it makes it a crime for anyone to supply a service to a prostitute, because she is a prostitute In effect, it prevents a prostitute from hiring bodyguards, drivers and receptionists. The application judge found that by denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of the person

[67] ... I conclude that s. 212(1)(j) negatively impacts security of the person and engages s. 7.

(c) Section 213(1)(c): Communicating in a Public Place

[68] Section 213(1)(c) prohibits communicating or attempting to communicate for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute, in a public place or a place open to public view. The provision extends to conduct short of verbal communication by prohibiting stopping or attempting to stop any person for those purposes

[Chief Justice McLachlin accepted the application judge's findings that face-to-face communication was an "essential tool" in enhancing street prostitutes' safety and that, by depriving them of this tool, s 213(1)(c) "significantly increases the risks they face." Therefore, s 213(1)(c) engaged the applicants' interest in security of the person.]

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(2) A Closer Look at Causation

[73] For the reasons discussed above, the application judge concluded—and I agree—that the impugned laws negatively impact and thus engage security of the person rights of prostitutes. However, the appellant Attorneys General contend that s. 7 is not engaged because there is an insufficient causal connection between the laws and the risks faced by prostitutes. First, they argue that the courts below erroneously measured causation by an attenuated standard. Second, they argue that it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face. These arguments cannot succeed.

(a) The Nature of the Required Causal Connection

[In a passage reproduced above, in Section I.B, McLachlin CJ held that the applicants had to establish a "sufficient causal connection" between the law and the effect on their s 7 interests.]

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(b) Is the Causal Connection Negated by Choice or the Role of Third Parties?

[79] The Attorneys General ... argue that prostitutes choose to engage in an inherently risky activity. They can avoid both the risk inherent in prostitution and any

increased risk that the laws impose simply by choosing not to engage in this activity. They say that choice—and not the law—is the real cause of their injury.

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[85] ... I cannot accept the argument that it is not the law, but rather prostitutes' choice and third parties, that cause the risks complained of in this case.

[86] First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. ... Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice ... these are not people who can be said to be truly "choosing" a risky line of business (see *PHS*, at paras. 97-101).

[87] Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution—the exchange of sex for money—is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. ...

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[89] It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

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(3) Principles of Fundamental Justice

(a) The Applicable Norms

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[96] The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[97] The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel *Charter* claims.

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[107] Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality"—the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). ...

[108] ... The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

[109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

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[111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in [*Chaoulli v Quebec*, 2005 SCC 35], the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

[112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. ...

[113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.

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[117] ... [I]t may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

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[120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[121] Gross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law. ...

[122] Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.

[123] All three principles—arbitrariness, overbreadth, and gross disproportionality—compare the rights infringement caused by the law with the objective of the

law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

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(4) Do the Impugned Laws Respect the Principles of Fundamental Justice?

(a) Section 210: The Bawdy-House Prohibition

(i) The Object of the Provision

[Chief Justice McLachlin reviewed the legislative history and the case law concerning the bawdy-house offence and concluded that its purpose was not to deter prostitution as such but "to combat neighbourhood disruption or disorder and to safeguard public health and safety" (at para 132).]

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(ii) Compliance with the Principles of Fundamental Justice

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[134] I agree with [the courts below] that the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. ... The application judge found on the evidence that moving to a bawdy-house would improve prostitutes' safety by providing "the safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate" (para. 427). Balancing this against the evidence demonstrating that "complaints about nuisance arising from indoor prostitution establishments are rare" (*ibid.*), she found that the harmful impact of the provision was grossly disproportionate to its purpose.

[135] The Court of Appeal ... concluded that the evidence supported the application judge's findings on gross disproportionality—in particular, the evidence of the high homicide rate among prostitutes, with the overwhelming number of victims being street prostitutes. ...

[136] ... The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.

(b) Section 212(1)(j): Living on the Avails of Prostitution

(i) The Object of the Provision

[Chief Justice McLachlin rejected the government's argument that "the true objective of s. 212(1)(j) was to target the commercialization of prostitution, and to promote the values of dignity and equality" (at para 138) and held that "the purpose of this provision is to target pimps and the parasitic, exploitative conduct in which they engage" (at para 137).]

(ii) Compliance with the Principles of Fundamental Justice

[139] The courts below concluded that the living on the avails provision is overbroad insofar as it captures a number of non-exploitative relationships which are not connected to the law's purpose. The courts below also concluded that the provision's negative effect on the security and safety of prostitutes is grossly disproportionate to its objective of protecting prostitutes from harm.

[140] I agree with the courts below that the living on the avails provision is overbroad.

[141] The provision has been judicially restricted to those who provide a service or good to a prostitute because she is a prostitute, thus excluding grocers and doctors It also has been held to require that exploitation be proven in the case of a person who lives with the prostitute, in order to exclude people in legitimate domestic relationships with a prostitute These refinements render the prohibition narrower than its words might suggest.

[142] ... The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

[143] The appellant Attorneys General argue that the line between an exploitative pimp and a prostitute's legitimate driver, manager or bodyguard, blurs in the real world. A relationship that begins on a non-exploitative footing may become exploitative over time. If the provision were tailored more narrowly—for example, by reading in "in circumstances of exploitation" as the Court of Appeal did—evidentiary difficulties may lead to exploiters escaping liability. Relationships of exploitation often involve intimidation and manipulation of the kind that make it very difficult for a prostitute to testify. For these reasons, the Attorneys General argue, the provision must be drawn broadly in order to effectively capture those it targets.

[144] This argument is more appropriately addressed under the s. 1 analysis. As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one way the government may justify an overbroad law under s. 1 of the *Charter*.

[145] Having found that the prohibition on living on the avails of prostitution is overbroad, I find it unnecessary to consider whether it is also grossly disproportionate to its object of protecting prostitutes from exploitative relationships.

(c) Section 213 Provision (1)(c): Communicating in Public for the Purposes of Prostitution

(i) The Object of the Provision

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[147] It is clear that the purpose of the communicating provision is not to eliminate street prostitution for its own sake, but to take prostitution "off the streets and out of public view" in order to prevent the nuisances that street prostitution can cause. ...

(ii) Compliance with the Principles of Fundamental Justice

[148] The application judge concluded that the harm imposed by the prohibition on communicating in public was grossly disproportionate to the provision's object

of removing the nuisance of prostitution from the streets. This was based on evidence that she found established that the ability to screen clients was an "essential tool" to avoiding violent or drunken clients (application decision, at para. 432).

[Chief Justice McLachlin accepted this conclusion.]

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D. Are the Infringements Justified Under Section 1 of the Charter?

[161] The appellant Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1 of the *Charter*. ... I therefore find it unnecessary to engage in a full s. 1 analysis for each of the impugned provisions. However, some of their arguments under s. 7 of the *Charter* are properly addressed at this stage of the analysis.

[162] In particular, the Attorneys General attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

[163] The Attorneys General have not raised any other arguments distinct from those considered under s. 7. I therefore find that the impugned laws are not saved by s. 1 of the *Charter*.

V. Result and Remedy

[164] I would dismiss the appeals and allow the cross-appeal. Sections 210, 212(1)(j) and 213(1)(c) are declared to be inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void.

[The Court suspended the declaration of invalidity for one year.]

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Appeals dismissed and cross appeal allowed.

NOTES AND QUESTIONS

1. The principles of fundamental justice invoked in *Bedford* (and subsequently in *Carter*, immediately below)—the norms against arbitrary, overbroad, and grossly disproportionate laws—are all concerned with the relationship between the legislature's purpose and the impact of the law on the interests protected by s 7. Thus, to apply these norms, it seems that a court should compare the effectiveness of the law in achieving its purpose with the overall impact of the law on everyone's life, liberty, and security of the person. But in *Bedford* and *Carter*, the Court held that these norms were to be applied individualistically; as the Court said in *Bedford* (at para 123), these principles

compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. ... The question ... is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad.

How can a court decide whether a law is "arbitrary" in the sense articulated in these cases without considering its "effectiveness"? How can a court determine the proportionality

between a law's purpose and its impact on the s 7 interests by looking at its effect on one person in isolation from its effectiveness? Should these comparisons be made under s 1 of the Charter instead? For further discussion of these questions, see Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60 McGill LJ 575.

2. Parliament responded to *Bedford* by enacting the *Protection of Communities and Exploited Persons Act*, SC 2014, c 25. This statute begins with a lengthy preamble expressing Parliament's concern about matters such as "the exploitation that is inherent in prostitution," "the objectification of the human body and the commodification of sexual activity," and the "disproportionate impact" of prostitution on women and children. In substance, the statute amends the *Criminal Code* by modifying s 213, repealing s 212 in its entirety, and enacting several new offences relating to "obtaining sexual services for consideration": see ss 286.1 through 286.5 of the *Criminal Code*. Under these provisions, it is an offence to obtain sexual services for consideration, to communicate for that purpose, to advertise such services, or to obtain a material benefit from such services. However, s 286.5(2) states that "[n]o person shall be prosecuted" for these new offences on any theory of accessory liability—for example, aiding and abetting—or conspiracy where "the offence relates to the offering or provision of their own sexual services." The new material benefit offence in s 286.2(1) is subject to a number of exemptions in s 286.2(4), such as obtaining benefits from a "legitimate living arrangement" or a "moral and legal obligation." But these exemptions are themselves restricted by s 286.2(5), which states (among other limits) that the material benefit offence continues to apply where the benefit is received "in the context of a commercial enterprise that offers sexual services for consideration." In effect, these new provisions of the *Criminal Code* attempt to criminalize the purchase, but not the sale, of sexual services; they also attempt to remedy the overbreadth of the old law, but at the same time attempt to discourage the commercialization of sex work. In light of *Bedford*, how would you go about constructing arguments for and against the constitutional validity of this new criminal law regime for sex work? See *R v NS*, [2021 ONSC 1628](#).

Carter v Canada (AG)

[2015 SCC 5](#)

THE COURT (McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, and Gascon JJ):

[1] It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

[2] The question on this appeal is whether the criminal prohibition that puts a person to this choice violates her *Charter* rights to life, liberty and security of the person (s. 7) and to equal treatment by and under the law (s. 15). This is a question that asks us to balance competing values of great importance. On the one hand stands the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition. On the other stands the sanctity of life and the need to protect the vulnerable.

[3] The trial judge found that the prohibition violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition. She concluded that this infringement is not justified under s. 1 of the *Charter*. We agree. The trial judge's findings were based on an exhaustive review of

the extensive record before her. The evidence supports her conclusion that the violation of the right to life, liberty and security of the person guaranteed by s. 7 of the Charter is severe. It also supports her finding that a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error.

[4] We conclude that the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. We therefore allow the appeal.

II. Background

[5] In Canada, aiding or abetting a person to commit suicide is a criminal offence: see s. 241(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. This means that a person cannot seek a physician-assisted death. Twenty-one years ago, this Court upheld this blanket prohibition on assisted suicide by a slim majority: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. ...

[6] Despite the Court's decision in *Rodriguez*, the debate over physician-assisted dying continued. Between 1991 and 2010, the House of Commons and its committees debated no less than six private member's bills seeking to decriminalize assisted suicide. None was passed. ...

[7] More recent reports have come down in favour of reform. In 2011, the Royal Society of Canada published a report on end-of-life decision-making and recommended that the *Criminal Code* be modified to permit assistance in dying in some circumstances. The Quebec National Assembly's Select Committee on Dying with Dignity issued a report in 2012, recommending amendments to legislation to recognize medical aid in dying as appropriate end-of-life care (now codified in *An Act respecting end-of-life care*, CQLR, c. S-32.0001).

[8] The legislative landscape on the issue of physician-assisted death has changed in the two decades since *Rodriguez*. In 1993 Sopinka J. noted that no other Western democracy expressly permitted assistance in dying. By 2010, however, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana and Colombia. ... Together, these regimes have produced a body of evidence about the practical and legal workings of physician-assisted death and the efficacy of safeguards for the vulnerable.

[9] Nevertheless, physician-assisted dying remains a criminal offence in most Western countries, and a number of courts have upheld the prohibition on such assistance in the face of constitutional and human rights challenges . . . [Here the Court cited the majority decision of the Supreme Court of the United Kingdom in *R (on the application of Nicklinson) v Ministry of Justice*, [2014] UKSC 38, [2014] 3 All ER 843.]

[10] The debate in the public arena reflects the ongoing debate in the legislative sphere. Some medical practitioners see legal change as a natural extension of the principle of patient autonomy, while others fear derogation from the principles of medical ethics. Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying, as medical professionals assume that a disabled patient "leans towards death at a sharper angle than the acutely ill—but otherwise non-disabled—patient" (2012 BCSC 886, 287 C.C.C. (3d) 1, at para. 811). Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one's death respects, rather than threatens, their autonomy and

dignity, and that the legalization of physician-assisted suicide will protect them by establishing stronger safeguards and oversight for end-of-life medical care.

[11] The impetus for this case arose in 2009, when Gloria Taylor was diagnosed with a fatal neurodegenerative disease, amyotrophic lateral sclerosis (or ALS), which causes progressive muscle weakness. ALS patients first lose the ability to use their hands and feet, then the ability to walk, chew, swallow, speak and, eventually, breathe. Like Sue Rodriguez before her, Gloria Taylor did "not want to die slowly, piece by piece" or "wracked with pain," and brought a claim before the British Columbia Supreme Court challenging the constitutionality of the *Criminal Code* provisions that prohibit assistance in dying, specifically ss. 14, 21, 22, 222 and 241. She was joined in her claim by Lee Carter and Hollis Johnson, who had assisted Ms. Carter's mother, Kathleen ("Kay") Carter, in achieving her goal of dying with dignity ... ; Dr. William Shoichet, a physician from British Columbia ... ; and the British Columbia Civil Liberties Association

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V. Issues on Appeal

[40] ... The appellants advance two claims: (1) that the prohibition on physician-assisted dying deprives competent adults, who suffer a grievous and irremediable medical condition that causes the person to endure physical or psychological suffering that is intolerable to that person, of their right to life, liberty and security of the person under s. 7 of the *Charter*, and (2) that the prohibition deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

[The Court reviewed the proceedings in the courts below. The trial judge found that the prohibition against physician-assisted dying violated the s 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition and concluded that this infringement is not justified under s 1 of the *Charter*. She also found that the prohibition unjustifiably infringed s 15 of the *Charter*. She declared the prohibition unconstitutional, granted a one-year suspension of invalidity, and provided Taylor with a constitutional exemption. The majority of the British Columbia Court of Appeal allowed the government's appeal on the ground that the trial judge was bound to follow the Supreme Court of Canada's decision in *Rodriguez*.]

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VI. Was the Trial Judge Bound by Rodriguez?

[The Court, applying its approach to precedent from *Bedford*, held that the trial judge was not bound by *Rodriguez*.]

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[44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a strait-jacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[45] Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.

[46] The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The majority of this Court in *Rodriguez* acknowledged the argument that the impugned laws were “over-inclusive” when discussing the principles of fundamental justice (see p. 590). However, it did not apply the principle of overbreadth as it is currently understood, but instead asked whether the prohibition was “arbitrary or unfair in that it is unrelated to the state’s interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition” (p. 595). By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law’s objectives (*Bedford*, at para. 101). This different question may lead to a different answer. The majority’s consideration of overbreadth under s. 1 suffers from the same defect: see *Rodriguez*, at p. 614. Finally, the majority in *Rodriguez* did not consider whether the prohibition was grossly disproportionate.

[47] The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia (pp. 605-7); (2) the lack of any “halfway measure” that could protect the vulnerable (pp. 613-14); and (3) the “substantial consensus” in Western countries that a blanket prohibition is necessary to protect against the slippery slope (pp. 601-6 and 613). The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions

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VIII. Section 7

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A. Does the Law Infringe the Right to Life, Liberty and Security of the Person?

(1) Life

[57] The trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged.

[58] We see no basis for interfering with the trial judge’s conclusion on this point. ...

[59] The appellants and a number of the interveners urge us to adopt a broader, qualitative approach to the right to life. Some argue that the right to life is not restricted to the preservation of life, but protects quality of life and therefore a right to die with dignity. Others argue that the right to life protects personal autonomy and fundamental notions of self-determination and dignity, and therefore includes the right to determine whether to take one’s own life.

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[61] The trial judge, on the other hand, rejected the “qualitative” approach to the right to life. She concluded that the right to life is only engaged when there is a threat of death as a result of government action or laws. In her words, the right to life is limited to a “right *not* to die” (para. 1322 (emphasis in original)).

[62] This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death ... and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care ... In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

[63] This said, we do not agree that the existential formulation of the right to life requires an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live," rather than a "right to life," and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect. It is to this fundamental choice that we now turn.

(2) Liberty and Security of the Person

[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving ... control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88 per Sopinka J., referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering [reference was made to *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46; *Blencoe*; and *Chaoulli*]. While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[65] The trial judge concluded that the prohibition on assisted dying limited Ms. Taylor's s. 7 right to liberty and security of the person, by interfering with "fundamentally important and personal medical decision-making" (para. 1302), imposing pain and psychological stress and depriving her of control over her bodily integrity (paras. 1293-94). She found that the prohibition left people like Ms. Taylor to suffer physical or psychological pain and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person. She further noted that seriously and irremediably ill persons were "denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity" and that is "consistent with their lifelong values and that reflects their life's experience" (para. 1326).

[66] We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This

interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.

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B. The Principles of Fundamental Justice

[71] Section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person—laws do this all the time—but rather that the state will not do so in a way that violates the principles of fundamental justice.

[72] Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of *Charter* adjudication, this Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty, or security of the person must meet (*Bedford*, at para. 94). While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.

[73] Each of these potential vices involves comparison with the object of the law that is challenged (*Bedford*, at para. 123). The first step is therefore to identify the object of the prohibition on assisted dying.

[74] The trial judge, relying on *Rodriguez*, concluded that the object of the prohibition was to protect vulnerable persons from being induced to commit suicide at a time of weakness (para. 1190). All the parties except Canada accept this formulation of the object.

[75] Canada agrees that the prohibition is intended to protect the vulnerable, but argues that the object of the prohibition should also be defined more broadly as simply "the preservation of life" . . . We cannot accept this submission.

[76] First, it is incorrect to say that the majority in *Rodriguez* adopted "the preservation of life" as the object of the prohibition on assisted dying. Justice Sopinka refers to the preservation of life when discussing the objectives of s. 241(b) (pp. 590, 614). However, he later clarifies this comment, stating that "[s]ection 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide" (p. 595). Sopinka J. then goes on to note that this purpose is "grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken" (*ibid.*). His remarks about the "preservation of life" in *Rodriguez* are best understood as a reference to an animating social value rather than as a description of the specific object of the prohibition.

[77] Second, defining the object of the prohibition on physician-assisted dying as the preservation of life has the potential to short-circuit the analysis. In *RJR-MacDonald*, this Court warned against stating the object of a law "too broadly" in the s. 1 analysis, lest the resulting objective immunize the law from challenge under the *Charter* (para. 144). The same applies to assessing whether the principles of fundamental justice are breached under s. 7. If the object of the prohibition is stated broadly as "the preservation of life," it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.

[78] Finally, the jurisprudence requires the object of the impugned law to be defined precisely for the purposes of s. 7. In *Bedford*, Canada argued that bawdy-house prohibition in s. 210 of the *Code* should be defined broadly as to "deter prostitution" for the purposes of s. 7 (para. 131). This Court rejected this argument, holding

that the object of the prohibition should be confined to measures directly targeted by the law (para. 132). That reasoning applies with equal force in this case. Section 241(b) is not directed at preserving life, or even at preventing suicide—attempted suicide is no longer a crime. Yet Canada asks us to posit that the object of the prohibition is to preserve life, whatever the circumstances. This formulation goes beyond the ambit of the provision itself. The direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness.

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(1) Arbitrariness

[83] The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.

[84] The object of the prohibition on physician-assisted dying is to protect the vulnerable from ending their life in times of weakness. A total ban on assisted suicide clearly helps achieve this object. Therefore, individuals' rights are not limited arbitrarily.

(2) Overbreadth

[85] The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law goes too far by denying the rights of some individuals in a way that bears no relation to the object: *Bedford*, at paras. 101 and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see *Bedford*, at para. 113). The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.

[86] Applying this approach, we conclude that the prohibition on assisted dying is overbroad. The object of the law, as discussed, is to protect vulnerable persons from being induced to commit suicide at a moment of weakness. Canada conceded at trial that the law catches people outside this class: "It is recognized that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives" (trial reasons, at para. 1136). The trial judge accepted that Ms. Taylor was such a person—competent, fully-informed, and free from coercion or duress (para. 16). It follows that the limitation on their rights is in at least some cases not connected to the objective of protecting vulnerable persons. The blanket prohibition sweeps conduct into its ambit that is unrelated to the law's objective.

[87] Canada argues that it is difficult to conclusively identify the "vulnerable," and that therefore it cannot be said that the prohibition is overbroad. Indeed, Canada asserts, "every person is potentially vulnerable" from a legislative perspective

[88] We do not agree. The situation is analogous to that in *Bedford*, where this Court concluded that the prohibition on living on the avails of prostitution in

s. 212(1)(j) of the *Criminal Code* was overbroad. The law in that case punished everyone who earned a living through a relationship with a prostitute, without distinguishing between those who would assist and protect them and those who would be at least potentially exploitative of them. Canada there as here argued that the line between exploitative and non-exploitative relationships was blurry, and that, as a result, the provision had to be drawn broadly to capture its targets. The Court concluded that that argument is more appropriately addressed under s. 1

(3) Gross Disproportionality

[The Court found it "unnecessary to decide whether the prohibition also violates the principle against gross disproportionality, in light of our conclusion that it is overbroad" (at para 90).]

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X. Section 1

[94] In order to justify the infringement of the appellants' s. 7 rights under s. 1 of the *Charter*, Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. ...

[95] It is difficult to justify a s. 7 violation The rights protected by s. 7 are fundamental, and "not easily overridden by competing social interests" (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed (*Bedford*, at para. 96). However, in some situations the state may be able to show that the public good—a matter not considered under s. 7, which looks only at the impact on the rights claimants—justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.

[96] Here, the limit is prescribed by law, and the appellant concedes that the law has a pressing and substantial objective. The question is whether the government has demonstrated that the prohibition is proportionate.

[97] At this stage of the analysis, the courts must accord the legislature a measure of deference. Proportionality does not require perfection Section 1 only requires that the limits be "reasonable." This Court has emphasized that there may be a number of possible solutions to a particular social problem, and suggested that a "complex regulatory response" to a social ill will garner a high degree of deference [*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37], at para. 37).

[98] On the one hand, as the trial judge noted, physician-assisted death involves complex issues of social policy and a number of competing societal values. Parliament faces a difficult task in addressing this issue; it must weigh and balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying. It follows that a high degree of deference is owed to Parliament's decision to impose an absolute prohibition on assisted death. On the other hand, the trial judge also found—and we agree—that the absolute prohibition could not be described as a "complex regulatory response" (para. 1180). The degree of deference owed to Parliament, while high, is accordingly reduced.

(1) Rational Connection

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[100] We agree with Finch C.J.B.C. in the Court of Appeal that, where an activity poses certain risks, prohibition of the activity in question is a rational method of

curtailing the risks . . . We therefore conclude that there is a rational connection between the prohibition and its objective.

[101] The appellants argue that the *absolute* nature of the prohibition is not logically connected to the object of the provision. This is another way of saying that the prohibition goes too far. In our view, this argument is better dealt with in the inquiry into minimal impairment. It is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness. The means here are logically connected with the objective.

(2) Minimal Impairment

[102] At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[103] The question in this case comes down to whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' 7 rights to life, liberty and security of the person, is the least drastic means of achieving the legislative objective. It was the task of the trial judge to determine whether a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards.

[104] This question lies at the heart of this case and was the focus of much of the evidence at trial. In assessing minimal impairment, the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad. She also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated. In the trial judge's view, an absolute prohibition would have been necessary if the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life

[105] The trial judge, however, expressly rejected these possibilities. After reviewing the evidence, she concluded that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them:

My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced. [para. 883]

[106] The trial judge found that it was feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence could all be reliably assessed as part of that process In reaching this conclusion, she particularly relied on the evidence

on the application of the informed consent standard in other medical decision-making in Canada, including end-of-life decision-making . . . She concluded that it would be possible for physicians to apply the informed consent standard to patients who seek assistance in dying, adding the caution that physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity . . .

[107] As to the risk to vulnerable populations (such as the elderly and disabled), the trial judge found that there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying . . . She thus rejected the contention that unconscious bias by physicians would undermine the assessment process . . . The trial judge found there was no evidence of inordinate impact on socially vulnerable populations in the permissive jurisdictions, and that in some cases palliative care actually improved post-legalization . . . She also found that while the evidence suggested that the law had both negative and positive impacts on physicians, it did support the conclusion that physicians were better able to provide overall end-of-life treatment once assisted death was legalized . . . Finally, she found no compelling evidence that a permissive regime in Canada would result in a “practical slippery slope” (para. 1241).

[108] Canada says that the trial judge made a palpable and overriding error in concluding that safeguards would minimize the risk associated with assisted dying. Canada argues that the trial judge’s conclusion that the level of risk was acceptable flies in the face of her acknowledgment that some of the evidence on safeguards was weak, and that there was evidence of a lack of compliance with safeguards in permissive jurisdictions. Canada also says the trial judge erred by relying on cultural differences between Canada and other countries in finding that problems experienced elsewhere were not likely to occur in Canada.

[109] We cannot accede to Canada’s submission. In *Bedford*, this Court affirmed that a trial judge’s findings on social and legislative facts are entitled to the same degree of deference as any other factual findings (para. 48). In our view, Canada has not established that the trial judge’s conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada’s criticisms amount to “pointing out conflicting evidence,” which is not sufficient to establish a palpable and overriding error . . . We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.

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[118] Canada also argues that the permissive regulatory regime accepted by the trial judge “accepts too much risk,” and that its effectiveness is “speculative” . . . In effect, Canada argues that a blanket prohibition should be upheld unless the appellants can demonstrate that an alternative approach eliminates all risk. This effectively reverses the onus under s. 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition’s object. The burden of establishing minimal impairment is on the government.

[119] The trial judge found that Canada had not discharged this burden. The evidence, she concluded, did not support the contention that a blanket prohibition was necessary in order to substantially meet the government’s objectives. We agree. A theoretical or speculative fear cannot justify an absolute prohibition. As Deschamps J. stated in *Chaoulli*, at para. 68, the claimant “[does] not have the burden of disproving every fear or every threat,” nor can the government meet its burden simply by asserting an adverse impact on the public. Justification under s. 1 is a

process of demonstration, not intuition or automatic deference to the government's assertion of risk ([*RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 1995 CanLII 64], at para. 128).

[120] Finally, it is argued that without an absolute prohibition on assisted dying, Canada will descend the slippery slope into euthanasia and condoned murder. Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well. The resolution of the issue before us fails to be resolved not by competing anecdotes, but by the evidence. The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.

[121] We find no error in the trial judge's analysis of minimal impairment. We therefore conclude that the absolute prohibition is not minimally impairing.

(3) Deleterious Effects and Salutary Benefits

[122] This stage of the *Oakes* analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. Given our conclusion that the law is not minimally impairing, it is not necessary to go on to this step.

[123] We conclude that s. 241(b) and s. 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*.

XI. Remedy

[The Court first dealt with the issue whether, as suggested by the BC Court of Appeal, free-standing constitutional exemptions for those whose rights were violated would be a more appropriate remedy than a declaration of invalidity.]

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[125] In our view, this is not a proper case for a constitutional exemption. We have found that the prohibition infringes the claimants' s. 7 rights. Parliament must be given the opportunity to craft an appropriate remedy. The concerns raised in [*R v Ferguson*, 2008 SCC 6] about stand-alone constitutional exemptions are equally applicable here: issuing such an exemption would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts.

[The Court went on to hold that the appropriate remedy was a declaration of invalidity and that it should be suspended for 12 months. The appellants' request to create a mechanism for exemptions during the period of invalidity was refused.]

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[130] A number of the interveners asked the Court to account for physicians' freedom of conscience and religion when crafting the remedy in this case. ...

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[132] In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. ... However, we note—as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler*—that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to

this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled.

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[147] The appeal is allowed. We would issue the following declaration, which is suspended for 12 months:

Section 241(b) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

Appeal allowed.

NOTES AND QUESTIONS

1. Parliament's response to *Carter* (*An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3) received royal assent on June 17, 2016. This Act amends the *Criminal Code* to create a procedure for exempting medical professionals from criminal liability for providing medical assistance in dying to a person who has a "grievous and irremediable medical condition": see ss 241.1 through 241.4. These provisions include both a substantive definition of the requisite medical condition and procedural requirements. The *Criminal Code* definition of a "grievous and irremediable medical condition" is found in s 241.2(2) and in its initial formulation was arguably more restrictive than what the Supreme Court of Canada had in mind in *Carter*. In *Truchon c Procureur général du Canada*, [2019 QCCS 3792](#), Baudouin J of the Quebec Superior Court held that the requirement in s 241.2(2)(d) that the person's "natural death has become reasonably foreseeable" violated ss 7 and 15 of the *Charter* and was not justified under s 1. The government chose not to appeal the ruling, and in 2021, Parliament repealed s 241.2(2)(d). When you read the new provisions of the Code, as amended in 2021, consider whether they are constitutionally valid, in light of the reasoning and the result in *Carter*.

2. For further discussion of the remedial issues raised by *Carter*, see Chapter 25, Enforcement of Rights, specifically the discussion of the temporary suspension of declarations of invalidity.

3. At paras 130–32 of *Carter*, the Court raises the issue of physicians who have conscientious objections to participation in assisted dying, noting that it is in the hands of the physicians' colleges, Parliament, and the provincial legislatures to respond to these objections: for further discussion of this issue, see Chapter 19.

4. In *Bedford* and *Carter*, the Court held that a law would be overbroad in s 7 terms if "it is rational in some cases, but ... overreaches in its effect in others" (*Bedford* at para 113; compare *Carter* at para 85). Thus, an "overbroad ... effect on one person is sufficient to establish a breach of s 7" (*Bedford* at para 123). This strict approach to the norm against overbreadth has been confirmed in subsequent cases (see, for example, *R v Safarzadeh-Markhali*, [2016 SCC 14](#)). However, on occasion, courts seem to have interpreted the norm against overbreadth in a more relaxed manner, as requiring only a rational connection between the law and its purpose (see, for example, *R v Moriarity*, [2015 SCC 55](#); *R v AB*, [2015 ONCA 803](#)). On the strict approach, are all laws overbroad? On the more relaxed approach, is there any difference between the norm against overbreadth and the norm against arbitrariness?

III. SECTION 7 AND SOCIAL CITIZENSHIP

Should interests associated with social citizenship—for example, public pensions, welfare benefits, adequate nutrition, housing, education, and health care—receive constitutional protection in the form of a right to life, liberty, and security of the person? The following cases discuss this question. As you read them, ask yourself to what extent they are consistent with one another.

Gosselin v Québec (AG)

2002 SCC 84

[Under Quebec's social assistance scheme, found in the *Social Aid Act*, RSQ, c A-16 and accompanying regulations, between 1984 and 1989 the base amount of money payable to claimants under the age of 30 was one-third of that payable to those 30 and over. Those under 30 could increase their welfare payments to either the same as or slightly less than the amount received by those 30 and over by participating in an educational or work experience program. There was evidence that many young persons fell between the cracks and were unable to participate in these programs. The age-based distinction was removed in 1989. Gosselin brought a class action on behalf of all those who had been under 30 and affected by the old scheme before 1989. (Between 1982 and 1987 the scheme was protected from Charter scrutiny by Quebec's decision to apply the s 33 "notwithstanding" clause to all of its legislation.) Arguments were based on both ss 15 and 7 of the Charter. Reproduced below are the Court's opinions on whether the legislation violated s 7 of the Charter. A discussion of the Court's reasoning on the s 15 issue is found in Chapter 23, Equality Rights.]

McLACHLIN CJ (Gonthier, Iacobucci, Major, and Binnie JJ concurring):

[75] ... The appellant argues that the s. 7 right to security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs. ... There are three elements to [her] claim: (1) that the legislation affects an interest protected by the right to life, liberty and security of the person within the meaning of s. 7; (2) that providing inadequate benefits constitutes a "deprivation" by the state; and (3) that, if deprivation of a right protected by s. 7 is established, this was not in accordance with the principles of fundamental justice. The factual record is insufficient to support this claim. Nevertheless, I will examine these three elements.

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[80] Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy." Similarly, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect "economic rights fundamental to human ... survival." Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice. ...

[81] Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice.

Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.

[82] One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits." ... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. ... The question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

[83] I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

[Justice Bastarache reached the same result as the majority on s 7, but for different reasons, which focused on the restriction of s 7 to situations involving interaction with the justice system and its administration. Justice LeBel, who dissented on the s 15 issue, found it unnecessary to consider the effect of s 7 beyond stating that, while no violation of s 7 was established, he agreed with that part of McLachlin CJ's reasons stating that it is inappropriate to rule out the possibility that s 7 might be applied in the future to circumstances unrelated to the justice system.]

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ARBOUR J (dissenting):

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[308] I would allow this appeal on the basis of the appellant's s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to "life, liberty and security of the person" include a positive dimension. Few would dispute that an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and security of its citizens. There is considerably less agreement, however, as to whether this positive moral obligation translates into a legal one. Some will argue that there are interpretive barriers to the conclusion that s. 7 imposes a positive obligation on the state to offer such basic protection.

[309] In my view these barriers are all less real and substantial than one might assume. This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state—as in this case—for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7. In my view, far from resisting this conclusion, the language and structure of the *Charter*—and of s. 7 in particular—actually compel it. Before demonstrating all of this it will be necessary to deconstruct the various firewalls that are said to exist around s. 7, precluding this Court from reaching in this case what I believe to be an inevitable and just outcome.

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II. Analysis of Section 7 of the Charter

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[336] ... I set out s. 7 in its entirety:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. [Emphasis added.]

I have drawn attention to the conjunction in s. 7

[337] ... My reasons for emphasizing this ... are straightforward. Past judicial treatments of the section have habitually read out of the English version of s. 7 the conjunction and, with it, the entire first clause. The result is that we typically speak about s. 7 guaranteeing only the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. ...

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[340] ... [But] only by ignoring the structure of s. 7—by effectively reading out the conjunction and, with it, the first clause—is it possible to conclude that it protects exclusively “the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.” There may be some question as to how far, precisely, the protection of s. 7 extends beyond this, but that the section’s first clause affords some additional protection seems, as a purely textual matter, beyond reasonable objection.

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[355] ... *Charter* rights and freedoms find protection in s. 1, not only because they are guaranteed in that section, but because limitations on some rights are required by the positive protection of others. This approach to s. 1 justification, which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive dimension. Constitutional rights are not simply a shield against state interference with liberty; they place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others.

[356] In other words, the justificatory mechanism in place in s. 1 of the *Charter* reflects the existence of a positive right to *Charter* protection asserted in support of alleged interference by the state with the rights of others. If such positive rights exist in that form in s. 1, they must, *a fortiori*, exist in the various *Charter* provisions articulating the existence of the rights. For instance, if one’s right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

[357] This concludes my interpretive analysis of s. 7. In my view, the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.

[358] It remains to show that the interest claimed in this case falls within the range of entitlements that the state is under a positive obligation to provide under s. 7. In one sense it seems obvious that it does. ... [A] minimum level of welfare is so closely connected to issues relating to one’s basic health (or security of the person), and potentially even to one’s survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it. Indeed in this case the legislature has in fact chosen to legislate in respect of welfare rights.

Thus determining the applicability of the foregoing general principles to the case at bar requires only that we analyse this case through the lens of the underinclusiveness line of cases

III. Application to the Case at Bar

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[365] [Dunmore v Ontario (AG), 2001 SCC 94] articulated the criteria necessary for making a *Charter* claim based on underinclusion outside the context of s. 15. In my view, these criteria are satisfied in this case. They are as follows:

1. The claim must be grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime
2. A proper evidentiary foundation must be provided, before creating a positive obligation under the *Charter*, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfillment of a protected right
3. It must be determined whether the state can truly be held accountable for any inability to exercise the right or freedom in question

A. Is the Claim Grounded in an Appropriate Charter Right?

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[367] ... Under s. 7, [the claimants argue] not that exclusion from the statutory regime is illicit *per se*, but that it violates their self-standing right to security of the person (and potentially their right to life as well). As in *Dunmore*, this right exists independently of any statutory enactment.

[368] The distinction between the s. 7 claim and the s. 15 claim can be illustrated as follows: if it were the case that the claimants could meet their basic needs through means outside of the *Social Aid Act*—for instance through an independent government program providing for subsidized housing, food vouchers, etc., in exchange for the performance of works of public service—their s. 7 claim would entirely disappear, but their s. 15 claim would potentially remain intact inasmuch as it would still be open to them to argue that being forced to resort to these alternative means somehow violated their human dignity. The problem in this case, by way of contrast, is that exclusion from this statutory regime effectively excludes the claimants from any real possibility of having their basic needs met through any means whatsoever. Thus, it is not exclusion from the *particular* statutory regime that is at stake but, more basically, the claimants' fundamental rights to security of the person and life itself.

B. Is There a Sufficient Evidentiary Basis to Establish That Exclusion from the Social Aid Act Substantially Interfered with the Fulfilment and Exercise of the Claimants' Fundamental Right to Security of the Person?

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[370] ... [O]ne must avoid placing undue emphasis on whatever (often remote) possibility there might have been that the claimants could have satisfied their basic needs through private means. ... There is simply no requirement that they prove they exhausted all other avenues of relief before turning to public assistance. On the contrary, all that is required is that the claimants show that the lack of government intervention "substantially impede[d]" the enjoyment of their s. 7 rights. ...

[371] There is ample evidence in this case that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their s. 7 rights, in particular their right to security of the person. Welfare recipients under the age of 30 were allowed \$170/month. The various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised during the period at issue. This was compellingly illustrated by the appellant's own testimony and by that of her four witnesses: a social worker, a psychologist, a dietician and a community physician. The sizeable volume of the appellant's record prohibits an exhaustive exposé of the dismal conditions in which many young welfare recipients lived. ...

[372] On \$170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately \$237 to \$412/month, depending on the location. Two-bedroom apartments went for about \$368 to \$463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5 000 young adults lived on the streets

(1) Interference with Physical Security of the Person

[373] The exclusion of welfare recipients under the age of 30 from the full benefits of the social assistance regime severely interfered with their physical integrity and security. First, there are the health risks that flow directly from the dismal living conditions that \$170/month afford. ... According to Dr. Christine Colin, persons living in poverty are six times more likely to develop diseases like bronchial infections, asthma and emphysema than persons who live in decent conditions. Dr. Colin also testified that the poor not only develop more health problems, but are also more severely affected by [those] ailments

[374] Second, ... [malnourishment and undernourishment] result in a plethora of health problems. In 1987, the cost of proper nourishment for a single person was estimated at \$152/month, that is 89 percent of the \$170/month allowance. Jocelyne Leduc-Gauvin, a dietician, gave detailed evidence of the effects of poor and insufficient nourishment. [Justice Arbour cited evidence pointing to severe health outcomes for malnourished young adults including "obesity, anxiety, hypertension, infections, ulcers, fatigue and an increased sensitivity to pain" (at para 374).] ...

[375] In order to eat, many young welfare recipients benefited from food banks, soup kitchens and like charitable organizations. But since these could not be relied upon consistently other avenues had to be pursued. While some resorted to theft, others turned to prostitution. Dumpsters and garbage cans were scavenged in search of edible morsels of food, exposing the hungry youths to the risks of food poisoning and contamination. In one particular case reported by Mr. Sandborn, two young adults paid a restauranteur \$10/month for the right to sit in his kitchen and eat whatever patrons left in their plates.

(2) Interference with Psychological Security of the Person

[376] The psychological and social consequences of being excluded from the full benefits of the social assistance regime were equally devastating. The hardships and marginalization of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction. According to a 1987 enquiry by Santé Québec, one out of five indigent young adults attempted suicide

or had suicidal thoughts. The situation was even more alarming among homeless youths in Montreal, 50 percent of whom reportedly attempted to take their own lives.

[377] In my view, this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well. Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.

C. Can the State Be Held Accountable for the Claimants' Inability to Exercise Their Section 7 Rights?

[378] In one sense, there appears to be considerable overlap between this third criterion for making out a successful underinclusion claim and the second criterion just discussed. In fact, once one establishes in accordance with the second criterion that a claimant's fundamental rights cannot be effectively exercised without government intervention, it is difficult to see what more would be required in order to demonstrate state accountability.

[379] The absence of a direct, positive action by the state may appear to create particular problems of causation. Of course, state accountability in this context cannot be conceived of along the same lines of causal responsibility as where there is affirmative state action This may mean that one should not search for the same kind of causal nexus tying the state to the claimants' inability to exercise their fundamental freedoms. Such a nexus could only ever be established by pointing to some positive state action giving rise to the claimants' aggrieved condition. While this focus on state action is appropriate where one is considering the violation of a negative right, it imports a requirement that is inimical to the very idea of positive rights.

[380] Among the immediate implications of this is that the claimants in this case need not establish ... that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, ... [or] that the government's inaction worsened their plight. Here, as in all claims asserting the infringement of a positive right, the focus is on whether the state is under an obligation of performance to alleviate the claimants' condition, and not on whether it can be held causally responsible for that condition in the first place.

[381] All of which indicates that government accountability in the context of claims of underinclusion is to be understood simply in terms of the existence of a positive state obligation to redress conditions for which the state may or may not be causally responsible. On this view, the third criterion serves the purpose of ensuring not only that government intervention is needed to secure the effective exercise of a claimant's fundamental rights or freedoms, but also that it is obligatory. ...

[382] A focus on state obligation was also the driving force behind this Court's finding in *Dunmore* that the government could be held accountable for the violation of the claimants' s. 2(d) rights in that case. It led to the search for a "minimum of state action" ... [that] was satisfied in *Dunmore* by the mere fact that the government had chosen to legislate over matters of association (at para. 29):

Once the state has chosen to regulate a private relationship such as that between employer and employee ... it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to Charter review

There can be no doubt that these dicta apply with equal force to the instant appeal.

[383] ... It is almost a cliché that the modern welfare state has developed in response to an obvious failure on the part of the free market economy to provide these basic needs for everyone. Were it necessary, this Court could take judicial notice of this fact in assessing the relevance of the *Social Aid Act* to the claimants' s. 7 rights. As it happens, any such necessity is mitigated by the fact that s. 6 of the Act explicitly sets out its objective: to provide supplemental aid to those who fall below a *subsistence level*.

[Justice Arbour cited various statements of the Quebec government where it recognized an obligation to provide for those who are unable to work; and acknowledged that the flaws in social assistance programs presented continuing barriers to the autonomy and emancipation of welfare recipients. She found those statements to indicate a willingness on the part of the state to regulate "the field of interests that generally fall within the rubric of s. 7 of the *Charter*" (at para 385) such that an effective lack of government intervention could violate section 7 rights.

Justice Arbour concluded that the government had not demonstrated that the violation could be saved by it. Justice L'Heureux-Dubé concurred with Arbour J's reasoning on the s 7 issue.]

Appeal dismissed.

In *G (J)*, discussed in Section I.B, above, the Court held that the failure to provide legal aid to an indigent parent in child welfare proceedings where the state sought custody of the parent's child violated s 7 of the Charter (the removal of a child implicated security of the person, and a parent's lack of legal representation in the proceedings was inconsistent with the principles of fundamental justice), and it ordered the New Brunswick government to provide the parent with state-funded legal counsel. How does the Court's holding in *G (J)*, where a positive economic obligation was placed on the state, square with its decision in *Gosselin*?

Chaoulli v Quebec (AG)

2005 SCC 35

[Suffering from various health problems, Zeliotis found the waiting times in Quebec's public health care system untenable. Dr Chaoulli, a physician, was unsuccessful in having his home-delivered medical activities recognized and in obtaining a licence to operate an independent private hospital. Their situations had come about as a result of a statutory prohibition on private health insurance for health care services available in the public system (the prohibition was found in the *Health Insurance Act [HEIA]* and the *Hospital Insurance Act [HOIA]*). Having joined forces, Zeliotis and Chaoulli challenged the validity of this prohibition, contending that it deprived them of access to services that do not come with the waiting times inherent in the public system and thus violated their rights under s 7 of the Charter and under s 1 of the Quebec *Charter of Human Rights and Freedoms*, CQLR, c C-12 [Quebec Charter]. The trial court dismissed the motion for a declaratory judgment on the basis that even though Zeliotis and Chaoulli had demonstrated a deprivation of the rights to

life, liberty, and security of the person guaranteed by s 7 of the Canadian Charter, this deprivation was in accordance with the principles of fundamental justice. The Court of Appeal affirmed that decision. A majority of the Supreme Court of Canada allowed the appeal.

Note that Deschamps J's judgment, one of the two judgments that together form the majority ruling, was based strictly on the Quebec Charter. Section 1 provides that "[e]very human being has a right to life, and to personal security, inviolability and freedom." The limitation clause in s 9.1 of the Quebec Charter states: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law." Justice Deschamps found that the prohibitions at issue violated s 1 of the Quebec Charter and were not justified under s 9.1; she, therefore, found it unnecessary to consider arguments based on the Canadian Charter. Her judgment is nevertheless relevant to s 7 of the Canadian Charter for its general characterization of the issue at stake and for its interpretation of the right to life and security of the person. Moreover, Deschamps J applied the Canadian Charter's *Oakes* test to s 9.1. Her comments on the circumstances where deference should, or should not, be shown to legislative choices are therefore relevant to the Canadian Charter's limitation clause.]

DESCHAMPS J:

[1] Quebecers are prohibited from taking out insurance to obtain in the private sector services that are available under Quebec's public health care plan. Is this prohibition justified by the need to preserve the integrity of the plan?

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[4] In essence, the question is whether Quebecers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state. For the reasons that follow, I find that the prohibition infringes the right to personal inviolability and that it is not justified by a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

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[14] ... [N]o one questions the need to preserve a sound public health care system. The central question raised by the appeal is whether the prohibition is justified by the need to preserve the integrity of the public system. In this regard, when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel health care system, I can only agree with them that it does. But that is not the issue in the appeal. The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security. It is the measure chosen by the government that is in issue, not Quebecers' need for a public health care system.

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I. Legislative Context

[16] ... The debate about the effectiveness of public health care has become an emotional one. The Romanow Report [Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada* (Ottawa, 2002)] stated that the *Canada Health Act* [RSC 1985, c C-6] has achieved an iconic status that makes it untouchable by politicians The tone adopted by my colleagues Binnie and LeBel JJ is indicative of this type of emotional reaction. It leads them to characterize the debate as pitting rich against poor when the case is really about determining whether a specific measure is justified under either the *Quebec Charter*

or the *Canadian Charter*. I believe that it is essential to take a step back and consider these various reactions objectively. The *Canada Health Act* does not prohibit private health care services, nor does it provide benchmarks for the length of waiting times that might be regarded as consistent with the principles it lays down, and in particular with the principle of real accessibility.

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V. Infringement of the Rights Protected by Section 1 of the Quebec Charter

[37] The appellant Zeliotis argues that the prohibition infringes Quebecers' right to life. Some patients die as a result of long waits for treatment in the public system when they could have gained prompt access to care in the private sector. Were it not for [the impugned provisions], they could buy private insurance and receive care in the private sector.

[38] ... After meticulously analysing the evidence, [the trial judge] found that the right to life and liberty protected by s. 7 of the *Canadian Charter* had been infringed. ... [T]he trial judge's findings of fact concerning the infringement of the right to life and liberty protected by s. 7 of the *Canadian Charter* apply to the right protected by s. 1 of the *Quebec Charter*.

[39] Not only is it common knowledge that health care in Quebec is subject to waiting times, but a number of witnesses acknowledged that the demand for health care is potentially unlimited and that waiting lists are a more or less implicit form of rationing Waiting lists are therefore real and intentional. ...

[40] ... [Because of a monthly rise in the risk of mortality due, according to a physician witness, to waiting times], [t]he right to life is therefore affected by the delays that are the necessary result of waiting lists.

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[44] In the opinion of my colleagues Binnie and LeBel JJ, there is an internal mechanism that safeguards the public health system. According to them, Quebecers may go outside the province for treatment where services are not available in Quebec. This possibility is clearly not a solution for the system's deficiencies. The evidence did not bring to light any administrative mechanism that would permit Quebecers suffering as a result of waiting times to obtain care outside the province. The possibility of obtaining care outside Quebec is case-specific and is limited to crisis situations.

[45] I find that the trial judge did not err in finding that the prohibition on insurance for health care already insured by the state constitutes an infringement of the right to life and security. ... Quebecers are denied a solution that would permit them to avoid waiting lists, which are used as a tool to manage the public plan. ...

VI. Justification for the Prohibition

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A. Purpose of the Statute

[49] ... The general objective of [the impugned] statutes is to promote health care of the highest possible quality for all Quebecers regardless of their ability to pay. Quality of care and equality of access are two inseparable objectives under the statutes.

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[52] The *HOIA* and the *HEIA* provide that, within the framework they establish, the state is responsible for the provision and funding of health services. ... [A detailed review of the legislation and its administration is omitted.]

[53] It can be seen from this brief review of the legislation governing health services that such services are controlled almost entirely by the state.

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[55] Section 11 *HOIA* and s. 15 *HEIA* ... render any proposal to develop private professional services almost illusory. The prohibition on private insurance creates an obstacle that is practically insurmountable for people with average incomes. ... These effects must not be confused with the objective of the legislation. According to the Attorney General of Quebec, the purpose of the prohibition is to preserve the integrity of the public health care system. From this perspective, the objective appears at first glance to be pressing and substantial. Its pressing and substantial nature can be confirmed by considering the historical context.

[56] ... The enactment of the first legislation providing for universal health care was a response to a need for social justice. ... Since the government passed legislation based on its view that it had to be the principal actor in the health care sphere, it is easy to understand its distrust of the private sector. At the stage of analysis of the objective of the legislation, I believe that preserving the public plan is a pressing and substantial purpose.

B. Proportionality

(1) Rational Connection

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[58] ... Although the effect of a measure is not always indicative of a rational connection between the measure and its objective, in the instant case the consequences show an undeniable connection between the objective and the measure. The public plan is preserved because it has a quasi-monopoly.

(2) Minimal Impairment

[Justice Deschamps held that the prohibition on private insurance was not minimally impairing. She held that the evidence led at trial did not support the trial judge's factual findings concerning minimal impairment.]

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[84] It cannot therefore be concluded from the evidence relating to the Quebec plan or the plans of the other provinces of Canada, or from the evolution of the systems in place in various OECD countries, that the Attorney General of Quebec has discharged his burden of proof under s. 9.1 of the *Quebec Charter*. A number of measures are available to him to protect the integrity of Quebec's health care plan. The choice of prohibiting private insurance contracts is not justified by the evidence. However, is this a case in which the Court should show deference?

(d) Level of Deference Required

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[89] The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch. [As K Roach has stated in "Dialogic Judicial Review and Its Critics" (2004) 23 SCLR (2d) 49 at 71:]

... Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process.

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[91] To refuse to exercise the power set out in s. 52 of the *Quebec Charter* [that Charter's primacy clause] would be to deny that provision its real meaning and to deprive Quebecers of the protection to which they are entitled.

[92] In a given case, a court may find that evidence could not be presented for reasons that it considers valid, be it due to the complexity of the evidence or to some other factor. However, the government cannot argue that the evidence is too complex without explaining why it cannot be presented. If such an explanation is given, the court may show greater deference to the government. Based on the extent of the impairment and the complexity of the evidence considered to be necessary, the court can determine whether the government has discharged its burden of proof.

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[95] ... Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state. This list is certainly not exhaustive. It serves primarily to highlight the facts that it is up to the government to choose the measure, that the decision is often complex and difficult, and that the government must have the necessary time and resources to respond. ...

[96] The instant case is a good example of a case in which the courts have all the necessary tools to evaluate the government's measure. Ample evidence was presented. The government had plenty of time to act. Numerous commissions have been established ... , and special or independent committees have published reports Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.

[97] For many years, the government has failed to act; the situation continues to deteriorate. ... While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebecers' right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.

[98] In the instant case, the effectiveness of the prohibition has by no means been established. The government has not proved, by the evidence in the record, that the measure minimally impairs the protected rights. Moreover, the evidence shows that a wide variety of measures are available to governments, as can be seen from the plans of other provinces and other countries.

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McLACHLIN CJ and MAJOR J (Bastarache J concurring):

[Agreeing with Deschamps J's conclusion as to the invalidity of the impugned provisions in respect of the Quebec Charter, McLachlin CJ and Major J focused their analysis on the Canadian Charter.]

[103] The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.

[104] The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. ...

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[106] The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* ... limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme. ... This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.

[107] ... The fact that [a] matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. ...

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I. Section 7 of the Charter

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A. Deprivation of Life, Liberty or Security of the Person

[110] The issue at this stage is whether the prohibition on insurance for private medical care deprives individuals of their life, liberty or security of the person protected by s. 7 of the *Charter*.

[111] The appellants have established that many Quebec residents face delays in treatment that adversely affect their security of the person and that they would not sustain but for the prohibition on medical insurance. It is common ground that the effect of the prohibition on insurance is to allow only the very rich, who do not need insurance, to secure private health care in order to avoid the delays in the public system. Given the ban on insurance, most Quebecers have no choice but to accept delays in the medical system and their adverse physical and psychological consequences.

[After reviewing the evidence adduced at trial, McLachlin CJ and Major J reached the same conclusion as Deschamps J, emphasizing both the physical and psychological consequences of waiting times on patients.]

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[119] In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in [*R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90]. ... In *Morgentaler* the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. ...

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[121] ... The sanction by which the mandatory public system was maintained [was] criminal in *Morgentaler*, [as opposed to] "administrative" in the case at bar. Yet the consequences for the individual in both cases are serious. In *Morgentaler*, as here, the system left the individual facing a lack of critical care with no choice but to travel

outside the country to obtain the required medical care at her own expense. It was this constraint on s. 7 security, ... and not the criminal sanction, that drove the majority analysis in *Morgentaler*. We therefore conclude that the decision provides guidance in the case at bar.

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[123] Not every difficulty rises to the level of adverse impact on security of the person under s. 7. ... However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, [in this case] s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. ... Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.

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B. Deprivation in Accordance with the Principles of Fundamental Justice

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(1) Laws Shall Not Be Arbitrary: A Principle of Fundamental Justice

[129] It is a well-recognized principle of fundamental justice that laws should not be arbitrary ...

[130] A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]." To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: [*Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 1993 CanLII 75], at pp. 594-95.

[131] In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

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(2) Whether the Prohibition on Private Medical Insurance Is Arbitrary

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[135] The government argues that ... if people can purchase private health insurance, they will seek treatment from private doctors and hospitals, which are not banned under the Act. According to the government's argument, this will divert resources from the public health system into private health facilities, ultimately reducing the quality of public care.

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[137] The appellants ... disagreed and offered their own conflicting "common sense" argument for the proposition that prohibiting private health insurance is neither necessary nor related to maintaining high quality in the public health care system. Quality public care, they argue, depends not on a monopoly, but on money and management. They testified that permitting people to buy private insurance

would make alternative medical care more accessible and reduce the burden on the public system. The result, they assert, would be better care for all. ...

[138] To this point, we are confronted with competing but unproven "common sense" arguments, amounting to little more than assertions of belief. ... But as discussed above, a theoretically defensible limitation may be arbitrary if in fact the limit lacks a connection to the goal.

[139] This brings us to the evidence called by the appellants at trial on the experience of other developed countries with public health care systems which permit access to private health care. The experience of these countries suggests that there is no real connection in fact between prohibition of health insurance and the goal of a quality public health system.

[140] The evidence adduced at trial establishes that many western democracies that do not impose a monopoly on the delivery of health care have successfully delivered to their citizens medical services that are superior to and more affordable than the services that are presently available in Canada. This demonstrates that a monopoly is not necessary or even related to the provision of quality public health care.

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[149] In summary, the evidence on the experience of other western democracies refutes the government's theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care.

[150] Binnie and LeBel JJ suggest that the experience of other countries is of little assistance. With respect, we cannot agree. This evidence was properly placed before the trial judge and, unless discredited, stands as the best guide with respect to the question of whether a ban on private insurance is necessary and relevant to the goal of providing quality public health care. The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence. This is supported by our jurisprudence, according to which the experience of other western democracies may be relevant in assessing alleged arbitrariness. ...

[151] Binnie and LeBel JJ also suggest that the government's continued commitment to a monopoly on the provision of health insurance cannot be arbitrary because it is rooted in reliance on "a series of authoritative reports [that analysed] health care in this country and in other countries" (para. 258); We observe in passing that the import of these reports, which differ in many of their conclusions, is a matter of some debate But the conclusions of other bodies on other material ... cannot relieve the courts of their obligation to review government action for consistency with the *Charter* on the evidence before them.

[152] When we look to the evidence rather than to assumptions, the connection between prohibiting private insurance and maintaining quality public health care vanishes. ...

[153] We conclude that on the evidence adduced in this case, the appellants have established that in the face of delays in treatment that cause psychological and physical suffering, the prohibition on private insurance jeopardizes the right to life, liberty and security of the person of Canadians in an arbitrary manner, and is therefore not in accordance with the principles of fundamental justice.

II. Section 1 of the Charter

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[155] The government undeniably has an interest in protecting the public health regime. However, given the absence of evidence that the prohibition on the purchase and sale of private health insurance protects the health care system, the rational connection between the prohibition and the objective is not made out. Indeed, we

question whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*, [1986] 1 S.C.R. 103. [The three judges found that the denial of access to medical care was not minimally impairing, nor did its benefits outweigh its deleterious effects.]

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BINNIE and LeBEL JJ (Fish J concurring) (dissenting):

I. Introduction

[161] The question in this appeal is whether the province of Quebec not only has the constitutional authority to establish a comprehensive single-tier health plan, but to discourage a second (private) tier health sector by prohibiting the purchase and sale of private health insurance. ... We are unable to agree with our four colleagues who would allow the appeal that such a debate can or should be resolved as a matter of law by judges. ...

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[163] The Court recently held in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78, that the government was not required to fund the treatment of autistic children. It did not on that occasion address in constitutional terms the scope and nature of "reasonable" health services. Courts will now have to make that determination. What, then, are constitutionally required "reasonable health services"? What is treatment "within a reasonable time"? What are the benchmarks? How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is "reasonable" enough to satisfy s. 7 of the [Canadian Charter] and s. 1 of the [Quebec Charter]. It is to be hoped that we will know it when we see it.

[164] The policy of the *Canada Health Act*, R.S.C. 1985, c. C-6, and its provincial counterparts is to provide health care based on need rather than on wealth or status. The evidence certainly established that the public health care system ... has serious and persistent problems. This does not mean that the courts are well placed to perform the required surgery. ... Our colleagues McLachlin C.J. and Major J. argue that Quebec's enforcement of a single-tier health plan ... is "arbitrary." In our view, with respect, the prohibition against private health insurance is a rational consequence of Quebec's commitment to the goals and objectives of the *Canada Health Act*.

[165] ... [I]t must be recognized that the liberty and security of Quebecers who do not have the money to afford private health insurance, who cannot qualify for it, or who are not employed by establishments that provide it, are not put at risk by the absence of "upper tier" health care. It is Quebecers who have the money to afford private medical insurance and can qualify for it who will be the beneficiaries of the appellants' constitutional challenge.

[166] The Quebec government views the prohibition against private insurance as essential to preventing the current single-tier health system from disintegrating into a *de facto* two-tier system. The trial judge found, and the evidence demonstrated, that there is good reason for this fear. ... She thus found no *legal* basis to intervene, and declined to do so. ... [T]he debate is about social values. It is not about constitutional law. ...

[167] We believe our colleagues the Chief Justice and Major J have extended too far the strands of interpretation under the *Canadian Charter* laid down in some of the earlier cases, in particular the ruling on abortion in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (which involved criminal liability, not public health policy). We cannot find

in the constitutional law of Canada a "principle of fundamental justice" dispositive of the problems of waiting lists in the Quebec health system. ... The proper forum to determine the social policy of Quebec in this matter is the National Assembly.

[168] ... There is nothing in the evidence to justify our colleagues' disagreement with [the trial judge's] conclusion that the general availability of health insurance will lead to a significant expansion of the private health sector to the detriment of the public health sector. While no one doubts that the Quebec health plan is under sustained and heavy criticism, ... [a]s a matter of law, we see no reason to interfere with [lower courts'] collective and unanimous judgment on this point. Whatever else it might be, the prohibition is not arbitrary.

[169] ... A legislative policy is not "arbitrary" just because we may disagree with it. As our colleagues the Chief Justice and Major J. fully recognize, the legal test of "arbitrariness" is quite well established in the earlier case law. ... Suffice it to say at this point that in our view, the appellants' argument about "arbitrariness" is based largely on generalizations about the public system drawn from fragmentary experience, an overly optimistic view of the benefits offered by private health insurance, an oversimplified view of the adverse effects on the public health system of permitting private sector health services to flourish and an overly interventionist view of the role the courts should play in trying to supply a "fix" to the failings, real or perceived, of major social programs.

A. The Argument About Adding an "Upper Tier" to the Quebec Health Plan

[170] ... It is evident, of course, that neither Quebec nor any of the other provinces has a "pure" single-tier system. ... The issue here, as it is so often in social policy debates, is where to draw the line. ... Drawing the line around social programs properly falls within the legitimate exercise of the democratic mandates of people elected for such purposes, preferably after a public debate.

B. Background to the Health Policy Debate

[The dissent's historical analysis is omitted.]

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[174] Not all Canadian provinces prohibit private health insurance, but all of them (with the arguable exception of Newfoundland) take steps to protect the public health system by discouraging the private sector, whether by prohibiting private insurance. ... or by prohibiting doctors who opt out of the public sector, from billing their private patients more than the public sector tariff ... , or eliminating any form of cross-subsidy from the public to the private sector. [A catalogue of the various provincial plans is omitted.] The ... underlying policies flow from the *Canada Health Act* and are the same: i.e. as a matter of principle, health care should be based on need, not wealth, and as a matter of practicality the provinces judge that growth of the private sector will undermine the strength of the public sector and its ability to achieve the objectives of the *Canada Health Act*.

[175] The argument for a "two-tier system" is that it will enable "ordinary" Canadians to access private health care. Indeed, this is the view taken by our colleagues the Chief Justice and Major J. This way of putting the argument suggests that the Court has a mandate to save middle-income and low-income Quebecers from themselves [The dissent rejected comparisons to the American experience which, in their view, created much worse outcomes for minority groups.]

[176] It would be open to Quebec to adopt a U.S.-style health care system. No one suggests that there is anything in our Constitution to prevent it. But to do so would be contrary to the policy of the Quebec National Assembly, and its policy in that respect is shared by the other provinces and the federal Parliament. ... While the existence of waiting times is undoubtedly, and their management a matter of serious public concern, the proposed constitutional right to a two-tier health system for those who can afford private medical insurance would precipitate a seismic shift in health policy for Quebec. We do not believe that such a seismic shift is compelled by either the *Quebec Charter* or the *Canadian Charter*.

II. Analysis

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[180] Our colleagues the Chief Justice and Major J[’s conclusion] ... that there is a violation of s. 7 of the *Canadian Charter*. ... rests in substantial part on observations made by various members of this Court in *Morgentaler*. ... The factual and legal issues raised in that criminal law problem are, we think, far removed from the debate over a two-tiered health system. *Morgentaler* applied a “manifest unfairness” test which has never been adopted by the Court outside the criminal law, and certainly not in the context of the design of social programs. The *Morgentaler* judgment fastened on *internal inconsistencies* in s. 251 of the [Criminal] Code, which find no counterpart here. In our view, with respect, *Morgentaler* provides no support for the appellants in this case, as we discuss commencing at para. 259.

[181] As stated, we accept the finding of the courts below that a two-tier health care system would likely have a negative impact on the integrity, functioning and viability of the public system Although this finding is disputed by our colleagues the Chief Justice and Major J. (a point to which we will return), it cannot be contested that as a matter of principle, access to private health care based on wealth rather than need contradicts one of the key social policy objectives expressed in the *Canada Health Act*. The state has established its interest in promoting the equal treatment of its citizens in terms of health care. The issue of arbitrariness relates only to the validity of the means adopted to achieve that policy objective. ... While Quebec does not outlaw private health care, which is therefore accessible to those with cash on hand, it wishes to discourage its growth. Failure to stop the few people with ready cash does not pose a structural threat to the Quebec health plan. Failure to stop private health insurance will, as the trial judge found, do so. Private insurance is a condition precedent to, and aims at promoting, a flourishing parallel private health care sector. For Dr. Chaoulli in particular, that is the whole point of this proceeding.

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B. The Canadian Charter of Rights and Freedoms

[Justices Binnie and LeBel began by expressing the view that s 7 was likely not applicable in this case because there was an insufficient nexus to adjudicative or administrative proceedings. In their opinion, in the absence of this nexus it would be difficult for the claimants to establish a breach of the principles of fundamental justice.]

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(2) Which Section 7 Interests Are Engaged?

[200] Section 7 interests are enumerated as life, liberty and security of the person. As stated, we accept the trial judge’s finding that the current state of the Quebec

health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of some individuals on some occasions, of putting at risk their life or security of the person.

[201] We do not agree with the appellants, however, that the Quebec Health Plan puts the "liberty" of Quebecers at risk. The argument that "liberty" includes freedom of contract (in this case to contract for private medical insurance) is novel in Canada, where economic rights are not included in the Charter and discredited in the United States. In that country, the liberty of individuals (mainly employers) to contract out of social and economic programs was endorsed by the Supreme Court in the early decades of the 20th century on the theory that laws that prohibited employers from entering into oppressive contracts with employees violated their "liberty" of contract; see, e.g., *Lochner v. New York*, 198 U.S. 45 (1905)

[202] Nor do we accept that s. 7 of the *Canadian Charter* guarantees Dr. Chaoulli the "liberty" to deliver health care in a private context. ... The fact that state action constrains an individual's freedom by eliminating career choices that would otherwise be available does not in itself attract the protection of the liberty interest under s. 7. The liberty interest does not, for example, include the right to transact business whenever one wishes: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 786. Nor does it protect the right to exercise one's chosen profession: *Prostitution Reference* [[1990] 1 SCR 1123, 1990 CanLII 105], at p. 1179, per Larmer J. We would therefore reject Dr. Chaoulli's claim on behalf of care providers that their liberty interest under either the *Canadian Charter* or the *Quebec Charter* has been infringed by Quebec's single-tier public health system.

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[207] As stated, the principal legal hurdle to the appellants' *Canadian Charter* challenge is not the preliminary step of identifying a s. 7 interest potentially affected The hurdle lies in their failure to find a fundamental principle of justice that is violated by the Quebec health plan so as to justify the Court in striking down the prohibition

C. Principles of Fundamental Justice

[208] For a principle to be one of fundamental justice, it must count among the basic tenets of our *legal system*: [*Reference re Section 94(2) of the Motor Vehicle Act (BC)*, [1985] 2 SCR 486, 1985 CanLII 81], at p. 503. It must generally be accepted as such among reasonable people. ...

[209] Thus, the formal requirements for a principle of fundamental justice are threefold. First, it must be a *legal principle*. Second, the reasonable person must regard it as vital to our societal notion of justice, which implies a significant *societal consensus*. Third, it must be capable of being *identified with precision* and applied in a manner that yields *predictable results*. These requirements present insurmountable hurdles to the appellants. The aim of "health care to a reasonable standard within reasonable time" is not a *legal principle*. There is no "societal consensus" about what it means or how to achieve it. It cannot be "identified with precision." As the testimony in this case showed, a level of care that is considered perfectly reasonable by some doctors is denounced by others. Finally, we think it will be very difficult for those designing and implementing a health plan to predict when its provisions cross the line from what is "reasonable" into the forbidden territory of what is "unreasonable," and how the one is to be distinguished from the other.

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[212] A review of the expert evidence and the medical literature suggests that there is no consensus regarding guidelines for timely medical treatment. ... There are currently no national standards for timely treatment

[Justices Binnie and LeBel noted that the bulk of expert evidence adduced and accepted by the trial judge was reliable and credible.]

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[217] How serious is the waiting-list problem? No doubt it is serious; but *how* serious? The first major evidentiary difficulty for the appellants is the lack of accurate data. The major studies concluded that the real picture concerning waiting lists in Canada is subject to contradictory evidence and conflicting claims

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[220] It is even more difficult to generalize about the potential impact of a waiting list on a particular patient. ... [After examining the literature, Binnie and LeBel JJ comment:] In other words, waiting lists may be serious in some cases, but in how many cases and how serious?

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[221] Waiting times are not only found in public systems. They are found in all health care systems The consequence of a quasi-unlimited demand for health care coupled with limited resources, be they public or private, is to ration services. ...

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[223] In a public system founded on the values of equity, solidarity and collective responsibility, rationing occurs on the basis of clinical need rather than wealth and social status As a result, there exists in Canada a phenomenon of "static queues" whereby a group of persons may remain on a waiting list for a considerable time if their situation is not pressing. ... In general, the evidence suggests that patients who need immediate medical care receive it. There are of course exceptions, and these exceptions are properly the focus of controversy, but in our view they can and should be addressed on a case-by-case basis.

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[224] Section 10 of the *Health Insurance Act* provides that in certain circumstances Quebecers will be reimbursed for the cost of "insured services" rendered outside Quebec but in Canada (*Regulation respecting the application of the Health Insurance Act*, R.R.Q. 1981, c. A-29, s. 23.1), or outside Canada altogether (s. 23.2). There is no doubt that the power of reimbursement is exercised sparingly, and on occasion unlawfully The existence of the individual remedy, however, introduces an important element of flexibility, if administered properly.

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[225] ... [O]ur colleagues write, "patients die while on waiting lists" (para. 112). This, too, is true. But our colleagues are not advocating an overbuilt system with enough idle capacity to eliminate waiting lists, and such generalized comments provided no guidance for what in practical terms would constitute an appropriate level of resources to meet their suggested standard of "public health care of a reasonable standard within reasonable time" (para. 105).

[226] We have similar concerns about the use made by the appellants of various reports in connection with other OECD countries. ... We think the Court is sufficiently burdened with conflicting evidence about our own health system without attempting a detailed investigation of the merits of trade-offs made in other countries, for their own purposes. ...

[Justices Binnie and LeBel went on to criticize what they perceived as McLachlin CJ and Major J's selective use of evidence about the situation in foreign states.]

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[229] We are not to be taken as disputing the undoubted fact that there are serious problems with the single-tier health plan in Canada. Our point is simply that bits of evidence must be put in context. With respect, it is particularly dangerous to venture

selectively into aspects of foreign health care systems with which we, as Canadians, have little familiarity. At the very least such information should be filtered and analysed at trial through an expert witness.

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(2) Arbitrariness

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[233] We agree with our colleagues the Chief Justice and Major J. that a law is arbitrary if "it bears no relation to, or is inconsistent with, the objective that lies behind [the legislation]" (para. 130). We do not agree with the Chief Justice and Major J. that the prohibition against private health insurance "bears no relation to, or is inconsistent with" the preservation of access to a health system based on need rather than wealth in accordance with the *Canada Health Act*. We also do not agree with our colleagues' expansion of the *Morgentaler* principle to invalidate a prohibition simply because a court believes it to be "unnecessary" for the government's purpose. There must be more than that to sustain a valid objection.

[234] The accepted definition in *Rodriguez* states that a law is arbitrary only where "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation." To substitute the term "unnecessary" for "inconsistent" is to substantively alter the meaning of the term "arbitrary." "Inconsistent" means that the law logically contradicts its objectives, whereas "unnecessary" simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice. If a court were to declare unconstitutional every law impacting "security of the person" that the court considers unnecessary, there would be much greater scope for intervention under s. 7 than has previously been considered by this Court to be acceptable. ... The courts might find themselves constantly second-guessing the validity of governments' public policy objectives based on subjective views of the necessity of particular means used to advance legitimate government action as opposed to other means which critics might prefer.

[235] ... We approach the issue of arbitrariness in three steps

(a) What Is the "State Interest" Sought to Be Protected?

[236] Quebec's legislative objective is to provide high quality health care, at a reasonable cost, for as many people as possible in a manner that is consistent with principles of efficiency, equity and fiscal responsibility. Quebec (along with the other provinces and territories) subscribes to the policy objectives of the *Canada Health Act* An overbuilt health system is seen as no more in the larger public interest than a system that on occasion falls short. The legislative task is to strike a balance among competing interests.

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(b) What Is the Relationship Between the "State Interest" Thus Identified and the Prohibition Against Private Health Insurance?

[238] The relationship lies both in principle and in practicality.

[239] In principle, Quebec wants a health system where access is governed by need rather than wealth or status. Quebec does not want people who are uninsurable to be left behind. To accomplish this objective endorsed by the *Canada Health Act*, Quebec seeks to discourage the growth of private-sector delivery of "insured" services based on wealth and insurability. We believe the prohibition is rationally connected to Quebec's objective and is not inconsistent with it.

[240] In practical terms, Quebec bases the prohibition on the view that private insurance, and a consequent major expansion of private health services, would have a harmful effect on the public system.

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(c) **Have the Appellants Established That the Prohibition Bears No Relation to, or Is Inconsistent with, the State Interest?**

[242] The trial judge considered all the evidence and concluded that the expansion of private health care would undoubtedly have a negative impact on the public health system The trial judge relied on the reports available to her in rejecting the appellants' constitutional challenge, and none of the material that has since been added (such as the Romanow Report) changes or modifies the correctness of her conclusion, in our view. We therefore agree with the trial judge and the Quebec Court of Appeal that the appellants failed to make out a case of "arbitrariness" on the evidence. Indeed the evidence proves the contrary. . . .

[Justices Binnie and LeBel's summary of the extrinsic and expert evidence is omitted.]

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[256] For all these reasons, we agree . . . that in light of the legislative objectives of the *Canada Health Act* it is not "arbitrary" for Quebec to discourage the growth of private sector health care. Prohibition of private health insurance is directly related to Quebec's interest in promoting a need-based system and in ensuring its viability and efficiency. Prohibition of private insurance is not "inconsistent" with the state interest; still less is it "unrelated" to it.

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[258] As to our colleagues' dismissal of the factual basis for Quebec's legislative choice, the public has invested very large sums of money in a series of authoritative reports to analyse health care in this country and in other countries. The reports uniformly recommend the retention of single-tier medicine. People are free to challenge (as do the appellants) the government's reliance on those reports but such reliance cannot be dismissed as "arbitrary." People are also free to dispute Quebec's strategy, but in our view it cannot be said that . . . [a legislative choice] has been adopted "arbitrarily" by the Quebec National Assembly

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(4) Conclusion Under Section 7 of the Canadian Charter

[265] For the foregoing reasons, even accepting (as we do) the trial judge's conclusion that the claimants have established a deprivation of the life and security of some Quebec residents occasioned in some circumstances by waiting list delays, the deprivation would not violate any legal principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter*.

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Appeal allowed.

NOTES AND QUESTIONS

1. For further discussion of the implications of *Chaoulli* on the issue of privatization of our health care system, see Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

2. For another challenge to key elements of a provincial health care plan, with a very different outcome, see *Cambie Surgeries Corporation v British Columbia (AG)*, [2020 BCSC 1310](#).

3. In *Flora v Ontario Health Insurance Plan*, [2008 ONCA 538](#), the applicant was diagnosed with liver cancer in 1999. After consulting several Ontario doctors, he was told that he was not a suitable candidate for a liver transplant and was given approximately six to eight months to live. Eventually, at a cost of about \$450,000, he received life-saving treatment at a hospital in London, England. He applied to the Ontario Health Insurance Plan (OHIP) for reimbursement of his medical expenses. When the respondent rejected his reimbursement request, the applicant sought a review of OHIP's decision before the Health Services Appeal and Review Board. The majority of the Board upheld OHIP's denial of reimbursement on the basis that the treatment received by the appellant in England was not an "insured service" within the meaning of the *Health Insurance Act*, RSO 1990, c H.6 (the Act) and s 28.4(2) of RRO 1990, Reg 552 (the Regulation). His subsequent appeals to the Divisional Court and the Court of Appeal were dismissed. The Court of Appeal said that OHIP's decision did not violate the applicant's s 7 rights:

[101] ... In contrast to the legislative provisions at issue in *Chaoulli*, *Morgentaler and Rodriguez*, s. 28.4(2) of the Regulation does not prohibit or impede anyone from seeking medical treatment. ... Section 28.4(2) provides a defined benefit for out-of-country medical treatment that is not otherwise available to Ontarians—the right to obtain public funding for certain specific out-of-country medical treatments. By not providing funding for *all* out-of-country medical treatments, it does not deprive an individual of the rights protected by s. 7 of the Charter.

4. Recall the *PHS (Insite)* case, excerpted above in Section II. Could it be read as establishing any kind of "positive right" to health care against the state?

5. In *Allen v Alberta*, [2015 ABCA 277](#), a s 7 challenge to Alberta's ban on private health insurance was unsuccessful. *Chaoulli* was distinguished on an evidentiary basis, with a finding at the Court of Queen's Bench level, affirmed by the Court of Appeal, that the challenger, Allen, had not established on the facts a violation of his security of the person. (Allen, a dentist, had required back surgery as a result of hockey injuries. He was in increasing pain and was unable to work. The wait time for such surgery in Alberta was 18 months, and Allen eventually had surgery in the United States at a cost of over \$77,000.)

6. At issue in *Victoria (City) v Adams*, [2008 BCSC 1363](#) was a civil injunction, sought by the city of Victoria, British Columbia, against a group of homeless people who had erected a tent city in a park. The injunction required them to vacate pursuant to a city by-law that made it an offence for anyone to "take up a temporary abode overnight" (at para 9) or "erect or construct, or cause to be erected or constructed, a tent, building or structure, including a temporary structure such as a tent, in a park" (at para 32). Madam Justice Ross of the BC Supreme Court struck down the by-law, holding it in violation of s 7 of the Charter. In her words, "the uncontradicted expert evidence establishes that exposure to the elements without adequate shelter, and in particular without overhead protection, can result in a number of serious and life-threatening conditions, most notably hypothermia" (at para 145). Because Victoria's emergency shelters were insufficient to house the city's homeless population, she concluded that some homeless people were invariably forced to seek public shelter in a way that exposed them to significant health and safety risks. Justice Ross held further that the s 7 deprivation was both arbitrary and overbroad. The purposes of the prohibition were to ensure

that use of public spaces was open to all members of society, to protect the natural environment from damage, and to address public health and safety concerns. But the specific ban on setting up a tent in a park was not tailored to any of these purposes. Noting the Supreme Court of Canada's decision in *Gosselin*, Ross J did not declare that s 7 imposes a positive obligation on the government to provide adequate housing. Instead, relying on the Court's decision in *Chaoulli*, she concluded that the government violated a negative obligation to not deprive individuals of their s 7 rights. The city's appeal was dismissed: *Victoria (City) v Adams, 2009 BCCA 563*.

7. An attempt to expand the ambit of s 7 to include social and economic rights was unsuccessful in *Tanudjaja v Canada (AG), 2014 ONCA 852*, leave to appeal to SCC dismissed, [2015 CanLII 36780, \[2015\] SCCA No 39 \(QL\)](#). The appellants suffered from homelessness and inadequate housing and applied for Charter relief on the basis that legislative policies, programs, and services had worsened their plight. A majority of the Ontario Court of Appeal upheld the finding of the motions judge that the application was not justiciable and that it was "demonstrably unsuitable for adjudication" (at para 36). Justice Feldman dissented; leave to appeal to the Supreme Court of Canada was denied.

8. Could s 7 be used to safeguard environmental rights? Could a successful s 7 challenge be brought to laws or other government actions that allow pollution at levels that interfere with human health and well-being? What difficulties would arise in bringing such a challenge?: see Nathalie J Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?" (2016) 28 J Envtl L & Prac 89.

9. For further discussion of the difficulties and possibilities of using s 7 to protect and promote social citizenship, see Margot Young, "Social Justice and the Charter" (2013) 50 Osgoode Hall LJ 669; Margot Young, "Section 7: The Right to Life, Liberty, and Security of the Person" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) ch 37.

IV. SECTIONS 7 AND 1

The Supreme Court of Canada has never upheld a violation of s 7 under s 1 and has often commented that it would be difficult to do so, particularly where the s 7 violation involves a law that is arbitrary, overbroad, or grossly disproportionate. It might be thought that an arbitrary law could not pass the rational connection stage, while an overbroad law would not be minimally impairing, and a grossly disproportionate law would necessarily fail the final step of the *Oakes* test. More generally, one might wonder whether a law that deprives someone of life, liberty, and security of the person in a way that violates the principles of fundamental justice could be "demonstrably justified in a free and democratic society" (Charter, s 1). Nevertheless, in *Bedford*, excerpted above in Section II, McLachlin CJ accepted the possibility of justifying a s 7 infringement:

[124] This Court has previously identified parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights. These parallels should not be allowed to obscure the crucial differences between the two sections.

[125] Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different—whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of

an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

[126] ... Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

[127] By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative—for example, how many people are negatively impacted—but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.

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[129] It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter* (*Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *R. v. Malmo-Levine* [2003 SCC 74], at paras. 96–98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.

In *R v Michaud*, 2015 ONCA 585, the Ontario Court of Appeal considered a Charter challenge to an Ontario regulation that required commercial truckers to equip their vehicles with devices that limited their speed to 105 km/h. The Court of Appeal accepted the trial judge's conclusion that in a small number of cases, a truck driver would have to travel faster than 105 km/h for a short period of time in order to avoid collisions. The regulation therefore affected truck drivers' security of the person; moreover, it was arbitrary in part—that is, overbroad—in light of its overall objective of improving highway safety. Nevertheless, after noting McLachlin CJ's comments in *Bedford*, the Court conducted a complete *Oakes* analysis and held that this infringement of s 7 was justified. On the minimal impairment step, Lauwers JA commented that the choice of a 105 km/h limit was, in the context of "a complex regulatory response to the social problem of motor vehicle and highway safety" (at para 127), "within the reasonable range of policy choices open to the government ... and is well within the margin of appreciation or room to maneuver due to the regulator" (at para 136). How far might this kind of reasoning extend? Why does it matter that the law at issue in *Michaud* was part of a complex regulatory scheme as opposed to an outright prohibition on behaviour?

For an extensive discussion of the relationship between s 7 and s 1 of the Charter and of the reasoning in *Michaud*, see *Cambie Surgeries Corporation v British Columbia (AG)*,

2020 BCSC 1310. In a very lengthy decision, Steeves J considered and rejected a constitutional challenge to central elements of British Columbia's *Medicare Protection Act*, RSBC 1996, c 286. He rejected the plaintiffs' claim that the impugned restrictions on private clinics and private health insurance violated s 7 of the Charter, but he also commented that if there had been any violations, he would have upheld them under s 1.

CHAPTER TWENTY-THREE

EQUALITY RIGHTS

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I. INTRODUCTION AND HISTORY OF EQUALITY RIGHTS

Section 15 of the *Canadian Charter of Rights and Freedoms* (Charter) came into effect on April 15, 1985, three years after the rest of the Charter. This delay was provided so that governments had time to review their laws for compliance with the new equality guarantee. However, as we will see in this chapter, s 15 demanded more than simply reviewing laws that were discriminatory on their face, which created challenges for both courts and governments. Indeed, former Chief Justice Beverley McLachlin once called equality “the most difficult” Charter right (in “Equality: The Most Difficult Right” (2001) 14 SCLR (2d) 17), and the Supreme Court of Canada has continuously re-evaluated its approach to equality rights since it decided its first s 15 case, *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2. The difficulty could be seen to stem from several sources: the history of equality rights and their interpretation prior to s 15, contested meanings of equality in other jurisdictions and in different disciplines, and the demands that the eradication of systemic inequality places upon courts and governments. At the root of the difficulty is the contrast between formal equality, which only requires that similarly situated people be treated the same, and substantive equality, which recognizes that differential treatment and positive government action are often needed in order to redress the inequalities experienced by members of disadvantaged and oppressed groups. As we will see, although the Supreme Court has claimed that s 15, interpreted properly, guarantees the right to substantive equality, the meaning of that term remains contested, and it has been inconsistently applied in the case law.

Prior to the Charter, the *Canadian Bill of Rights*, SC 1960, c 44 guaranteed individuals “equality before the law and the protection of the law” (s 1(b)). The *Canadian Bill of Rights* jurisprudence on equality was influenced by British constitutional theorist Albert Venn Dicey, who conceptualized equality in relation to “the rule of law” (see Chapter 15, Antecedents of the Charter). For Dicey, equality only demanded equal treatment in the administration and enforcement of the law. While this definition was consistent with the idea that society be governed by law, it did not require a review of the constitutionality of governments’ exercise of legislative powers. Equality-based challenges to legislation under the *Canadian Bill of Rights* were uniformly unsuccessful (see, for example, *Bliss v Attorney General of Canada*,

[1979] 1 SCR 183, 1978 CanLII 25, discussed in the excerpt from *Andrews* in Section II.A), and equality-seeking groups sought to ensure that the Charter's equality guarantee would provide courts with a more fulsome basis for addressing systemic inequalities.

Also pre-dating the Charter is a series of international human rights instruments providing for civil and political rights, economic, social and cultural rights, and a range of rights related to race, sex, disability, and other grounds (see the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976); the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976); the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Can TS 1970 No 28 (entered into force 4 January 1969, ratified by Canada 14 October 1970); the *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, Can TS 1982 No 31 (entered into force 3 September 1981, ratified by Canada 10 December 1981). The *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010) and the *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295 (assented to by Canada 21 June 2021), post-date the Charter). These international human rights instruments grounded the lobbying efforts of equality-seeking groups more so than the equality guarantee in the 14th Amendment of the United States Constitution, which is discussed in Section II.A, Note 4 following *Andrews*. The former provided a clearer pathway to the realization of positive state duties to ensure economic, social, and cultural rights, whereas the 14th Amendment, like the *Canadian Bill of Rights*, guaranteed only "equal protection of the laws" and had a history of narrow and formalistic interpretations of equality.

The first draft of the Charter's equality guarantee, tabled in 1980, provided that:

- 15.(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
- (2) The section does not preclude any program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

See *Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada*, tabled in the House of Commons and Senate, 6 October 1980.

Advocacy from a range of equality-seeking groups resulted in several changes to this text. First, protections were added for equality under the law and equal benefit of the law. As explained in *Andrews* by McIntyre J, writing for the majority (at 170) on s 15, the inclusion of four equality rights

was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*. It also reflected the expanded concept of discrimination being developed under the various human rights codes since the enactment of the *Canadian Bill of Rights*.

As we will see throughout this chapter, however, subsequent to *Andrews* the Court has not had much to say about the four equality rights in its s 15 decisions. For further discussion, see Mary Ebets & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89.

The second major change was that the list of grounds that are protected under s 15 was made open ended, and mental and physical disability were added as enumerated grounds. Advocates also sought to include marital status, sexual orientation, and political belief as enumerated grounds, but these were left out and made subject to the interpretation of the courts as to appropriate "analogous grounds." In the case of sexual orientation, in particular, commentators noted the lack of consensus on inclusion of this ground and the desire on the part of some framers to leave this issue to judicial review. Third, the ameliorative programs provision in s 15(2)

was revised to include the same open-ended list of grounds as s 15(1). Fourth, the heading for s 15 was changed from "Non-discrimination Rights" to "Equality Rights," largely at the behest of women's groups concerned about a negative rights approach to s 15.

The final text of s 15 reads as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Another significant feature of the language of s 15 is its guarantee of equality rights to "every individual," which means that—unlike some other Charter rights and freedoms—natural persons, including non-citizens, can mount challenges under s 15, while corporations and estates cannot (see *Canada (AG) v Hislop*, 2007 SCC 10 at paras 71-73).

Women's groups also lobbied for the inclusion of s 28 of the Charter, which was seen as crucial when the notwithstanding clause, s 33, was added to the Charter and allowed equality rights to be subject to the legislative override at the behest of governments. Drafted so as to apply notwithstanding s 33, s 28 provides that:

28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Similar to s 28 is s 35(4) of the *Constitution Act, 1982*, which guarantees Aboriginal and treaty rights equally to male and female persons. Although neither section has been subject to extensive judicial consideration, we consider some potential applications of s 28 in Section II.C of this chapter.

For further discussions of the history of ss 15 and 28, see Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 NJCL 35; Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) ch 1; FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000); Bruce Porter, "Expectations of Equality" (2006) 33 SCLR (2d) 23.

While much of the focus on the development of s 15 was on the four equality rights, the concept of discrimination also lies at the heart of s 15(1). Section II of this chapter will review the key cases establishing the test for discrimination, its evolution over time, and how the courts have undertaken the interpretation of the key elements of s 15.

Section III of this chapter will discuss the interplay between s 15(1) and s 15(2). Section 15(2) protects laws, programs, and activities that are aimed at improving the condition of disadvantaged groups. It provides interpretive assistance with the scope and purpose of Charter equality rights by suggesting that ameliorative programs do not violate s 15(1), and it also provides an alternative basis for governments to defend their actions, rather than relying on s 1. As we shall see, however, the Court has looked at the ameliorative nature of laws and policies under both s 15(1) and s 15(2), depending on the nature of the claim at issue and whether it is one of so-called "reverse discrimination" or an underinclusive benefit program.

Another important issue that arises is the interplay between s 15(1) and s 1 of the Charter, which we will review in Section IV of this chapter. Since *Andrews*, the Court has emphasized the importance of keeping s 15 and s 1 analytically distinct. This means that the reasons behind government laws and policies that are alleged to violate s 15 should not be relied on to foreclose the finding of a violation of s 15. To do otherwise would be to import s 1

considerations into s 15, when s 15—unlike s 7 and the principles of fundamental justice—does not have an internal limit apart from “discrimination” and the protected grounds. This is an important issue in terms of who bears the burden of proof as to the reasonableness and rationality of government actions. Section IV will also review some of the nuances in s 1 analysis where there has been a breach of s 15, as well as what sorts of remedies a s 15 violation may demand.

This chapter focuses on two key s 15 decisions as “bookends” in the Court’s development of equality rights doctrine: *Andrews* and *Fraser v Canada (AG)*, [2020 SCC 28](#). These two cases allow us to explore the evolution of many of the core issues in the interpretation and application of s 15, including the test for discrimination; the differences between direct and adverse effects discrimination; the role of grounds under s 15; and the interplay between s 15(1), s 15(2), and s 1. In *Fraser*, Abella J attempted to provide clarity on several issues that have plagued the Court for decades, but the strong dissenting reasons in *Fraser* leave open many questions about the future of s 15 claims. We also include discussion of several s 15 cases between *Andrews* and *Fraser* and post-*Fraser*, exploring issues such as the relative success of claims involving LGBTQ2+ rights and the challenges of applying s 15 in the context of individual and group claims connected to the rights of Indigenous peoples, which involve the intersection of equality and Aboriginal rights.

We review some of the ongoing debates about s 15 throughout this chapter, including divisions in the courts about the test for discrimination and how it should be applied; the interplay between s 15 and s 25 of the Charter, which protects Aboriginal, treaty, and other rights that may conflict with Charter rights; other potential conflicts and overlaps between rights and freedoms, including freedom of religion and the right to be free from discrimination based on sexual orientation, gender identity, and gender expression; and gaps in s 15 jurisprudence, including a lack of cases involving racial discrimination and reproductive rights.

Our aim in this chapter is to ensure that students and other readers come away with an understanding of why s 15 has been “the most difficult right” (McLachlin, “Equality: The Most Difficult Right,” above) for courts and governments. We pose questions throughout about the leading Supreme Court cases we excerpt and their implications for equality rights litigation and government decision making. As you read the cases and notes in this chapter, here are some overarching questions to consider: What are the challenges inherent in s 15 litigation from the claimants’ perspectives? How does this compare with challenges in litigating other Charter rights, or Aboriginal rights claims under s 35 of the *Constitution Act, 1982*? How should governments respond to their s 15 obligations in the context of their legislative, executive, and administrative functions, as well as in the litigation context? Most importantly, can s 15 litigation lead to the sort of legal and social change that “substantive equality” promises and that equality-seeking groups hoped for with the entrenchment of s 15? Are some claims easier than others for courts to accept under s 15—for example, those that require recognition of members of equality-seeking groups rather than redistribution of public resources or other positive action on the part of government? What are the proper roles of courts and governments in responding to systemic inequality in all its manifestations?

II. SECTION 15 FRAMEWORK AND ANALYTICAL APPROACH

In this part, we focus on the earliest s 15(1) case decided by the Supreme Court of Canada—*Andrews*—and the latest major s 15 decision—*Fraser*. The cases in the 30-plus intervening years are briefly noted and excerpted in the notes between these two bookends, as are some of the recurring issues. Cases decided subsequent to *Fraser*, and other recurring issues, are discussed in the notes following *Fraser*.

Because the implementation of s 15 was delayed until three years after the rest of the Charter came into force, it was not until 1989 that the Supreme Court of Canada decided its first case interpreting and applying the equality guarantee. In *Andrews*, the Court set out a three-part approach to s 15, requiring (1) differential treatment (2) on the basis of an expressly prohibited or analogous ground (3) that is discriminatory because it imposes a burden or denies a benefit.

A. THE TEST FOR DISCRIMINATION/PURPOSE OF SECTION 15

Andrews v Law Society of British Columbia

[\[1989\] 1 SCR 143, 1989 CanLII 2](#) (cited to SCR)

[Andrews, a British subject permanently resident in Canada, brought an action for a declaration that the Canadian citizenship requirement for admission to the Law Society of British Columbia violated s 15 of the Charter. In accepting his claim, the Supreme Court evaluated three possible approaches to s 15 and selected the one that seemed to make the most sense of its language and history, as well as the relationship between s 15 and s 1.

The Supreme Court unanimously held that the citizenship requirement violated s 15. Justice McIntyre wrote the principal opinion on the interpretation of s 15. Justice Wilson (Dickson CJ and L'Heureux-Dubé J concurring) and La Forest J wrote separate opinions in which they agreed with McIntyre J's approach to s 15. They disagreed with McIntyre J on the issue of whether the violation was justified under s 1; in their view, the citizenship requirement was not closely linked to candidates' ability to effectively practise law. Justice McIntyre would have upheld the citizenship requirement, using a deferential approach to the state's burden of justifying s 15 violations. While McIntyre J's judgment was ultimately the dissent in a 4–2 ruling, it is the Court's unanimous position on the interpretation of s 15.]

McINTYRE J (Lamer J concurring) (dissenting in part):

[158] This appeal raises only one question. Does the citizenship requirement for entry into the legal profession contained in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, (the "Act") contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

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[163] The Concept of Equality

Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups [164] an obligation to accord equal treatment to others. It is concerned with the application of the law. No problem regarding the scope of the word "law," as employed in s. 15(1), can arise in this case because it is an Act of the Legislature which is under attack. Whether other governmental or quasi-governmental regulations, rules, or requirements may be termed laws under s. 15(1) should be left for cases in which the issue arises.

The concept of equality has long been a feature of Western thought. As embodied in s. 15(1) of the *Charter*, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition. ...

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. ...

[165] [The thought that inequality may result from equal treatment] has been expressed in this Court in the context of s. 2(a) of the Charter in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where Dickson C.J. said at p. 347:

The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C," depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law—and in human affairs an approach is all that can be expected—the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

[166] ... The similarly situated test is a restatement of the Aristotelian principle of formal equality—that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness" (*Ethica Nicomachea*, trans. W. Ross, Book V3, at p. 1131a-6 (1925)).

The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. ...

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[167] ... A similarly situated test focussing on the equal application of the law to those to whom it has application could lead to results akin to those in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. In Bliss, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. She claimed that the *Unemployment Insurance Act*, 1971, violated the equality guarantees of the *Canadian Bill of Rights* because it discriminated against her on the basis of her sex. Her claim was dismissed by this Court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the Act was that of pregnant persons, and within that class, all persons were treated equally. This case, of course, was decided before the advent of the Charter.

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... [T]he [similarly situated] test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may—and to govern effectively—must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern [169] society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?

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[In answering these questions, McIntyre J quoted the articulation of the purposive approach in *Hunter v Southam Inc*, [1984] 2 SCR 145, 1984 CanLII 33 (as discussed in Chapter 17) before setting out the purpose of s 15:]

[171] ... It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component. ...

It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ...".

[172] Discrimination

The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

Discrimination as referred to in s. 15 of the *Charter* must be understood in the context of pre-*Charter* history. Prior to the enactment of s. 15(1), the Legislatures of the various provinces and the federal Parliament had passed during the previous fifty years what may be generally referred to as Human Rights Acts. ...

[173] ... What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551, discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of

employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force." It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. ...

[Turning next to Dickson CJ's discussion of systemic discrimination in *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109, McIntyre J relied upon the following passage from Rosalie S Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984) at 2:]

[174] ...

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ...

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

[Justice McIntyre continued:]

... I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those [175] based on an individual's merits and capacities will rarely be so classed.

... The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights. ...

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[177] Relationship Between s. 15(1) and s. 1 of the Charter

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[178] ... This Court has described the analytical approach to the Charter in *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, and other cases, the essential feature of which is that the right guaranteeing sections be kept analytically separate from s. 1. In other words, when confronted with a problem under the Charter, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. Any justification of an

infringement which is found to have occurred must be made, if at all, under the broad provisions of s. 1. It must be admitted at once that the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis. It is, however, important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her Charter right has been infringed and for the state to justify the infringement.

Approaches to s. 15(1)

[Justice McIntyre discussed three approaches that had been adopted with respect to the interpretation of s 15 and its relationship to s 1. The first, advanced by Peter Hogg in *Constitutional Law of Canada*, 2nd ed (Toronto: Carswell, 1985), proposed that every distinction drawn would be a breach of s 15 and require justification under s 1. Justice McIntyre rejected this approach, saying that it trivialized a fundamental Charter right and deprived the concept of "discrimination" of any content by equating it with "distinction." The second approach, which had been adopted by (then) McLachlin J in the lower court decision—*Andrews v Law Society of British Columbia*, 1986 CanLII 1287, 27 DLR (4th) 600 at 610 (BCCA)—required that the reasonableness and fairness of any distinction drawn by the law be considered under s 15(1). Justice McIntyre rejected this approach because it left only a very minor role for s 1 and departed from the Court's analytical approach to the Charter. Justice McIntyre adopted a third approach that is based on the limitations in the text of s 15(1)—that is discrimination on the basis of prohibited grounds.]

[179] A third approach, sometimes described as an "enumerated or analogous grounds" approach, adopts the concept that discrimination is generally [180] expressed by the enumerated grounds. ...

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The analysis of discrimination in this approach must take place within the context of the enumerated grounds and those analogous to them. The words "without discrimination" require more than [181] a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

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[182] ... The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

Where discrimination is found a breach of s. 15(1) has occurred and—where s. 15(2) is not applicable—any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place

under s. 1. This approach would conform with the directions of this Court in earlier decisions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem.

[Justice McIntyre went on to find that the distinction drawn between citizens and non-citizens imposed a burden by delaying admission to the bar and was therefore discriminatory. See Section II.C for a discussion of the reasons for finding non-citizenship to be an analogous ground.

In addition to concurring with McIntyre J's approach to the interpretation of s 15, Wilson J agreed that non-citizens should have access to s 15. Like McIntyre J, she borrowed a famous phrase from American equal protection law, stating that non-citizens are a "discrete and insular minority" vulnerable to having their interests overlooked in the legislative process (*United States v Carolene Products Co*, 304 US 144 at 152-53, n 4 (1938) as cited in *Andrews* at 151 (Wilson J) and at 183 (McIntyre J)); see Note 4 below.

A majority of the Court found that the *Oakes* test should apply without modification to a s 15(1) violation. For a discussion of the different approaches taken by the judges in *Andrews* to the s 1 question of justification, see Section IV, Note 1.]

NOTES AND QUESTIONS

1. The Supreme Court of Canada adopted a purposive approach to the interpretation of Charter provisions in *Hunter v Southam Inc*, [1984] 2 SCR 145 at 157, 1984 CanLII 33, holding that a judgment about the scope of a particular right can only be made after the Court has "specif[ied] the purpose underlying" the right or "delineate[d] the nature of the interests it is meant to protect" (see Chapter 17, Section II). *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69 at para 117, added that the purpose is to be found in

the character and the larger objects of the *Charter* itself, ... the language chosen to articulate the specific right or freedom, ... the historical origins of the concepts enshrined, and where applicable, [in] the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

In *Andrews*, McIntyre J articulated the purpose of s 15 and the nature of the interests it is meant to protect in accordance with the purposive approach to Charter interpretation, saying that the purpose of the equality guarantee is to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (at 171). As we will see in the following note, for a time the Supreme Court highlighted the underlying values of equal concern and respect, but in later cases it dropped almost all references to the interests being protected.

Justice McIntyre's interpretation of s 15 included a look at its historical origins (as discussed in Section I) and a focus on the language used to articulate the right. Initially, the Court's approach was very text-based. Consider the bifurcated nature of s 15(1), with its first branch specifying four equality rights that are to be enjoyed by every individual without discrimination, and the second branch specifying an open-ended list of the grounds on which discrimination is prohibited. After noting the four basic rights and their reason for inclusion in the text, McIntyre J pointed to the fact they were granted with the direction contained in s 15 itself that they be "without discrimination" (at 172). Justice Wilson, in *R v Turpin*, [1989] 1 SCR 1296 at 1331, 1989 CanLII 98, articulated the interpretation that equality rights were limited by the prohibition on discrimination even more plainly, holding:

The internal qualification in s. 15 that the differential treatment be “without discrimination” is determinative of whether or not there has been a violation of the section. It is only when one of the four equality rights has been denied with discrimination that the values protected by s. 15 are threatened.

It did not take long, however, for the language chosen to articulate the four basic equality rights to be ignored by the courts, leaving the s 15 analysis focused almost entirely on discrimination. A focus on discrimination rather than equality arguably contributes to the under-theorizing of the purpose of the equality guarantee and a less-than-robust understanding of substantive equality. See Mary Eberts & Kim Stanton, “The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence” (2018) 38:1 NJCL 89; James Hendry, “The Current Nature and Measure of the Charter Equality Right” (2012) 31:1 NJCL 25. See also Melina Buckley’s rewrite of *Andrews* for the “Women’s Court of Canada,” a fictional court that has reimagined several s 15 decisions in alternative judgment form: “Reference re: Andrews v Law Society of British Columbia” (2018) 30:2 CJWL 197. What difference might it make if each claim were articulated as a claim to one or more of the four equality rights specified in s 15(1)? Would a greater focus on the specific rights that claimants have—rather than on a right to be free from discrimination—facilitate a broader understanding of equality?

An originalist interpretation for the Charter had been rejected early in *Hunter v Southam Inc* on the basis that a constitution is designed to provide a continuing framework for the legitimate exercise of government power and cannot easily be repealed or amended, with the Court concluding “it must, therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers” (at 155). Originalism is a group of approaches that maintain that the meaning of constitutional provisions is fixed at the time a provision such as the Charter’s s 15 comes into effect. The original intent or meaning—the original intentions of the framers or the “public meaning” of the words at the time—prevails. The purposive approach does include the historical origins of the concepts enshrined in constitutional provisions, but references to the framers’ intent are rare in current s 15 jurisprudence. See Adam M Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of Charter Rights and Their Limits” (2008) 41 SCLR (2d) 331; Kerri A Froc, “Is Originalism Bad for Women? The Curious Case of Canada’s Equal Rights Amendment” (2015) 19:2 Rev Const Stud 237; Kerri A Froc, “A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality,” above. Recall Section I of this chapter and the language advocated by equality-seeking groups in order to support positive rights, and social and economic rights. What are the potential benefits and dangers of an original meaning approach to the interpretation of s 15?

2. Various attempts to elaborate on s 15’s purpose have appeared in the case law, with most elaborations occurring in the decade immediately following *Andrews*. Differences in articulating the purpose of s 15 and the underlying interests to be protected matter because disagreement at this foundational level manifests in different articulations of the test for discrimination and the factors to be taken into account. As we will see, there have been at least four different articulations of the test since *Andrews* (depending on what is counted as a major enough change to be considered a different test) and numerous contentious interpretive factors.

The narrowing effect of a purposive interpretation is illustrated by the judgment of Wilson J, writing for a unanimous Court in *R v Turpin*. That case involved persons charged with murder in Ontario who argued that the *Criminal Code* discriminated against them by denying them the choice of a trial by judge alone, a choice open to accused persons in Alberta. In rejecting the s 15(1) claim, Wilson J said that it was not enough for the claimant to show that they were disadvantaged by the challenged law. They had to show the distinction in the legislation defined a group that was disadvantaged in other ways, and “province of residence” did not identify a disadvantaged group in the context of this case. Justice Wilson tied the reasons

for denying the claim to the purpose of s 15(1) by stating that accepting the claim would not "advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (at 1333). In *Turpin*, the purpose of s 15 was said to be to remedy or prevent "discrimination against groups suffering social, political, and legal disadvantage in our society" (at 1333).

In the mid-1990s, the fundamental purpose of s 15 was articulated as the protection of "human dignity," putting the focus on the underlying interest to be protected. Justice Cory, in *Egan v Canada*, [1995] 2 SCR 513 at 584, 1995 CanLII 98, stated that the equality guarantee "recognizes and cherishes the innate human dignity of every individual." In *Egan*, L'Heureux-Dubé J elaborated on that purpose in the following words (at 545):

[A]t the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s.15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.

Perhaps the lengthiest discussion of the purpose of s 15 can be found in the unanimous decision in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 675. After reviewing what previous cases had said about the purpose, Iacobucci J continued (at para 51):

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

Justice Iacobucci elaborated on the underlying interests associated with human dignity, stating that "[i]t is concerned with the realization of personal autonomy and self-determination ... [and] physical and psychological integrity and empowerment" (at para 53). But he went on to emphasize more subjective aspects as well, saying that human dignity "means that an individual or group feels self-respect and self-worth" and "concerns the manner in which a person legitimately feels when confronted with a particular law" (at para 53). See Rahool Parkash Argarwal, "An Autonomy-Based Approach to Section 15(1) of the Charter" (2006) 12:1 Rev Const Stud 83 for an argument that basic human dignity can be understood as the more precise concept of personal autonomy.

To what extent does human dignity explain why certain types of differential treatment are unfair or harmful and therefore constitute discrimination? Are there types of systemic inequality that a focus on human dignity might leave out? Is a focus on underlying interests such as human dignity and autonomy more helpful to articulating a test for s 15 than a focus on the

goal of substantive equality? Why or why not? For commentary on the role of human dignity in s 15, see Denise G Réaume, "Discrimination and Dignity" (2002-2003) La L Rev 645; Sophia R Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291; James R Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 Sask L Rev 1; Denise G Réaume, "Dignity, Equality, and Comparison" in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013).

The purpose of s 15 has also been articulated to include equal citizenship and full participation in society, but less often than one might expect of a constitutional document in a democratic society. For one example, see *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 at paras 73-74 (also excerpted in Section II.C). A reluctance to articulate full participation in society as the goal of s 15 may be tied to the courts' hesitation to embrace social and economic rights. See Fay Faraday, "Access to Social Programs: Substantive Equality Under the Charter of Rights" (2006-2007) 21 NJCL 111; see also the discussion of positive rights in Section II.B, Note 6 following *Eldridge*.

In these articulations of the purpose of s 15, equality has been seen as instrumental to other rights or values, rather than as an intrinsic good in and of itself. However, the Supreme Court has on occasion attributed intrinsic value to the equality guarantee. See Jonnette Watson Hamilton & Dan Shea, "The Value of Equality: End, Means or Something Else?" (2010) 29 Windsor Rev Legal Soc Issues 125.

3. When the Court signalled a new approach to s 15(1) in *R v Kapp*, 2008 SCC 41, the purpose of s 15 began to focus less on its underlying interests than on its goal, the promotion of substantive equality. According to McLachlin CJ and Abella J (at para 16):

Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

In *Fraser*, the Court considered a claim of sex discrimination by female RCMP officers in the context of their pension rights. Justice Abella, writing for the majority, identified substantive equality as "the philosophical premise of s. 15" (at para 40), the "animating norm" of s 15 (at paras 42, 48), and "the foundational premise of this Court's s. 15 jurisprudence" (at para 134).

In rejecting the "similarly situated test," Andrews rejected formal equality and embraced substantive equality, albeit without using the latter term. For differences among the concepts of formal equality, substantive equality, equity, and diversity, see Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 SCLR (2d) 245; Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010).

The term "substantive equality" was first used by the Court in L'Heureux-Dubé J's dissent in *Symes v Canada*, [1993] 4 SCR 695 at 786, 1993 CanLII 55 and then affirmed more broadly by a majority of the Court in *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 1997 CanLII 327 and *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (both excerpted in Section II.B). These two cases were the first to challenge the government's failure to take action to remedy disadvantage. They were the first Supreme Court decisions in which the obligation to promote equality, and not simply prevent discrimination, were given some real effect.

In two pay equity cases decided in 2018—*Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 and *Centrale des syndicats*

du Québec v Quebec (AG), 2018 SCC 18—and in *Fraser*, we see the majority and dissent divide sharply on the usefulness of recognizing substantive equality as “the foundational premise of this Court’s s. 15 jurisprudence” (*Fraser*, Abella J at para 134).

Is the articulation of the purpose of s 15 a precondition to articulating a test to identify violations of the equality guarantee? Could the Court’s continual reformulation of the test be avoided if the Court focused more of its attention on the purpose? Would a consensus on the underlying interests being protected be a better way forward?

4. In *Andrews*, both McIntyre J (at 183) and Wilson J (at 151) used the phrase “discrete and insular minority,” a phrase coined by Stone J of the United States Supreme Court (USSC) in *United States v Carolene Products Co*, 304 US 144 at 152–53, n 4, 58 S Ct 778 (1938), as part of that country’s equal protection jurisprudence. The phrase was Stone J’s way of describing groups, such as African Americans, who were vulnerable to the prejudices of those in power. However, the term can be misleading because vulnerable groups are not necessarily discrete and insular. As Dale Gibson argues, the phrase is best understood as a way of describing those groups, like non-citizens, that suffer a relative lack of political power: *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 151.

Andrews discussed other concepts found in American constitutional law, including that of adverse effects discrimination (discussed in this section, Note 6 after *Fraser*) and the “similarly situated” approach.

The major source of American constitutional protection for equality is the equal protection clause of the 14th amendment of the United States Constitution, which simply states: “No State shall ... deny to any person within its jurisdiction the equal protection of the laws” (s 1). That clause—and the social, political, economic, cultural, ideological, and historical context of the law—is very different from the Charter’s s 15. As Colleen Sheppard has explained, the starting premise of US constitutional law is the idea that equality means “sameness of treatment”: see “Equality in Context: Judicial Approaches in Canada and the United States” (1990) 39 UNBLJ 111 at 113–15, 122. The context for this interpretation is that country’s history of slavery, segregation, and the denial of civil and political rights based on race. Equality as sameness of treatment was the response to injustice in the form of differential treatment. What emerged in the doctrine based on this history was the “strict scrutiny test,” based on the idea that race was a “suspect class” and almost never a legitimate basis of legislative line-drawing (Sheppard at 114).

The strict scrutiny test was later relaxed. Instead of providing an absolute right to sameness of treatment, it provided protection only against arbitrary or unreasonable differences in treatment, most commonly measured by the “similarly situated” test. That test—discussed and rejected by McIntyre J in *Andrews*—interpreted the equal protection clause to require that everyone who was similarly situated, with respect to the purpose of the law, be treated similarly. In addition, the government must show that the challenged classification serves a compelling interest and that the classification is necessary to serve that interest.

Although distinctions involving suspect classifications such as race, national origin, and religion, as well as distinctions that burden certain fundamental rights (such as the right to vote) are still subject to strict scrutiny, the USSC developed two other levels of scrutiny of claims made under the equal protection clause: intermediate scrutiny and rational basis review. The intermediate level of scrutiny of “quasi-suspect” classifications applies to distinctions made on the basis of sex or illegitimacy. For those grounds, the challenged classification must serve an important government interest but only has to be substantially related to serving that interest. Most classifications are only subject to rational basis review by courts. This minimum level of scrutiny applies to distinctions made, for example, on the basis of sexual orientation and disability. In such cases, the government only needs to show that the challenged classification is rationally related to serving a legitimate government interest. See, for example, Barry Sullivan, “Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens” (2018) 20 Eur JL Reform 181; Katie R Eyer, “The Canon of Rational Basis Review” (2018) 93:3 Notre Dame L Rev 1317.

Although the USSC developed a jurisprudence in which the level of scrutiny depended on the ground of discrimination, as we will see in Section II.C of this chapter, Canadian courts have not applied different levels of scrutiny to different grounds under s 15.

Another major difference between the United States and Canada is that the equal protection clause of the former has been held to prohibit only intentional discrimination (*Washington v Davis*, 426 US 229, 96 S Ct 2040 (1976)). At a very general level, when the law does not employ a racial classification on its face, an equality claimant must prove intentional malice or *animus* on the part of the state actor. However, challenges to affirmative action programs designed to ameliorate racial inequality are governed by what the American jurisprudence and commentary usually calls the norm of “colourblindness,” which renders the government’s good motives irrelevant. See Ian Haney-Lopez, “Intentional Blindness” (2012) 87:6 NYU L Rev 1779; Michael Selmi, “Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric” (1997) 86:2 Geo LJ 279. For discussion of Canada’s approach to affirmative action, that is, to ameliorative programs under s 15(2) of the Charter, see Section III.

5. As previously noted, in *Andrews*, McIntyre J organized his analysis of s 15(1) around three questions: (1) Has there been a denial of one of the four equality rights set out in s 15(1)? (2) Is there discrimination? (3) Is the discrimination based on enumerated or analogous grounds? Unlike the focus on the four types of equality rights, the focus on grounds has been maintained. For the answer to the second question, McIntyre J relied on the understanding of discrimination (quoted above) that focused on impact or effect (thereby recognizing both direct and adverse effects discrimination), on comparison with others, and on benefits or burdens. To a greater or lesser extent, this focus has dominated the various articulations of the tests used to analyze equality claims ever since.

A majority of the Court in *Andrews* also decided that the *Oakes* test should apply without modification to s 15(1) violations. For further discussion of the equality guarantee and s 1, see Section IV.

For commentary on *Andrews*, see, for example, Richard Moon, “A Discrete and Insular Right to Equality: Comment on *Andrews v Law Society of British Columbia*” (1989) 21 Ottawa L Rev 563; Anne F Bayefsky, “A Case Comment on the First Three Equality Rights Cases Under the Canadian Charter of Rights and Freedoms: *Andrews*, Worker’s Compensation Reference, *Turpin*” (1990) 1 SCLR (2d) 503; Marc Gold, “Comment: *Andrews v Law Society of British Columbia*” (1988-1989) 34 McGill LJ 1063; Mary Eaton, “*Andrews v Law Society of British Columbia*” (1990) 4 CJWL 276.

6. The apparent consensus in the Court’s approach to s 15 in *Andrews* and subsequent cases came undone in 1995 in a trilogy of cases. Three different perspectives on the proper interpretation of s 15 were on display in each case.

In *Miron v Trudel*, [1995] 2 SCR 418, 1995 CanLII 97, the Court held, by a 5–4 majority, that the denial of automobile accident insurance benefits to an unmarried opposite-sex couple constituted discrimination on the basis of marital status and could not be justified. In *Egan v Canada*, [1995] 2 SCR 513, 1995 CanLII 98, the Court held, again by a 5–4 majority, that the denial of an old age spousal allowance to same-sex couples was discriminatory but justified under s 1. Nevertheless, *Egan* was a milestone because the Court was unanimous in recognizing for the first time that sexual orientation is an analogous ground of discrimination. In *Thibaudeau v Canada*, [1995] 2 SCR 627, 1995 CanLII 99, the Court dismissed a challenge to the rules in the *Income Tax Act*, RSC 1985, c 1 (5th Supp) which permitted the parent who paid spousal and child support—98 percent of whom were men—to deduct it from income, while requiring the parent receiving support—98 percent of whom were women—to add the amount to income.

In the trilogy, one approach—that of McLachlin, Cory, Iacobucci, and Sopinka JJ—retained the analysis most resembling that developed in *Andrews*. A second approach, espoused only by L’Heureux-Dubé J, recommended that the focus on grounds be abandoned in favour of a focus on the nature of the claimant group and their interests. A final approach—that of Lamer

CJ and Gonthier, La Forest, and Major JJ—added a “relevance” element to the *Andrews* test. They held that to prove a violation of s 15, the personal characteristic at issue must be irrelevant to the functional values underlying the challenged law. On this view, because the functional value underlying the laws at issue in *Miron* and *Egan* was the support of marriage, it followed that marital status and sexual orientation were relevant, and the laws, therefore, were not discriminatory. This approach was criticized almost immediately on the basis that it was a formal equality approach, and it brought s 1 considerations about the rationality of the law’s means in relation to its purpose into s 15. Notwithstanding the rejection of the addition of relevance by a majority of the Court, relevance continues to resurface as a factor in equality cases.

7. Despite the fractures revealed by the equality trilogy, in two cases decided in the late 1990s the Court illustrated an expansive understanding of discrimination, rigorous and contextualized effects-based analysis, and a willingness to use s 15(1) to promote equality and not simply prevent discrimination. These two cases—*Eldridge* and *Vriend*—both involved adverse effects discrimination, where the distinction on protected grounds is created not by line-drawing on the face of the law but by the law’s impact. These two cases—the only successful examples of adverse effects discrimination claims decided by the Supreme Court until 2020—are excerpted and discussed in Section II.B.

8. Between 1999 and 2008, the *Law* case, with its focus on human dignity and contextual factors, replaced *Andrews* as the leading case on s 15. Justice Iacobucci presented the *Law* guidelines as a summary of the *Andrews* test as refined in subsequent jurisprudence, but most commentators and courts were of the view that *Law* introduced a new test.

The claimant in the case, Nancy Law, was 30 years old when her husband died. Because she was under the age of 35 years at the time of his death, was not disabled, and did not have any dependent children, she was precluded from receiving survivor’s benefits under the Canada Pension Plan until she reached the age of 65.

The unanimous decision written by Iacobucci J established a three-step inquiry for claims of discrimination (at para 88):

- (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
- (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

Justice Iacobucci emphasized that the appropriate perspective to use in establishing discrimination is that of the claimant in the selection of comparators in step one and in evaluating the impact of the differential treatment in step three (at paras 59–61). However, the analysis is not entirely subjective. According to *Law* (at para 59), “the larger context of the legislation in question,” as well as society’s treatment of the claimant and others with similar characteristics or circumstances in the past and the present must support the claim. The question of whose perspective and how much context belongs in the s 15(1) analysis has become controversial recently; see Note 2 following *Fraser* in this Section.

The question of discrimination—step three and normally the key issue—focused on whether the claimant could show a violation of their human dignity. The relevant point of view was that of the reasonable person in circumstances similar to those of the claimant. Contextual factors were made relevant to this question and, although not intended to be an exhaustive list, the four factors listed by Iacobucci J became the four contextual factors that helped to determine if s 15(1) had been infringed during the *Law* era (at para 88, emphasis added):

- (A) *Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.* The effects of a law [on] individuals or groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities” should

- always be a central consideration. Although ... association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative ... , the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.
- (B) *The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.* ... [I]t will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.
- (C) *The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.* An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where [their] exclusion ... corresponds to the greater need or the different circumstances experienced by the [targeted] disadvantaged group This factor is more relevant [for claims by] more advantaged member[s] of society.
- (D) *The nature and scope of the interest affected by the impugned law.* The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

Despite Iacobucci J's warning that it was "inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula" (at para 88), subsequent decisions applied the three-plus-four-step test in mechanical, formalistic fashion. This was problematic, in part, because *Law* imported some s 1 considerations into s 15, particularly through the second contextual factor of correspondence, which proved over the years to be the most important of the four contextual factors. Paying attention to the correspondence between the ground and the claimant's actual circumstances inevitably involved paying attention to the purpose of the challenged law or policy and a consideration of whether the differential treatment on a prohibited ground was relevant to the achievement of that purpose.

The abstract, subjective, and malleable nature of human dignity was another problem with the *Law* test. The effect of *Law* was to shift the focus of equality analysis, which *Andrews* had placed on disadvantage—a matter of structural and social relations—to a focus on dignity, defined by *Law* as feelings of "self-respect and self-worth" (at para 53). The criticisms of *Law* were acknowledged by the Supreme Court in *Kapp* in 2008, but for the nine years that followed the *Law* decision, human dignity and the contextual factors played major roles in s 15 analyses.

For commentary on *Law*, see, for example, June Ross, "A Flawed Synthesis of the Law" (2000) 11 Const Forum Const 74; Deborah M McAllister, "Section 15(1)—The Unpredictability of the Law Test" (2003-2004) 15 NJCL 35; Christopher Bredt & Adam Dodek, "Breaking the Law's Grip on Equality: A New Paradigm for Section 15" (2003) 20 SCLR (2d) 33; Donna Greschner, "Does 'Law' Advance the Cause of Equality?" (2001) 27 Queens LJ 299.

9. *Kapp* involved a challenge to the federal government's Aboriginal Fishing Strategy, which included a 24-hour priority license to fishers from three First Nations along the Fraser River. A group of mostly non-Aboriginal commercial fishers argued that this priority violated their equality rights because it discriminated on the basis of race. *Kapp* is usually considered most significant for its approach to s 15(2), which is discussed in Section III of this chapter, but the case made some important changes to the framework for analyzing s 15(1) claims.

Chief Justice McLachlin and Abella J, writing for a unanimous Court on the s 15 issue, abandoned the human dignity test that *Law* had made the focus of equality analysis and purported to restore the approach in *Andrews* while retaining *Law*'s four contextual factors:

[17] The template in *Andrews*, as further developed in a series of cases culminating in *Law* ... established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does

the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[18] In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. ...

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors

• • •

[21] ... [S]everal difficulties have arisen from the attempt in *Law* to employ human dignity as a legal test. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. ...

[22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews*—combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

Kapp's understanding of the meaning of discrimination was narrower than *Andrews*' focus on disadvantage or *Law*'s concern with human dignity. *Kapp* was interpreted as limiting the inquiry in the second step to a search for the perpetuation of prejudice or stereotyping. Disadvantage was mentioned (see para 24), but its role alongside prejudice and stereotyping was minimized in *Kapp* and in cases heard subsequent to *Kapp* and before Quebec (AG) v A, [2013 SCC 5](#).

In *Kapp*, the majority of the Supreme Court did not discuss the appropriateness of the ground of race, or whether Indigeneity is a subset of race, despite the fact that *Kapp* was the first case in which the Court found a violation of s 15 based on the ground of race. The majority simply accepted the race-based argument without any discussion of s 35 of the *Constitution Act, 1982* or s 25 of the *Charter* and how those provisions acknowledge the unique place of Indigenous peoples within the Canadian state. For an argument that *Kapp* should not have been treated as a case about racial differentiation in the service of an ameliorative program, see Sonia Lawrence's judgment for the Women's Court of Canada, "R v Kapp" (2018) 30:2 CJWL 268. For further discussion of grounds and Indigeneity, see Section II.C, Note 4.

For other commentary on *Kapp*, see Margot E Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sandra Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: Butterworths, 2010) at 183; Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2010) 47:4 Alta L Rev 927; Sophia Moreau, "R. v. *Kapp*: New Directions for Section 15" (2008-2009) 40 Ottawa L Rev 283.

10. The Court's next major s 15(1) case—a unanimous decision co-authored by McLachlin CJ and Abella J—was *Withler v Canada* (AG), [2011 SCC 12](#), which is often seen as a companion case to *Kapp*. The surviving spouses of federal civil servants and Canadian Forces members challenged the reduction in the supplementary death benefits they received after their spouses died on the basis of age, a reduction that applied only to the surviving spouses of older plan members.

Withler confirmed the continued relevance of Law's four contextual factors and added a fifth factor that has proven to be divisive in some of the Court's most recent cases. Chief Justice McLachlin and Abella J held (at para 3) that where

the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries.

A large degree of deference to the government was shown, with the Court indicating that "allocation of resources and particular policy goals that the legislature may be seeking to achieve" are relevant in the context of large benefit schemes (at para 67).

This new factor appeared to import s 1 considerations about balancing interests and social policy goals into s 15, departing from the principle in *Andrews* that s 15 and s 1 considerations must be kept distinct. In *Withler* itself, the Court found that the age distinction was not discriminatory because the central consideration was the overall purpose of the benefit scheme, the allocation of government resources, and legislative policy goals. The Court also held that the reduced benefits did not fail to account for the claimant's actual needs and circumstances when their situation was compared to that of the beneficiaries of the broader benefit scheme.

Withler's approach to comparative analysis under s 15(1) was also significant and has prevailed. The s 15(1) equality right had been recognized as a comparative concept from the beginning (*Andrews* at 164). As Dianne Pothier noted in "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" (2006) 33 SCLR (2d) 135, how comparisons are made and whether they can take account of difference has a great deal to do with whether an equality analysis contributes to the goal of substantive equality. In the 2004 case of *Hodge v Canada (Minister of Human Resources Development)*, [2004 SCC 65](#) at para 23 (involving a claim for a Canada Pension Plan survivor's pension by the woman who had been in a common law relationship with the deceased but had separated from him before his death), the Court had asserted what came to be known as the "mirror comparator" approach:

The appropriate comparator group is the one which mirrors the characteristics of the claimant ... relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.

Hodge lost her claim on the ground of marital status because the Court compared her situation as a former common law spouse to that of a divorced spouse (who was ineligible for a survivor's pension) rather than to that of a separated spouse (who was eligible).

Shortly after that decision, the Court repeated the need for a "mirror comparator" in *Auton (Guardian ad litem of) v British Columbia* (AG), [2004 SCC 78](#). In that case, parents of autistic children sued for provincial government funding of a specific applied behavioural therapy that

was not provided by doctors or hospitals and was therefore only funded on a discretionary basis. A funding difference based on who provided the therapy arguably disproportionately failed to meet the needs of persons with disabilities. Chief Justice McLachlin, writing for a unanimous Court, held that there was no violation of s 15(1) because the benefit claimed was not one provided by law and went on to specify the appropriate comparator in the following words (at para 55):

[A] non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.

This level of detail in a comparator “all but guarantees there will be no one else in the mirror to serve as the basis for an equality argument” (Pothier at 147)—in other words, there will be no one “similarly situated.” Both *Hodge* and *Auton* illustrate that substantive equality may require more generality in comparators in order that analogies can be drawn. For further commentary, see Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006) 24 Windsor YB Access Just 111; Sophia Reibetanz Moreau, “Equality Rights and the Relevance of Comparator Groups” (2006) 5 JL & Equality 81.

In *Withler*, McLachlin CJ and Abella J took note of the criticism of the mirror comparator approach, admitting that it might have resulted in formal equality due to the focus on comparing the treatment of those who were similarly situated, and acknowledging that it could make claims based on intersecting grounds of discrimination more difficult. As a result, they adopted a more flexible approach to comparison. At the first stage of the *Kapp* test, there was no need to identify a comparator group if the claimant established a distinction based on one or more protected grounds. However, this would be difficult if the claim was one of adverse effects discrimination, where the law on its face treated everyone the same but had an adverse impact on a particular group. In such cases, McLachlin CJ and Abella J said (at para 64) that claimants “will have more work to do” as they may need to present evidence of historical or sociological disadvantage to show how the law imposed a burden or denied a benefit to them relative to others. For commentary on *Withler*, see Jennifer Kosan & Jonnette Watson Hamilton, “Meaningless Mantra: Substantive Equality After *Withler*” (2011) 16:1 Rev Const Stud 31; Patrick J Monahan & Chanakya Sethi, “Constitutional Cases 2011: An Overview” (2012) 58 SCLR (2d) 1 at 31-36.

11. The 2013 decision of the Supreme Court in Quebec (*AG v A*, [2013 SCC 5](#)), signalled the beginning of a fourth reconfiguration of the analytical approach to s 15(1). This case involved the exclusion of *de facto* spouses from Quebec’s *Civil Code* provisions dealing with spousal support and property division on the breakdown of relationships. These provisions were available to spouses who were married or in a civil union. A 5–4 majority found that the exclusion of *de facto* spouses violated s 15(1). Justice Abella wrote only for herself, but four other judges indicated they agreed with her on the s 15(1) issue. The dissent of LeBel J, concurred in by three other judges, found no violation of the equality guarantee. However, McLachlin CJ held that the violation was justified under s 1, making no (unjustified) discrimination the 5–4 majority decision on the outcome. The influence of this decision was arguably diminished by the divisions within the Court and the difficulty of identifying a majority.

Nevertheless, Abella J made several points in *Quebec v A* that were developed in subsequent cases to become the latest approach to s 15(1). In reviewing the *Kapp/Withler* approach, she indicated that the Court’s references to prejudice and stereotyping were not intended to create a new s 15(1) test, nor to impose additional requirements on equality claimants. Instead, stereotyping and prejudice were to be seen as only two of the indicia relevant to whether there was a violation of substantive equality. The s 15(1) majority seemed to accept that discrimination may involve other harms and focused its analysis on broader

questions of disadvantage. Justice Abella also introduced the idea of “arbitrary disadvantage” when she wrote (at para 331) that

Kapp and *Withler* guide us … to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group.

12. *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30](#), a unanimous decision authored by Abella J, clarified the changes made in *Quebec v A*. The community election code adopted by the First Nation to govern elections for the positions of Chief and Band Councilors restricted eligibility for these positions to persons who had at least a Grade 12 education or its equivalent. Louis Taypotat, who had previously served as Chief for a total of 27 years, was disqualified from standing for election because he did not meet the new education minimum, which he challenged in an application for judicial review. The Supreme Court held that the adverse effects discrimination claim failed at the grounds stage due to evidentiary deficiencies. See the discussion of adverse effects and the ground of race in Sections II.B, Note 7 following *Eldridge* and II.C, Note 4 of this chapter.

Justice Abella built upon her own judgment in *Quebec v A*, reformulating the test under s 15(1) as an inquiry into “whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group” (at para 16; emphasis omitted). *Taypotat* therefore continued the shift away from prejudice and stereotyping—neither of which were mentioned in this judgment—and toward historical disadvantage. However, the case emphasized “arbitrary disadvantage” as the focus of the second step of the analysis. While Abella J used “arbitrary” as a synonym for “discriminatory,” the most common understanding of arbitrary is “not based on reason or evidence.” Commentators expressed concern that identifying “arbitrary disadvantage” as the harm risks importing s 1 justifications about purposes and the means for achieving those purposes into s 15.

Justice Abella also returned to two of the four contextual factors developed in *Law*. First, she noted that a law that perpetuates arbitrary disadvantage fails to respond to group members’ “actual capacities and needs” (at para 20)—the correspondence factor from *Law* which was critiqued because it requires a focus on the government’s objectives and their link to the group’s characteristics. Second, Justice Abella focused on “pre-existing disadvantage,” *Law*’s first contextual factor, raising a question about the necessity for claimants to prove historical disadvantage.

For more on *Taypotat*, see Sections II.B, Note 3 following *Eldridge* and II.C, as well as Section III, Note 5 in connection with s 15(2). For commentary on *Quebec (AG) v A* and *Taypotat*, see, for example, Jonnette Watson Hamilton & Jennifer Koshan, “*Kahkewistahaw First Nation v Taypotat: An Arbitrary Approach to Discrimination*” (2016) 76 SCLR 243; Alicja Puchta, “*Quebec v A* and *Taypotat*: Unpacking the Supreme Court’s Latest Decisions on Section 15 of the Charter” (2018) 55:3 Osgoode Hall LJ 665; Colleen Sheppard & Mary Louise Chabot, “*Obstacles to Crossing the Discrimination Threshold: Connecting Individual Exclusion to Group-Based Inequalities*” (2018) 96:1 Can B Rev 1.

In *Taypotat*, like other unanimous and significant Supreme Court equality decisions—including *Law*, *Kapp*, and *Withler*—the s 15 claim was denied. Is it perhaps easier for a nine-judge bench to agree on unsuccessful claims?

13. In *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#) and *Centrale des syndicats du Québec v Quebec (AG)*, [2018 SCC 18](#)—the Court’s companion pay equity decisions—the unanimity evident in *Taypotat* was gone. The Court was badly split in its analysis, and the substance of these disagreements continued into the Court’s 2020 decision in *Fraser* and beyond.

Despite the lack of consensus, *Alliance* is a significant case because it was the first time that women won a sex-based equality claim in the Supreme Court, and their claim involved a challenge to Quebec’s attempts to deal with systemic gender-based wage inequalities. The

1996 version of the *Pay Equity Act* created a continuous obligation on public and private employers with ten or more employees to monitor pay equity and make wage adjustments to achieve it. Employees and their unions could enforce these obligations through complaints to the Pay Equity Commission, which had the power to order retroactive employee compensation. Quebec amended its *Pay Equity Act* in 2009 because of "widespread non-compliance" (*Alliance* at para 16). The 2009 amendments replaced employers' continuous obligations to implement pay equity with a system of pay equity audits to be conducted every five years. The amendments also removed the possibility of retroactive employee compensation unless an employer acted in bad faith, arbitrarily, or with discrimination. The claimants' challenge to the 2009 amendments led to a 6–3 majority decision in *Alliance*, authored by Abella J, which found the amendments violated s 15(1) and could not be justified under s 1. Those in dissent—Côté, Brown, and Rowe JJ—found no violation of s 15(1) and, alternatively, that the legislation was protected under s 15(2).

The majority in both *Alliance* and *Centrale* clarified and simplified the test for proving a breach of s 15(1), and affirmed that Quebec *v A* and *Taypotat* had signalled a move away from the *Kapp* approach. In both cases, the majority decisions avoided *Taypotat's* problematic language of "arbitrary disadvantage," as well as the importation of Law's correspondence factor into the articulation of step two. Instead, Abella J formulated the test for a violation of s 15 (1) in the following terms in *Alliance* (at para 25):

The test for a *prima facie* violation of s. 15 proceeds in two stages: Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; if so, does the law impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating ... disadvantage."

The majority in *Alliance* had no problem finding a distinction based on sex in the legislation that targeted systemic pay discrimination against women. They also found the challenged amendments perpetuated women's pre-existing disadvantage by making employers' obligations episodic and partial rather than continuous, by removing the possibility of retroactive employee compensation in most cases, and by denying access to the information needed to challenge employers' decisions.

The dissent in *Alliance* retained the correspondence factor from *Taypotat's* articulation of the s 15(1) test. They also created another hurdle in the first step of the test by requiring consideration of whether the distinction was disadvantageous or prejudicial. In the second step of the test, the dissent brought back all four of Law's contextual factors. Relying heavily on the amelioration factor, they argued that the legislation as a whole did not perpetuate existing disadvantage but instead ameliorated it. They also considered the ameliorative nature of the program under s 15(2), as discussed in Section III below.

In *Centrale*, the claimants challenged a provision in the *Pay Equity Act* that created a six-year delay in implementing pay equity for women in workplaces without male comparators. In a 5–4 decision on s 15, again written by Abella J, the majority found that the delay in implementing pay equity was a violation of s 15(1), but all members of the majority except McLachlin CJ found that the violation was justified under s 1. Justice Wagner joined the three judges who had dissented in *Alliance* in finding no breach of s 15(1). In the result, the Court ruled against the claimants 8–1.

In *Centrale*, the majority applied the test from *Alliance* and found that the impugned provision created a distinction based on sex. They also found the distinction was discriminatory because it denied women access to remedies to combat pay inequality. However, the delay was seen as justified under s 1 by all but McLachlin CJ (for further discussion, see Section IV).

The s 15 dissent in *Centrale* reiterated the *Kapp* test but, unlike their previous dissent in *Alliance*, did not require proof of disadvantage or prejudice at step one. They again used Law's four contextual factors in the second step. In applying their modified *Kapp/Law* test, the dissent rejected the claim of sex-based discrimination. In their view, the fact that the Act did not

cover the claimants (because they occupied positions that had no ready male comparators) was a distinction related to their occupation, which is not a protected ground under s 15. As a result, Wagner, Côté, Brown, and Rowe JJ found no discrimination.

The pay equity cases revealed a serious split among the members of the Court on at least four issues: (1) the need to prove disadvantage in the first step of the test, at least in some cases; (2) the contrasting approaches to comparators; (3) the role of Law's four contextual factors; and (4) more generally, the question of positive and negative Charter rights. The latter issue was raised in a discussion by both the majority and the dissent about the significance of the fact that the Quebec government did not cause pay discrimination against women. The existence of positive obligations on government to redress social inequalities, a long-standing debate in equality jurisprudence, is discussed in Section II.B, Note 6 following *Eldridge*.

For more about the pay equity cases, see Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94 SCLR (2d) 301; Jonnette Watson Hamilton & Jennifer Kosan, "Equality Rights and Pay Equity: Deja Vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1. See also Section III on the Court's differing approaches to s 15(2) in *Alliance*.

Fraser v Canada (AG)

2020 SCC 28

[*Fraser* involved an adverse effects discrimination claim, the first successful adverse effects discrimination claim since *Vriend* and *Eldridge* in the 1990s. The claimants—retired RCMP officers—enrolled in the RCMP's job-sharing program in the 1990s after returning from maternity leave because they were unable to find childcare that could enable them to continue to work full-time. RCMP members on temporary leave without pay could elect to contribute to the pension fund on their return to full-time service and, by doing so, "buy back" pension benefits by paying both employee and employer contributions for the leave period into the pension fund. Those that the relevant regulations classified as part-time workers—including job sharers—were not entitled to buy back pension benefits when they returned to full-time service, leaving job-sharing participants with permanently reduced pensions. The vast majority of members who enrolled in the program were women with children. The claimants sued on the basis that the plan, which was neutral on its face, had a disproportionate impact on women with caregiving responsibilities.

The Federal Court denied the claim on the basis there was not enough evidence that job-sharing was disadvantageous as compared to unpaid leave, and, even assuming it was disadvantageous, the adverse effects were the result of the claimants' choice to job-share. The Federal Court of Appeal denied the appeal, holding that the claimants "were not denied buy-back rights based on their personal characteristics of being female RCMP members with young children, but rather because they elected to job-share as opposed to taking care and nurturing leave": *Fraser v Canada (AG)*, 2018 FCA 223 at para 53. They were successful in the Supreme Court, with Abella J writing for the 6–3 majority.

Justices Brown and Rowe dissented on the basis that the distinction between full-time RCMP officers and those in job-sharing arrangements—a distinction they agreed was a distinction based on sex—was not "arbitrary" because it was related to their employment status. In addition, Brown and Rowe JJ found that any disadvantage the claimants faced was not caused by the impugned provisions, but by the unequal division of household and family responsibilities, and other social circumstances. Looking at the larger benefit scheme surrounding the program, they also

relied on *Withler* to take into account the ameliorative impact of that scheme in determining whether the impugned provisions were discriminatory. Their reliance on the government's ameliorative purpose was tied to their deference to government action that intended to accommodate the claimant's "actual capacities and needs"—the correspondence factor. In addition, because Brown and Rowe JJ found that governments have no positive obligation to address systemic discrimination; incremental action by government with an ameliorative purpose in mind was enough for compliance with s 15. Finally, as noted above, this dissent attacked the goal of substantive equality, saying that it had become "an open-ended and undisciplined rhetorical device by which courts may privilege, without making explicit, their own policy preferences" (at para 146).

In a separate and much narrower dissent, Côté J found that the claim failed on the first step of the test for s 15(1) because the distinction was not based on the ground of sex and there was insufficient evidence for the ground of family or parental status to be recognized as analogous.]

ABELLA J (Wagner CJ and Moldaver, Karakatsanis, Martin, and Kasirer JJ concurring):

[27] Section 15(1) reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups (*Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 332; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20). To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:

- on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
- imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. ...

[28] Ms. Fraser does not suggest that the negative pension consequences of job-sharing are explicitly based on sex. Rather, she claims that they have an adverse impact on women with children.

[29] ... As Prof. Colleen Sheppard notes:

Why is it so critical to expand on our understanding of adverse effect discrimination? If we do not, there is a significant risk that discrimination embedded in apparently neutral institutional policies, rules, or procedures will not be recognized as discriminatory. This risk is accentuated by the necessity in anti-discrimination law to connect the experience of exclusion, harm, prejudice, or disadvantage to a recognized ground of discrimination. ... We need a sophisticated and coherent theory of adverse effect discrimination to assist claimants, lawyers, and adjudicators with the complexities of the manifestations of systemic discrimination. ("Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2001), 46 *McGill L.J.* 533, at p. 542)

[30] It is helpful to start by defining the concept. Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground Instead of explicitly singling out those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage

[31] Increased awareness of adverse impact discrimination has been a "central trend in the development of discrimination law," marking a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups (Denise G.

Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001), 2 *Theor. Inq. L.* 349, at pp. 350-51 ...). Accompanying this shift was the recognition that discrimination is "frequently a product of continuing to do things 'the way they have always been done,'" and that governments must be "particularly vigilant about the effects of their own policies" on members of disadvantaged groups (Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020), 94 *S.C.L.R.* (2d) 301, at p. 310; Sophia Moreau, "The Moral Seriousness of Indirect Discrimination," in Hugh Collins and Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law* (2018), 123, at p. 145).

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[35] Addressing adverse impact discrimination can be among the "most powerful legal measures available to disadvantaged groups in society to assert their claims to justice" (Hugh Collins and Tarunabh Khaitan, "Indirect Discrimination Law: Controversies and Critical Questions," in Hugh Collins and Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law* (2018), 1, at p. 30). Not only is such discrimination "much more prevalent than the cruder brand of openly direct discrimination," it often poses a greater threat to the equality aspirations of disadvantaged groups:

... even more common are situations where the discrimination occurs in a context like an employment relationship, government program or statute, or educational setting, and there is no single identifiable "villain," no single action identifiable as "discriminatory," and the outward appearance of a neutral set of rules or practices being applied across the board. This invisible structure, with its accompanying set of practices, is a powerful limit on the equality aspirations of many who must deal within that structure but have characteristics that do not match those of persons intended to benefit from the structure. (Mary Ebets and Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018), 38 *N.J.C.L.* 89, at p. 92)

[36] By recognizing the exclusionary impact of such discrimination, courts can better address "discrimination in its diverse forms," including at "the systemic or institutional level." Remediating adverse effects discrimination allows courts

[to] go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. (... Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996), 75 *Can. Bar Rev.* 433, at p. 462).

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[42] [Our decisions subsequent to *Andrews*] left no doubt that substantive equality is the "animating norm" of the s. 15 framework ... ; and that substantive equality requires attention to the "full context of the claimant group's situation," to the "actual impact of the law on that situation," and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members

[43] The Court, applying these principles, has acknowledged the existence of adverse impact discrimination under s. 15(1). [The Court discussed *Eldridge* and *Vriend*, excerpted in Section II.B.] ...

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[52] ... [I]n order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group. If so, the first stage of the s. 15 test will be met.

[53] How does this work in practice? Instead of asking whether a law explicitly targets a protected group for differential treatment, a court must explore whether it does so indirectly through its impact on members of that group . . . A law, for example, may include seemingly neutral rules, restrictions or criteria that operate in practice as "built-in headwinds" for members of protected groups. . . .

[54] In other cases, the problem is not "headwinds" built into a law, but the absence of accommodation for members of protected groups. . . .

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[56] Two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group. The second is evidence about the results of the law.

[57] Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation" This evidence may come from the claimant, from expert witnesses, or through judicial notice The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.

[58] Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. . . . This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups

[59] There is no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact, and the Court should not, in my view, craft rigid rules on this issue. The goal of statistical evidence, ultimately, is to establish "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance" (Sheppard (2001), at p. 546 . . .). The weight given to statistics will depend on, among other things, their quality and methodology

[60] Ideally, claims of adverse effects discrimination should be supported by evidence about the circumstances of the claimant group and about the results produced by the challenged law. Evidence about the claimant group's situation, on its own, may amount to merely a "web of instinct" if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim (*Taypotat*, at para. 34). Evidence of statistical disparity, on its own, may have significant shortcomings that leave open the possibility of unreliable results. The weaknesses with each type of evidence can be overcome if they are both present

[61] This is not to say, of course, that both kinds of evidence are always required. In some cases, evidence about a group will show such a strong association with certain traits—such as pregnancy with gender—that the disproportionate impact on members of that group "will be apparent and immediate" (*Taypotat*, at para. 33 . . .)

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[63] . . . Similarly, . . . [i]f there are clear and consistent statistical disparities in how a law affects a claimant's group, I see no reason for requiring the claimant to bear the additional burden of explaining why the law has such an effect. In such cases,

the statistical evidence is itself a compelling sign that the law has not been structured in a way that takes into account the protected group's circumstances

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[68] Some further observations.

[69] First, whether the legislature intended to create a disparate impact is irrelevant Proof of discriminatory intent has never been required to establish a claim under s. 15(1) Nor is an ameliorative purpose sufficient to shield legislation from s. 15(1) scrutiny

[70] Second, if claimants successfully demonstrate that a law has a disproportionate impact on members of a protected group, they need not independently prove that the protected characteristic "caused" the disproportionate impact

[71] It is also unnecessary to inquire into whether the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group Section 15(1) has always required attention to the systemic disadvantages affecting members of protected groups, even if the state did not create them

[72] Third, claimants need not show that the criteria, characteristics or other factors used in the impugned law affect all members of a protected group in the same way. This Court has long held that "[t]he fact that discrimination is only partial does not convert it into non-discrimination" (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1248 . . .). . . .

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[75] The Court subsequently confirmed that "heterogeneity within a claimant group does not defeat a claim of discrimination" (*Quebec v. A.*, at para. 354)

[76] This brings us to the second step of the s. 15 test: whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage This inquiry will usually proceed similarly in cases of disparate impact and explicit discrimination. There is no "rigid template" of factors relevant to this inquiry The goal is to examine the impact of the harm caused to the affected group. The harm may include "[e]conomic exclusion or disadvantage, [s]ocial exclusion . . . [p]sychological harms . . . [p]hysical harms . . . [or] [p]olitical exclusion," and must be viewed in light of any systemic or historical disadvantages faced by the claimant group ([Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada*] (2010), at pp. 62-63 (emphasis deleted)).

[77] The purpose of the inquiry is to keep s. 15(1) focussed on the protection of groups that have experienced exclusionary disadvantage based on group characteristics, as well as the protection of those "who are members of more than one socially disadvantaged group in society" (Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001), 80 *Can. Bar Rev.* 893, at p. 896 . . .).

[78] Notably, the presence of social prejudices or stereotyping are not necessary factors in the s. 15(1) inquiry. . . . They may assist in showing that a law has negative effects on a particular group, but they "are neither separate elements of the Andrews test, nor categories into which a claim of discrimination must fit" (*Quebec v. A.*, at para. 329)

[79] The perpetuation of disadvantage, moreover, does not become less serious under s. 15(1) simply because it was relevant to a legitimate state objective. I agree with Dean Mayo Moran that adding relevance to the s. 15(1) test—even as one contextual factor among others—risks reducing the inquiry to a search for a "rational basis" for the impugned law ("Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee," in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71, at pp. 81-84 . . .).

[80] Similarly, there is no burden on a claimant to prove that the distinction is arbitrary to prove a *prima facie* breach of s. 15(1). It is for the government to demonstrate that the law is not arbitrary in its justificatory submissions under s. 1

[81] In sum, then, the first stage of the s. 15 test is about establishing that the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact. At the second stage, the Court asks whether it has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Alliance*, at para. 25).

[82] Where possible, the two inquiries should be kept distinct, but there is clearly potential for overlap in adverse effects cases based on “the impossibility of rigid categorizations” (Sheppard (2010), at p. 21). What matters in the end is that a court asks and answers the necessary questions relevant to the s. 15(1) inquiry, not whether it keeps the two steps of the inquiry in two impermeable silos.

Application

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[86] In relying on Ms. Fraser’s “choice” to job share as grounds for dismissing her claim, the Federal Court and Court of Appeal, with respect, misapprehended our s. 15(1) jurisprudence. This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.

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[90] Prof. Sonia Lawrence makes the critical point that choices are themselves shaped by systemic inequality:

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Any number of structural conditions push people towards their choices, with the result that certain choices may be made more often by people with particular “personal characteristics.” This is a key feature of systemic inequality—it develops not out of direct statutory discrimination, but rather out of the operation of institutions which may seem neutral at first glance. [Emphasis added.]

(“Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15”, in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 115, at pp. 115-16 and 124-25)

[91] The case before us highlights the flaws of over emphasizing choice in the s. 15 inquiry. For many women, the decision to work on a part-time basis, far from being an unencumbered choice, “often lies beyond the individual’s effective control” (*Miron* at para. 153 ...).

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[97] In my respectful view, the use of an RCMP member’s temporary reduction in working hours as a basis to impose less favourable pension consequences plainly has a disproportionate impact on women. The relevant evidence—the results of the system—showed that:

- RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children.
- From 2010-2014, 100 percent of members working reduced hours through job-sharing were women, and most of them cited childcare as their reason for doing so.

[98] These statistics were bolstered by compelling evidence about the disadvantages women face as a group in balancing professional and domestic work. Evidence submitted by Ms. Fraser indicated that women have historically borne the overwhelming share of childcare responsibilities, that part-time workers in Canada are disproportionately women, and that they are far more likely than men to work part-time due to child care responsibilities. As a result, they experience less stable employment and periods of "scaling back at work," including within police services.

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[Justice Abella referred to several reports, case law, international law, and literature.]

[106] All of these sources—and more—show the clear association between gender and fewer or less stable working hours. They provide powerful support for Ms. Fraser's core argument: that the RCMP's use of a temporary reduction in working hours as a basis for imposing less favourable pension consequences has an adverse impact on women. The first part of the s. 15(1) test has therefore been met.

[107] This leads me to the second part of the s. 15(1) inquiry: whether this adverse impact reinforces, exacerbates or perpetuates disadvantage.

[108] There is no doubt that it does. I agree with Ms. Fraser that the negative pension consequences of job-sharing perpetuate a long-standing source of disadvantage to women: gender biases within pension plans, which have historically been designed "for middle and upper-income full-time employees with long service, typically male" (*Report of the Royal Commission on the Status of Pensions in Ontario* (1980), at p. 116).

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[Justice Abella then considered s 1 of the Charter.]

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[126] The Attorney General, in my respectful view, has identified no pressing and substantial policy concern, purpose or principle that explains why job-sharers should not be granted full-time pension credit for their service. On the contrary, this limitation is entirely detached from the purposes of both the job-sharing scheme and the buy-back provisions, which were intended to ameliorate the position of female RCMP members who take leave to care for their children. ...

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[138] In my view, the appropriate remedy is a declaration that there has been a breach of the s. 15(1) rights of full-time RCMP members who temporarily reduced their working hours under a job-sharing agreement, based on the inability of those members to buy back full pension credit for that service. The methodology for facilitating the buy-back of pension credit is for the government to develop, but any remedial measures it takes should be in accordance with this Court's reasons. They should also have retroactive effect in order to give the claimants in this case and others in their position a meaningful remedy.... .

[The dissent of Brown and Rowe JJ used a different test for identifying violations of s 15(1) than did the majority in *Fraser* and the two earlier pay equity decisions. They reverted to the version set out by the unanimous Court in *Taypotat* (at paras 19-20) that included one additional factor in the second step of the test:

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[169] As our colleague explains, this claim alleges adverse impact discrimination. We agree that the s. 15 test, as it is framed, can address such claims (paras. 48-50). That test consists of the following two steps:

1. Does the law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?

2. Does the law *fail to respond to the actual capacities and needs of the group* and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage? [emphasis added]

On the first step and the issue of linking the adverse distinction to protected grounds, Brown and Rowe JJ agreed with the majority that the comparison between full-time RCMP officers and those in job-sharing arrangements showed a distinction based on sex (at para 185). However, at step 2, they found that this distinction was not discriminatory because it was not arbitrary or wrongful—it simply related to the hours worked by these different groups of workers (at paras 195, 198, 200). Justices Brown and Rowe seemed to be saying that the only relevant distinction between these workers, or the real basis for the lack of full pension benefits, related to their employment status rather than sex, and employment status is not an analogous ground. See *Reference Re Workers' Compensation Act, 1983* (Nfld), [1989] 1 SCR 922, 1989 CanLII 86; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 1999 CanLII 649; *Baier v Alberta*, 2007 SCC 31; and *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, and see Section II.C, Note 8.

In step two, the added factor in Brown and Rowe JJ's version of the test is the correspondence factor from *Law*. Bringing the correspondence factor back into the test, and using *Withler's* additional factor that directs attention to the larger benefit scheme that the impugned provisions are a part of, allowed this dissent to focus on the ameliorative purpose of the job-sharing provisions:]

[162] ... It is incumbent upon this Court in judging the constitutionality of the Plan to understand and account for how the scheme operates as a *whole*, rather than compare options that are available to different groups line-by-line. And, considering the Plan as a whole, it is clear that it accommodates various stages of a member's life and career. It is meant to be flexible and meet different needs at different times.

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[168] In the present case, the Plan represents neither a public nor private source of ongoing systemic disadvantage. It does not contribute to women's systemic disadvantage; nor does it reinforce, perpetuate, or exacerbate the pre-existing disadvantage of women in the workplace which arises in part from unequal distribution of parental responsibilities. Rather, it seeks to ameliorate (although without eliminating) the effects of that pre-existing disadvantage on women's careers in the RCMP by providing employment options which allow them the flexibility to continue to pursue their careers while raising children. This case therefore raises the question: can a court strike down part of a statutory scheme for simply being insufficiently remedial? In our respectful view, and as we explain below, it cannot.

[As is evident in this passage, Brown and Rowe JJ's focus on the ameliorative purpose of the pension scheme as a whole is tied to their view that the claimants' disadvantage was entirely outside the impugned provision or the larger benefit scheme. Instead, the dissent identified the cause of the financial disadvantage experienced by job-sharing female RCMP members as the unequal distribution of parental responsibilities and the unavailability of quality child care, both of which existed "outside the purview of the courts" (at paras 168, 215). For the dissent, the impugned law had to at least be a "contribution" to the disadvantage and that was not the case on the facts (at paras 175, 180-181).]

Their approach also insisted that any government attempt at amelioration is enough to decide that there is no breach of s 15 (at paras 168, 177). This approach aligns with their re-insertion of responding "to the actual capacities and needs of

the group" into the test for a breach (at para 169), a phrase that they relied on heavily in their analysis of step 2 (at paras 189, 198). As long as the government intended to be accommodating (for example, by adding job-sharing as an option for its members with caregiving responsibilities), that was enough (at para 228). In addition, as long as the government acted with benevolent intentions, it could do so incrementally (at para 177). That is because, for Brown and Rowe JJ, the government did not need to act at all; there is no positive obligation on the government to address systemic discrimination (at paras 177, 210, 212). Since they saw no causal relationship between the claimants' disadvantage and the impugned provisions, Brown and Rowe JJ criticized the majority for making the state responsible for discrimination it had not caused (at para 181). And that was seen as injecting positive duties into s 15(1), which appeared to be the primary problem that Brown and Rowe JJ had with the majority decision in *Fraser* and also in the two pay equity cases. Positive and negative rights had been thoroughly canvassed in the dissenting opinion in *Alliance* (Côté, Brown, and Rowe JJ), where they asserted, "Charter rights are fundamentally negative in that they preclude the state from acting in ways that would impair them" (at para 65). In *Fraser*, Brown, and Rowe JJ made the same point:]

[212] The practical effect of this decision is to abandon the foundational principles so recently affirmed in *Alliance* and to discourage governments from offering ameliorative programs (or, as in this case, employment options to its employees) in the future. This is because our colleague has, in effect, imposed a positive obligation on legislatures, where they attempt merely to ameliorate the effects of inequality, to eradicate those effects altogether. Such an obligation exceeds the ambit this Court has given s. 15(1), which, unlike certain other provisions of the Charter that appear to compel government action (e.g. ss. 3, 14, 20 and 23), "does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality" (*Thibaudeau v Canada*, [1995] 2 SCR 637 at para 38 ...).

[Despite these indications of the depth of the dissent's disagreement with the majority's approach to s 15(1), it is the attack of Brown and Rowe JJ on substantive equality that is perhaps the most unusual feature of their dissent:]

[146] [The imposition of positive duties under s 15] leads to a more fundamental concern presented by this appeal—a concern which, we observe, has been repeatedly made by legal commentators, but which has yet to be taken up by this Court. The gauge of "substantive equality" by which this Court has measured s. 15(1) claims ... not having been defined (except by reference to what it is not—e.g. "formal equality"), has become an open-ended and undisciplined rhetorical device by which courts may privilege, without making explicit, their own policy preferences. As we explain below, and with respect, this case is an instance of that inherent malleability being deployed so as to strike down a scheme which was, after all, designed to be ameliorative.

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[216] ... For 30 years, this Court has struggled to define the term "substantive equality." An intelligible and principled definition continues to be elusive. Indeed, this case illustrates the difficulties posed by the slippery quality of "substantive equality"—the core value of our colleague's decision (at paras. 47-48)—and its constant shifting in this Court's jurisprudence.

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[218] To be clear, we do not seek to overturn the jurisprudence that our colleague recounts in her reasons. Rather, we aim to give effect to it. Our disagreement is about the meaning and requirements of substantive equality: we view her approach as lacking in the clarity and guidance necessary to give effect properly to the Charter's

purposes, notably with regard to legislation that is fundamentally *ameliorative*. ... The concept has not been defined in a manner that renders s. 15 rights, or even the criteria by which they are adjudicated, knowable in advance by claimants and the state, or applicable with any consistency by courts.

[219] This lack of definition *ex ante* is antithetical to any notion of judicial restraint. Where a legal test lacks defined bounds, courts applying it exercise truly arbitrary powers of review. And that is the point at which we have arrived with "substantive equality." It has become an unbounded, rhetorical vehicle by which the judiciary's policy preferences and personal ideologies are imposed piecemeal upon individual cases. Consider our colleague's approach here: legislation that is ameliorative in both intent and effect is judicially reconfigured because it is *not ameliorative enough*, or more precisely, *not ameliorative in ways our colleague would prefer*. It is also a prime example of how the goalposts of "substantive equality" are constantly on the move, evidenced most clearly by our colleague's abandonment of the prudent guidance in *Alliance*, at para. 42, regarding incremental measures to alleviate systemic inequality.

[Justices Brown and Rowe concluded their dissent with arguments about "chilling effect" and "opening the floodgates":]

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[228] As we see it, the sole reason the Plan is being judicially reviewed is because Parliament and the government tried to be accommodating in their employment options. If they had not offered pension buy back rights for members who take LWOP, there would be no basis for judicial intervention at all. The upshot of our colleague's reasoning is that the public is now burdened with new financial obligations, simply because Parliament and the executive dared to address pre-existing inequality incrementally, instead of taking more radical measures to eliminate it. In the future, they may well reason that inaction is the safer route.

[229] Similar issues will undoubtedly arise with any other social welfare legislation or government attempts to remedy systemic disadvantage. By reserving the right to arbitrarily second guess and undo any legislation that attempts to incrementally address systemic disadvantage, the Court makes it more practically difficult for legislatures and governments to implement policies that promote equality. Put simply, we see restricting the government's ability to incrementally address disadvantage as a peculiar way to promote equality.

[Justice Côté's dissent is much shorter and narrower than that of Brown and Rowe JJ. She did not agree that the ground of sex was the relevant one in *Fraser*. Justice Côté reasoned that although it was predominantly women with children who job-shared, not only women have child-care responsibilities, so the key focus was caregiving, parental, or family status rather than sex (at paras 234-235, 242). She relied heavily on the language of "based on" in the test for discrimination and on the need for evidence demonstrating a causal or necessary link between the adverse distinction and the ground in question (at paras 235, 242-243). Finding that the disproportionate impact was "based on" the claimants' caregiver status, Côté J agreed with the majority that there was an insufficient record of evidence and submissions for this ground to be recognized as an analogous ground under s 15, and she would have dismissed the claim on that basis (at para 238). For further discussion of parental or family status as analogous grounds, see Section II.C, Note 5.]

NOTES AND QUESTIONS

1. The Supreme Court has released two decisions dealing with s 15 of the Charter since *Fraser*, both in the criminal law context.

In *Ontario (AG) v G*, [2020 SCC 38](#), the Court considered a constitutional challenge to a provincial sex offender registry. The claimant, G, who had been found not criminally responsible on account of mental disorder (NCRMD) of two counts of sexual assault, argued that the application of the sex offender registry legislation to persons found NCRMD violated their rights under ss 7 and 15 of the Charter. His s 15 argument was based on mental disability, and the fact that persons found guilty of sexual offences had some opportunities for exemption and removal from the registry, or to be relieved from their obligation to report regularly to police. In contrast, persons found NCRMD of sexual offences could never be removed from the registry or exempted from reporting. The Supreme Court unanimously held that the lack of "exit ramps" from the registry for persons found NCRMD violated s 15 on the basis of mental disability and could not be justified under s 1 (at paras 16, 49, 55, 59, 60, 68, Karakatsani J; at para 222, Côté and Brown JJ). Unlike *Fraser*, the Court's main disagreements in this case focused on the issue of remedy rather than the approach to s 15, but there are hints of the split in *Fraser* in the decision. (For a discussion of the Court's divided approach to remedy see Chapter 25, Enforcement of Rights).

Applying the first step of the test from *Fraser*, Karakatsanis J found that persons found NCRMD "are plainly subjected to different treatment based on the enumerated ground of mental disability" (at para 52). At the second step of the *Fraser* test, Karakatsanis J noted how persons with mental illness are subject to stereotyping, stigmatization, and prejudice, which "has led to profound disadvantage" (at para 62). Furthermore, she found (at para 67) that the impugned law

imposes a burden on people found NCRMD in a manner that violates the norm of substantive equality in two respects: the law itself invokes prejudicial and stereotypical views about persons with mental illnesses, feeding harmful stigma; and the law puts those found NCRMD in a worse position than those found guilty. Both effects perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses.

The government argued that the distinction—lack of exit ramps from the registry—could be resolved by removing those mechanisms for persons found criminally responsible for sexual offences. Rejecting this argument, Karakatsanis J responded that subjecting everyone to similar treatment might still "impose a heavier burden on persons found NCRMD" (at para 55). Further, she found, such an approach might also raise concerns under s 7 of the Charter (at para 56).

In their reasons dissenting in part on the issue of remedy, Côté and Brown JJ agreed with the majority that the sex offender registry legislation violated s 15 on the basis of mental disability. However, they took issue with Karakatsanis J's "extensive *obiter dicta* discuss[ing] adverse-effects discrimination and 'substantive equality,'" stating that "[h]er doctrinal statements are not remotely relevant to the issues raised by this appeal, especially considering this is not an adverse-effects case" (at para 223). Justice Rowe concurred with the s 15 reasons of Côté and Brown JJ.

Why do you think the government continues to make s 15 arguments that have been rejected by the Court on previous occasions, for example, arguments that take a formal equality approach or rely on a lack of discriminatory intent?

2. In *R v CP*, [2021 SCC 19](#), the Court dismissed a challenge to s 37(10) of the *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA] under ss 7 and 15 of the Charter. The YCJA states that young persons have no automatic right of appeal to the Supreme Court, whereas the *Criminal Code* grants adults automatic leave in some circumstances. Chief Justice Wagner (Moldaver, Brown, and Rowe JJ concurring) found no violation of ss 7 or 15. Justice Abella (Karakatsanis and Martin JJ concurring) found a violation of s 15 that could not be justified under s 1. Justice

Kasirer agreed with Abella J's 15 reasons but found that the violation could be justified under s 1. Justice Côté viewed the Charter issues as moot since the Court had granted leave to appeal to CP. On the appeal of the criminal matter itself, all but Côté J upheld the conviction as reasonable, and their reasons on the Charter issues can be seen as *obiter dicta*.

On the s 15 issue, Wagner CJ cited the test from *Fraser*, and had no difficulty concluding that the impugned provision created a distinction based on age. The issue was whether this distinction was discriminatory. Chief Justice Wagner believed that a contextual analysis mandated a review of the impact of the YCJA as an entire legislative scheme, rather than "cherry-picking individual features" (at para 144). The YCJA was construed as balancing multiple interests—specifically, providing procedural protections that only young persons receive and enhanced timeliness and promptness in the resolution of matters, which was in turn connected to several interests pertaining to the young person, alleged victim, and society (including procedural fairness, reduced psychological impact, and rehabilitation/reintegration into society). Chief Justice Wagner cited *Withler* (at para 38) for the point that "the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will ... colour the discrimination analysis" (at para 152). He indicated that this approach did not inappropriately bring s 1 issues into s 15 but simply gave "full effect to the contextual analysis mandated by this Court's approach to substantive equality" (at para 153, citing *Fraser* at para 42). He also found that the "slight" delay entailed in applying for leave to appeal did not perpetuate a "tangible disadvantage" to young persons (at para 157) and that, moreover, the Court could be expected to exercise its discretion to grant leave appropriately.

Justice Abella distilled her s 15 and s 1 reasons as follows (at para 4):

- The fact that the overall purpose of the legislation is ameliorative is of no relevance in determining whether a particular limitation represents a *prima facie* breach of s. 15. It may factor contextually into the justificatory analysis in s. 1, but what is at issue at the breach stage is the impact of the limitation on the claimant group, not the purpose of the legislation as a whole. The crucial fact remains that the YCJA does not provide any analogous procedural substitute for a guaranteed right to appeal to this Court.
- The objective of timeliness is not a justification for denying access to a procedural protection that has historically served to guard against miscarriages of justice. There is no justification for a speedy resolution if the resolution is based on an unfair trial.

Justice Abella found that s 37(10) of the YCJA deprived young persons of a benefit on the basis of their age, namely an automatic right of appeal that could guard against wrongful convictions and miscarriages of justice. This differential treatment was discriminatory given that it perpetuated the disadvantage of young persons charged with criminal offences, including their heightened risk of wrongful conviction. She also noted that this vulnerability "is amplified for those young people who are indigenous or members of racial minorities," who "disproportionately interact with the criminal justice system for a complex variety of reasons, which include both direct and systemic racial discrimination within the system" (at para 88).

Justice Kasirer found that the considerations relied on by Wagner CJ under s 15—namely, the importance of timely dispositions of young persons' appeals and the Court's ability to grant leave to appeal in appropriate cases—justified the denial of an automatic right of appeal under s 1.

Do you think Wagner CJ's approach is in line with, or a departure from, the majority's approach in *Fraser*? Keeping in mind that Wagner CJ and Moldaver J were part of the majority in *Fraser*, are there key differences between the laws at issue in these two cases that explain any differences in their approach in *R v CP* and *Fraser*? Whose decision in *R v CP* do you find most persuasive, and why?

3. Three of the concepts that have most beleaguered the Court in its articulation of the tests for violations of s 15 have been "relevance," the "correspondence" factor, and "arbitrariness." In the 1995 equality trilogy (see Note 6 after *Andrews*, above), four judges held that adverse differential treatment is discriminatory only if the alleged enumerated or analogous

ground is irrelevant to the goals and values of the impugned law—in other words, they applied the rational connection test of s 1 that asks whether the distinction created by the legislation is rationally connected to its purpose. In *Law*, the Court did not refer to the irrelevant personal characteristics test from the 1995 trilogy. However, *Law*'s correspondence factor seems to invite a relevance/rational connection analysis.

With the eclipse of the *Law* test, first by *Kapp/Withler* and then *Taypotat*, the question became whether the correspondence or relevance analysis lived on in the search for “arbitrary disadvantage.” Justice Abella’s definition of arbitrariness as the failure of a law to “respond to the actual capacities and needs of the members of a group” (*Taypotat* at para 20) echoes the “correspondence” factor from *Law*, which asked whether there is a correspondence between the impugned legislation and “the actual need, capacity, or circumstances of the claimant or others” (at para 88).

Even now, following the omission of the language of “arbitrary disadvantage” and “fail[ing] to respond to the actual capacities and needs of the members of the group” (*Taypotat* at para 20) from the test used by the majorities in the pay equity cases, *Fraser*, *Ontario v G*, and *CP*, the question of the role and influence of relevance, correspondence, and arbitrariness remains.

In their dissent in *Fraser*, Brown and Rowe JJ argued that “substantive discrimination” has “always required an element of arbitrariness or unfairness” (at para 191). Like Abella J in *Taypotat*, Brown and Rowe JJ saw arbitrariness as being most often expressed as a failure to respond to individuals’ actual capacities, needs, and circumstances.

Does discussion of the government’s purpose in the s 15(1) analysis risk introducing a requirement that the government must act intentionally for a claim to be successful? Do “relevance,” the “correspondence” factor, and “arbitrary” disadvantage all import considerations from the s 1 analysis into s 15, and do they do so in the same way? Aside from the shifting of the evidentiary burden, what are the reasons for keeping the analysis of any violation under s 15 separate from the analysis of the justification of the violation under s 1?

4. “Choice” played a determining role in both the Federal Court and the Federal Court of Appeal decisions in *Fraser*. In *Fraser v Canada (AG)*, [2017 FC 557](#), the Federal Court found that the claimants did not have the option to buy-back their pensions because of “the decisions the member makes, as difficult as those may be, as a family to balance work and child care, by having one parent, usually the woman, work part-time for a few years” (at para 137, emphasis added). In *Fraser v Canada (AG)*, [2018 FCA 223](#), the Court of Appeal concluded “the appellants were not denied buy-back rights based on their personal characteristics ... but rather because they elected to job-share as opposed to taking care and nurturing leave” (at para 53, emphasis added). Although both levels of court acknowledged the constraints on the claimants’ choices to job-share, their choices—and not the law being challenged—were nevertheless seen as the cause of their disadvantage.

In contrast, on the appeal to the Supreme Court, Abella J for the majority asserted: “This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group” (at para 86, emphasis added). However, despite the claim of past consistency, the Supreme Court had previously relied on choice to determine that differential treatment was not discriminatory. It did so in *Nova Scotia (AG) v Walsh*, [2002 SCC 83](#), a decision now overturned by *Quebec (AG) v A*, [2013 SCC 5](#).

In *Walsh*, the claimant unsuccessfully challenged the exclusion of unmarried cohabitants from a statutory marital property regime that presumed an equal division of marital property, alleging discrimination on the basis of marital status. The majority held that the regime was not discriminatory because “it respects the fundamental personal autonomy and dignity of the individual” who has chosen to not marry (at para 62).

In *Quebec v A*, Abella J critiqued the choice-based approach as fundamentally flawed:

[342] ... In contrast to formal equality, which assumes an “autonomous, self-interested and self-determined” individual, substantive equality looks not only at the choices that are

available to individuals, but at "the social and economic environments in which [they] play out" (Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15", in Sandra Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010), 183, at pp. 190-91 and 196).

In *Fraser*, Abella J acknowledged the traditional role that governments' perceptions of choice have played in gendered systemic discrimination (at para 89, excerpted above) and the structural conditions that constrict choice (at para 29, excerpted above).

In addition to dismantling the relevance of choice to a finding of discrimination as a matter of law, Abella J in *Fraser* recognized that choice may also be factually absent (at para 91). On this point, she relied on McLachlin J's decision in *Miron v Trudel*, which considered choice in the context of whether marital status was an analogous ground. Justice McLachlin noted some of the factors that constrain an individual's choice to marry (at para 73):

The law; the reluctance of one's partner to marry; financial, religious or social constraints—these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.

At the same time, however, Abella J stated that *Fraser* "highlights the flaws of overemphasizing choice in the s. 15 inquiry" (at para 91, emphasis added), suggesting there is still a role for choice but leaving that role unspecified. In contrast, in her earlier decision in *Quebec v A*, she had been more prescriptive, listing only two very specific and narrow instances when choice may still be relevant to s 15(1) claims: in determining whether a personal characteristic qualifies as an analogous ground (as discussed in Section II.C) and as a factor in the s 1 analysis (at para 343).

If autonomy is one of the values underlying the purpose of s 15 (Note 2 after *Andrews*), does limiting the role of choice to determining which grounds are analogous and to s 1 sufficiently support those values? Or does the link between liberty interests and choice require more attention to relations of power before choice has any role to play in the achievement of substantive equality?

For further commentary on the role of choice under s 15(1), see Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: LexisNexis Canada, 2006) 209; Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court" in Sandra Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: LexisNexis Canada, 2010) 129.

5. Whether the group of which the claimant is a member *must* be historically disadvantaged in order to succeed under s 15(1) has been controversial. The question first arose in the Court's 1989 decision in *R v Turpin* and is still being addressed by the Supreme Court in its most recent decisions. In *Turpin*, Wilson J noted that a finding of discrimination would in most, if not all, cases "necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged" (at 1332).

Historical disadvantage was characterized as "probably the most compelling factor" in Iacobucci J's unanimous decision in *Law* in 1999:

[63] As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group . . . These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or

treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

Despite this characterization, in the 15 Supreme Court decisions that applied Law's reformulation of the test for discrimination, historical disadvantage played a secondary role to the correspondence factor. See Bruce Ryder, Cidalia C Faria & Emily Lawrence, "What's Law Good For?: An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 SCLR (2d) 103 at 122.

The role of historical disadvantage in the analytical framework for s 15 was divisive in *Fraser*. In their dissent, Brown and Rowe JJ accused the majority of requiring only proof of historical disadvantage in step two of the analysis:

[190] This Court has said that historic disadvantage plays a significant role in identifying substantive discrimination . . . Substantive discrimination, however, cannot be reduced to historical disadvantage. . . Under our colleague's approach, the second step of the s. 15 test serves only to check if the unequal impact of a law impacts a historically disadvantaged group; there is no analysis of whether the unequal impact corresponds with a group's actual circumstances or needs or whether it is in any other sense substantively discriminatory.

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[194] Our colleague now suggests, however, that the sole focus of the substantive discrimination analysis is historical disadvantage (at para. 77).

In the referenced paragraph, Abella J had stated:

[77] The purpose of the inquiry is to keep s. 15(1) focussed on the protection of groups that have experienced exclusionary disadvantage based on group characteristics, as well as the protection of those "who are members of more than one socially disadvantaged group in society" . . . As the Court noted in *Quebec v. A* when discussing the second stage of the s. 15 test:

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. [para. 332]

A similar point had been made in *Withler*, where McLachlin CJ and Abella J defined the "perpetuation" of disadvantage as the treatment of a historically disadvantaged group in a way that exacerbates their situation. The fact that the current test for a violation of s 15 requires in step two that the claimant prove the impugned provision imposes burdens or denies a benefit in a manner that has the effect of *reinforcing, perpetuating, or exacerbating* disadvantage suggests that the disadvantage must be historical, at least in the sense of pre-existing the challenged law or policy.

The most recent statement on this issue is found in the majority judgment of Karakatsanis J in *Ontario (AG) v G*, where she undertook a lengthy discussion of substantive equality, noting amongst other points that "historical discrimination need not be demonstrated for a court to find that a law infringes s 15(1)" (at para 39) and "substantive equality concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups ..." (at para 47, emphasis added). Despite the clarity of these statements, it is unlikely that the controversy over the need to prove historical disadvantage is over.

Do you think claimants should be required to show historical disadvantage in order to succeed on their s 15 claim? Consider the case of a claim challenging a new form of discrimination, such as discrimination based on genetics.

6. The concepts of "benefits" and "burdens" have played a key role in the s 15(1) analytical frameworks since *Andrews*. In that case, McIntyre J summarized his discussion of how inequality may be the result of the same treatment by stating (at 165):

[T]here must be accorded, as nearly as may be possible, an equality of *benefit* and protection and no more of the restrictions, penalties or *burdens* imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more *burdensome* or less *beneficial* impact on one than another. [Emphasis added.]

More than 30 years later, we see that the second step of the test in *Fraser* is once again framed in terms of benefits and burdens, requiring that the impugned law "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage" (at para 27). Justice Abella went on to adopt the metaphor of "headwinds" and the idea of "accommodations" to explain burdens and benefits in the context of adverse effects discrimination (at paras 53–54):

A law, for example, may include seemingly neutral rules, restrictions or criteria that operate in practice as "built-in headwinds" for members of protected groups. ... In other cases, the problem is not "headwinds" built into a law, but the absence of accommodation for members of protected groups.

The source of the "headwinds" metaphor is *Griggs v Duke Power Co*, 401 US 424, 91 S Ct 849 (1971), where the United States Supreme Court stated that "[g]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" (at 432). In *Fraser*, Abella J relied on *Griggs* as "a classic example of adverse impact discrimination" in distinguishing that type of discrimination from direct discrimination (at para 32). *Griggs* was an employment discrimination case decided under Title VII of the American 1964 Civil Rights Act. The case involved an employer that required its employees to have a high school diploma and pass standardized tests to work in certain departments at a power plant. Both requirements had the effect of disqualifying African Americans at a substantially higher rate than white applicants.

The two recent Supreme Court of Canada cases of *Ontario v G* and *R v CP* (discussed in Notes 1 and 2 above) illustrate the conventionally understood differences between benefits and burdens. In the first case, the claimant was denied the benefit of applying to be removed from the sex offender registry or to be exempted from reporting. In *R v CP*, young offenders had the burden of needing to seek leave to appeal to the Supreme Court imposed on them, when adult offenders were not so burdened. However, many claims can be categorized as either benefits or burdens, depending on the level of generalization. Can you reframe *Ontario v G* as a case involving a burden and *R v CP* as a case involving a benefit? *Fraser* can be framed as the denial of the benefit of buying back pension contributions or as one example of the burden of male pattern employment laws. Although the reframing of the claim as one involving a burden is much more abstract, it does reveal the systemic nature of the discrimination. See Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) at 109; Martha McCluskey, "Law and Economics Against Capitalism" in Deborah L Brake, Martha Chamallas & Verna L Williams, eds, *Oxford Handbook on Feminism and Law in the US* (Oxford: Oxford University Press, 2021) on the racialized, gendered, and contingent flaws of an existing legal structure being taken as neutral social and economic baselines.

The "widening the gap" metaphor that has become popular with all members of the Supreme Court is an attempt to combine benefits and burdens and express the concept of discriminatory disadvantage (or lack thereof) in one evocative metaphor; see, for example,

Quebec v A at para 332 (Abella J); *Alliance* at para 92 (Côté, Brown, and Rowe JJ); *Ontario v G* at para 69 (Karakatsanis J); *CP* at para 239 (Côté J).

If the “widening the gap” metaphor aptly describes the impact of the impugned law on the claimant, then step 2 of the test for a violation of s 15(1) has been met because “widening the gap between the historically disadvantaged group and the rest of society” is another way to say “reinforcing, perpetuating, or exacerbating historical disadvantage.” See Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) at 40–41; Jennifer Koshan & Jonnette Watson Hamilton, “*Alberta v Hutterian Brethren of Wilson Colony*” (2018) 30:2 CJWL 292 at 311–12.

How would you characterize the s 15 adverse effects claim in *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#), in terms of benefit or burden, headwinds or lack of accommodation? In *Hutterian Brethren*, excerpted in Chapter 19, Freedom of Religion, the law was changed to require photographs on all drivers’ licences by removing a religious exemption that had been available and used by members of the religious sect for faith-based reasons.

7. In a number of cases, judges have relied on the ameliorative purpose of the impugned legislative scheme as the decisive factor in determining that the provision did *not* violate s 15(1).

The ameliorative purpose or effect of a challenged law or policy was the third contextual factor used to determine whether a distinction was discriminatory in the *Law* test.

Consideration of amelioration was moved to s 15(2) in *Kapp*, but with a note that “the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage” (at para 23; see also Section II). Part of what we see in the current divisions within the Court is different answers to whether amelioration “might also be relevant” at step two of the s 15(1) analysis.

But there is another issue: how a narrow consideration of the ameliorative purpose or effect of the challenged provision or policy in *Law* and *Kapp* expanded to become a reliance on the ameliorative purpose or effect of the entire legislative scheme that the challenged provision was a part of. Recall that *Withler* added a fifth contextual factor to the second step of the discrimination test when the challenged law is part of a statutory benefit scheme that applies to a large number of people. Chief Justice McLachlin and Abella J held that, in such cases, the purpose of the impugned provision in the context of the broader legislative scheme will influence the discrimination analysis. Although the *Kapp* s 15(1) test was disavowed in *Taypotat*, the pay equity cases, and *Fraser*, the addition of the fifth contextual factor from *Withler* was not, and its continued use can be seen in Wagner CJ’s reasons in *CP*.

Is the YCJA “a statutory benefit scheme that applies to a large number of people”? In what ways is it similar to and distinguishable from the federal civil servant and Canadian Forces work-related benefits legislation at issue in *Withler*?

What is gained and what is lost by considering the ameliorative purpose and effects of a large benefit scheme and its balancing of interests in the s 15(1) analysis, as Wagner CJ did in *R v CP*, rather than under s 15(2) or as part of the proportionality analysis under s 1?

8. Each time the Supreme Court has revised the s 15 test, it has done so in response to the struggle over the meaning and scope of s 15. The critiques of Brown and Rowe JJ in their dissent in *Fraser* suggest that the test for s 15(1) has been reformulated so many times because the Court has failed to provide a definition of “substantive equality.” See Carissima Mathen’s “The Upside of Dissent in Equality Jurisprudence” (2013) 63 SCLR (2d) 111 on *Quebec v A* and her “Equality Before the Charter: Reflections on *Fraser v Canada*” (2021) SCLR (2d) (forthcoming) on *Fraser* for discussions of the Court’s continuing profound disagreement on what it means for a society to be committed to substantive equality.

Richard Moon has noted that the same issues and tensions that were evident in *Andrews* are still unreconciled in *Fraser*. He attributes the reason for the Court’s continuing struggle to its adoption of a broad and egalitarian equality of result approach in a context where the harm done by the impugned law or policy is only one manifestation of the disadvantaged

position of the group. He also argues that the Court's pursuit of substantive equality is constrained by its institutional competence, i.e., what the judiciary has the expertise and resources to deal with competently given its role and in contrast to the institutional competence of the legislative branch of government. See Richard Moon, "Comment on *Fraser v Canada* (AG): The More Things Change" (2021) 30:2 *Const Forum Const* 85 at 86, 94.

Taking this critique even further, Joshua Sealy-Harrington, in "The Alchemy of Equality Rights" (2021) 30:2 *Const Forum Const* 53, argues that a clear legal test for equality both is and should be impossible. This is because ideology is what divides the Court, with the scope of Canadian equality law dependent on the inequality the Court is willing to recognize; see also Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada* (Attorney General)" (2021) 30:2 *Const Forum Const* 1. Nevertheless, Sealy-Harrington applauds Abella J's explicit rejection in *Fraser* of the need for claimants to prove discriminatory intent, causation, stereotyping, arbitrariness, involuntariness (i.e., lack of choice), and exhaustion (i.e., that all members of the group must experience the same discrimination), seeing the *Fraser* test's relative simplicity as potentially giving it the necessary flexibility to deal with pervasive systemic inequalities (at 66–67, 82).

Other scholars are also hopeful about s 15. For example, Fay Faraday, in "The Elephant in the Room and Straw Men on Fire" (2021) 30:2 *Const Forum Const* 15, argues for "analytical guardrails" that keep those who do not understand substantive equality from resorting to the impoverished and thin embrace of formal equality (at 24–25). Like Mary Eberts & Kim Stanton in "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 *NJCL* 89, Faraday advocates for a renewed focus on the four equality rights in s 15, as well as for in-depth analysis and precision to describe and understand the systemic forces which perpetuate disadvantage and institutionalize systemic discrimination. Given what you have read so far in this chapter, how hopeful do you think equality-seeking groups should be about the potential of s 15 to address systemic inequality?

B. DIRECT DISCRIMINATION/ADVERSE EFFECTS DISCRIMINATION

The leading cases on s 15(1)—including *Andrews*, *Law*, *Kapp/Withler*, *Taypotat*, and *Fraser*—have all emphasized that discrimination can be found in the effects of a law. The first step in the s 15(1) analysis currently asks whether the impugned law or state action, "on its face or in its impact, creates a distinction based on an enumerated or analogous ground" (*Fraser* at para 27, emphasis added). To date, successful s 15(1) claims have predominantly involved differentiation on the face of the challenged law or policy. For example, the statute at issue in *Andrews* made citizenship a requirement for being called to the bar and thus treated citizens and non-citizens differently on its face. This is an example of "direct discrimination." In other cases—comprising a very small minority of the successful claims at the Supreme Court of Canada—the challenged law or policy is "facially neutral." In those cases, the differential treatment is the result of the impact of the law. For example, the legislation at issue in *Fraser* made no distinctions based on enumerated or analogous grounds on its face, but simply referenced part-time employment status (see Section II.C, Note 5 for discussions of the family/parental status grounds issue in *Fraser* and Note 8 for the lack of success in claiming employment status as a ground). When facially neutral state action has a differential impact on the basis of a prohibited ground of discrimination—such as the impact based on sex in *Fraser*—it is an example of "adverse effects" discrimination.

To illustrate the difference between direct and adverse effects claims, this section includes excerpts from three cases. First is *M v H*, a successful direct discrimination claim that was decided using the test from *Law*. Second is *Vriend*, an example of both direct and adverse effects discrimination that succeeded under the *Andrews* test. The third is *Eldridge*, which also uses the *Andrews* test and which is an example of a successful adverse effects claim. In each

case, the focus of the excerpts is on the “creation of the distinction” aspect of the first step in the test for a violation of s 15(1). Section II.C looks at the grounds aspect of the first step.

Eldridge and *Vriend* were, for many equality-seekers, the high point of s 15 litigation and the possibilities of achieving substantive equality. But they were also controversial, prompting accusations of judicial activism and claims that the courts were undemocratic institutions without legitimacy. In particular, the issue of whether the equality guarantee in s 15 is a positive right requiring governments to act or only a negative right limiting state discrimination came to the foreground in legal and political commentary following *Eldridge* and *Vriend*.

Despite the claimants’ victories in both *Vriend* and *Eldridge*, it was not until 2020 that a third successful adverse effects claim—*Fraser*—was decided by the Supreme Court. In the 22 years in between these cases, only 11 of the 72 s 15 cases heard by the Court included adverse effects claims, and all were unsuccessful. But the issue of positive versus negative rights is back at the forefront in the dissents in *Fraser* as well as in the 2018 pay equity cases.

M v H

[1999] 2 SCR 3, 1999 CanLII 686

[Two women, M and H, cohabited in a same-sex relationship from 1982 to 1992. H was in a financially stronger position than M during the relationship. The parties lived in a house owned by H and started their own advertising business, and H’s contributions to the business were greater than those of M, who devoted more of her time to domestic tasks than to the business. When the business failed, only H was able to find other employment. After their breakup, M commenced an action against H, including a claim for support pursuant to part III of the *Family Law Act*, RSO 1990, c F.3 [FLA]. Section 29 of the FLA extended the definition of “spouse” governing support applications beyond married persons to include unmarried opposite-sex couples who had cohabited for three years or more. M asserted that the law’s exclusion of same-sex couples was unconstitutional. A motions judge found in M’s favour, and extended the definition of “spouse” by reading out “a man and a woman” and reading in “two persons.” H and the Attorney General of Ontario, an intervenor before the motions judge, appealed. The Ontario Court of Appeal upheld the decision of the motions judge but suspended the order for one year to give the legislature time to amend the FLA. The Supreme Court granted the Attorney General leave to appeal that ruling.]

In the Supreme Court, the claim was analyzed using the *Law* test, which required three broad inquiries (see Section II.A, Note 8 following *Andrews*). It is the first question that the excerpts in this section focus on: does the impugned law (1) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (2) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?]

CORY and IACOBUCCI JJ (Lamer CJ and L’Heureux-Dubé, McLachlin, and Binnie JJ concurring): [In their joint reasons, Cory J addressed the s 15 issue.]

CORY J:

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[53] ... [T]he FLA draws a distinction by specifically according rights to individual members of unmarried cohabiting opposite-sex couples, which by omission it fails to accord to individual members of same-sex couples who are living together. It is

this distinction that lies at the heart of the s. 15 analysis. The rights and obligations that exist between married persons play no part in this analysis. The legislature did not extend full marital status, for the purposes of all the rights and obligations under the *FLA*, to those unmarried cohabitants included in s. 29 of the Act. Rather, the definition of "spouse" in s. 29 only applies for certain purposes. Specifically, it allows persons who became financially dependent in the course of a lengthy intimate relationship some relief from financial hardship resulting from the breakdown of that relationship. It follows that this provision was designed to reduce the demands on the public welfare system. This will be discussed more fully in the s. 1 analysis below.

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[57] The definition [of "spouse" in s 29] clearly indicates that the legislature decided to extend the obligation to provide spousal support beyond married persons. ... The obligation was extended to include those relationships which:

- (i) exist between a man and a woman;
- (ii) have a specific degree of permanence;
- (iii) are conjugal.

Only individuals in relationships which meet these minimum criteria may apply for a support order under Part III of the *FLA*.

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[61] Since gay and lesbian individuals are capable of being involved in conjugal relationships, and since their relationships are capable of meeting the *FLA*'s temporal requirements, the distinction of relevance to this appeal is between persons in an opposite-sex, conjugal relationship of some permanence and persons in a same-sex, conjugal relationship of some permanence. In this regard, I must disagree with the dissenting opinion in the court below, which characterized the distinction arising in s. 29 as being between opposite-sex and same-sex couples. This conclusion would require that the section be scrutinized for any discriminatory impact it may have on same-sex couples, and not on the individual members of that couple. Section 29 defines "spouse" as "either of a man and woman" who meet the other requirements of the section. It follows that the definition could not have been meant to define a couple. Rather it explicitly refers to the *individual* members of the couple. Thus the distinction of relevance must be between individual persons in a same-sex, conjugal relationship of some permanence and individual persons in an opposite-sex, conjugal relationship of some permanence.

[62] Thus it is apparent that the legislation has drawn a formal distinction between the claimant and others, based on personal characteristics. As stated in *Law, supra*, the first broad inquiry in the s. 15(1) analysis determines whether there is differential treatment imposed by the impugned legislation between the claimant and others. It is clear that there is differential treatment here. Under s. 29 of the *FLA*, members of opposite-sex couples who can meet the requirements of the statute are able to gain access to the court-enforced system of support provided by the *FLA*. It is this system that ensures the provision of support to a dependent spouse. Members of same-sex couples are denied access to this system entirely on the basis of their sexual orientation.

[The rest of the Court agreed with Cory J that s 29 of the *FLA* had drawn a distinction based upon sexual orientation, an analogous ground recognized in *Egan*. The members of the Court differed on whether the differential treatment was discriminatory and whether, if it was, it was saved by s 1.]

The majority held that s 29 of the *FLA* withheld a benefit that conferred access to a court-enforced process that could confer economic benefits and protect the

economic interests of individuals in intimate relationships. That denial of the benefit was held to violate the purpose of s 15 because it exacerbated the significant pre-existing disadvantage and vulnerability experienced by individuals in same-sex relationships, failed to take account of the claimant's actual situation, and promoted the view that M and others in same-sex relationships are less worthy of recognition and protection. See Section IV, Note 2 of this chapter for a discussion of the reasons why s 29 of the FLA was not saved by s 1. The majority ordered that s 29 of the FLA be severed and declared to be of no force or effect, although that remedy was suspended for six months.

Justice Bastarache also found a violation of s 15(1) that was not saved by s 1, although he differed from the majority on the objectives of the FLA. Justice Major also agreed with the majority's result but argued it was unnecessary to consider whether other types of long-term relationships gave rise to dependency. Justice Gonthier, dissenting, found there was no violation of s 15(1); while there was a distinction that differentiated between members of opposite-sex and same-sex cohabiting couples, the differentiation was not discriminatory because it did not perpetuate the view that individuals in same-sex relationships are less deserving of concern, respect, and consideration (at para 262).]

NOTES AND QUESTIONS

1. *M v H* was seen as a major victory against discrimination for same-sex relationships and LGBTQ2+ persons. As a result of the decision, the Ontario government responded with *An Act to amend certain statutes to ensure their constitutionality because of the Supreme Court of Canada decision in M v H*. As the government had recognized in its initial extension of rights to members of some unmarried couples, this amendment had the effect of "reducing the strain on the public purse" by privatizing the support obligation, suggesting that the recognition of same-sex benefits might be limited to, or easier for, new rights that did not cost the state any money. See Brenda Cossman, "Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories" (2000) 48:1 Clev St L Rev 49. And while the amendment extended the rights that members of unmarried couples had, it did so by introducing a new term, "same-sex partner," instead of changing the traditional definition of "spouse." See Brenda Cossman, "Developments in Family Law: The 1998-99 Term" (2000) 11 SCLR (2d) 433 at 463; Emily Graham, "Law v Canada: New Directions for Equality Under the Canadian Charter?" (2002) 22:4 Oxford J Leg Stud 641 at 657-58.

2. Beginning in 2000, cases in Quebec, Ontario, and British Columbia were launched that argued that the common law definition of marriage that restricted it to "one man and one woman" violated s 15(1). All three cases attracted national attention and succeeded in their respective provincial appellate courts. See *Catholic Civil Rights League v Hendricks*, [2004 CanLII 20538, \[2004\] RJQ 851 \(CA\)](#); *Halpern v Canada (AG)*, [2003 CanLII 26403, 65 OR \(3d\) 161 \(CA\)](#); *Barbeau v British Columbia (AG)*, [2003 BCCA 251](#) [*EGALE Canada v Canada (AG)*]. The federal government announced it would not appeal any of the decisions but would instead introduce legislation that formalized the British Columbia and Ontario judgments and refer that draft legislation to the Supreme Court of Canada. In its decision in *Reference re Same-Sex Marriage*, [2004 SCC 79](#), the Court held that Parliament alone had the authority to define marriage with respect to capacity issues, rejecting an originalist interpretation that would have restricted the word "marriage" to its common law meaning at the time of Confederation. It also held that while the proposed legislation was consistent with the Charter, religious officials could not be compelled by the state to perform same-sex marriage ceremonies. It declined to answer the reference question of whether the opposite-sex definition

of marriage violated s 15(1). For commentary on the case law subsequent to *M v H* and the legal fight for same-sex marriage, see for example, Sarah Loosemore, "EGALE v Canada: The Case for Same-Sex Marriage" (2002) 60 UT Fac L Rev 43; Nicholas Bala, "The Debates About Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution" (2005-6) 20 BYU J Pub L 195; Carissima Mathen, "Mutability and Method in the Marriage Reference" (2005) 54 UNBLJ 43.

3. For discussions of legislated reforms to same-sex partnerships and marriage and how feminist critiques of marriage and familial ideology were sidelined, including by gay and lesbian activists, see Claire Young & Susan Boyd, "Challenging Heteronormativity? Reaction and Resistance to the Legal Recognition of Same Sex Partnerships" in Dorothy E Chunn, Susan B Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 262. To what degree has the success of LGBTQ2+ equality rights litigation in the family law sphere required same-sex couples and LGBTQ2+ individuals to present themselves as similarly situated to heterosexual couples and individuals? How would you frame these cases in substantive equality rather than formal equality terms?

Vriend v Alberta

[1998] 1 SCR 493, 1998 CanLII 816

[*Vriend* is an example of a successful claim of both direct and adverse effects discrimination. The appellant, a laboratory coordinator, was fired from a Bible college after he had revealed that he was gay in response to an inquiry from the college's president. *Vriend* attempted to file a complaint with the Alberta Human Rights Commission, alleging discrimination on the basis of sexual orientation, but the Commission would not accept the complaint because sexual orientation was not a prohibited ground of discrimination in Alberta's *Individual's Rights Protection Act* [IRPA]. *Vriend* then initiated a court action, arguing that the omission was a violation of his equality rights. The trial judge agreed. The majority in the Court of Appeal allowed the government's appeal, which argued that the exclusion of sexual orientation did not amount to differential treatment; it constituted a "neutral silence" (*Vriend v Alberta*, 1996 ABCA 87 at para 16, McClung JA).

The question of whether the impugned statute, on its face or in its impact, created a distinction based on an analogous ground was an issue in the Court's decision, as was the application of the Charter to an omission in the law. On the latter point, Cory J held that "[t]he fact that it is the underinclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of Charter scrutiny in this case" (at para 55).]

CORY and IACOBUCCI JJ (Lamer CJ and Gonthier, McLachlin, and Bastarache JJ concurring): [In their joint reasons, Cory J addressed the s 15 issue.]

CORY J:

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[68] The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.

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(a) Does the IRPA Create a Distinction?

[75] The respondents have argued that because the *IRPA* merely omits any reference to sexual orientation, this "neutral silence" cannot be understood as creating a distinction. They contend that the *IRPA* extends full protection on the grounds contained within it to heterosexuals and homosexuals alike, and therefore there is no distinction and hence no discrimination. It is the respondents' position that if any distinction is made on the basis of sexual orientation that distinction exists because it is present in society and not because of the *IRPA*.

[76] These arguments cannot be accepted. They are based on that "thin and impoverished" notion of equality referred to in *Eldridge* (at para. 73). It has been repeatedly held that identical treatment will not always constitute equal treatment (see for example *Andrews, supra*, at p. 164). It is also clear that the way in which an exclusion is worded should not disguise the nature of the exclusion so as to allow differently drafted exclusions to be treated differently. [The Court quoted the following from *Knodel v British Columbia (Medical Services Commission)* (1991), 58 BCLR (2d) 356 (SC) at 384-85]:

Where the state makes a distinction between two classes of individuals, A and B, ... the manner in which the legislative provision or law is drafted is irrelevant for constitutional purposes; i.e., it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B. In both cases, the impact upon the individual within group B is the same.

[77] The respondents concede that if homosexuals were excluded altogether from the protection of the *IRPA* in the sense that they were not protected from discrimination on any grounds, this would be discriminatory. Clearly that would be discrimination of the most egregious kind. It is true that gay and lesbian individuals are not entirely excluded from the protection of the *IRPA*. They can claim protection on some grounds. Yet that certainly does not mean that there is no discrimination present. For example, the fact that a lesbian and a heterosexual woman are both entitled to bring a complaint of discrimination on the basis of gender does not mean that they have equal protection under the Act. Lesbian and gay individuals are still denied protection under the ground that may be the most significant for them, discrimination on the basis of sexual orientation.

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[80] If the mere silence of the legislation was enough to remove it from s. 15(1) scrutiny then any legislature could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups. Such an approach would ignore the recognition that this Court has given to the principle that discrimination can arise from underinclusive legislation. This principle was expressed with great clarity by Dickson C.J. in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1240. There he stated: "Underinclusion may be simply a backhanded way of permitting discrimination."

[81] It is clear that the [Act], by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.

[82] The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have

the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group. ... It is possible that a heterosexual individual could be discriminated against on the ground of sexual orientation. Yet this is far less likely to occur than discrimination against a homosexual or lesbian on that same ground. It thus is apparent that there is a clear distinction created by the disproportionate impact which arises from the exclusion of the ground from the *IRPA*.

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[84] Finally, the respondents' contention that the distinction is not created by law, but rather exists independently of the *IRPA* in society, cannot be accepted. It is, of course, true that discrimination against gays and lesbians exists in society. The reality of this cruel and unfortunate discrimination was recognized in *Egan*. Indeed it provides the context in which the legislative distinction challenged in this case must be analysed. The reality of society's discrimination against lesbians and gay men demonstrates that there is a distinction drawn in the *IRPA* which denies these groups equal protection of the law by excluding lesbians and gay men from its protection, the very protection they so urgently need because of the existence of discrimination against them in society. It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.

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[86] The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction on the basis of sexual orientation. The "silence" of the *IRPA* with respect to discrimination on the ground of sexual orientation is not "neutral." Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

[Justice Cory held that the appropriate remedy was to read sexual orientation in to the *IRPA*.

Justice L'Heureux-Dubé concurred with that result but wrote separately, reiterating her position from the 1995 trilogy that a group-based approach was the proper approach to s 15(1). Justice Major, dissenting in part, agreed there was a breach of s 15(1) but argued that sexual orientation should not be read in to the Act because the legislature might prefer to have no human rights legislation to extending the *IRPA*'s protection to the ground of sexual orientation. For a discussion of the Court's s 1 reasons, see Section IV, Note 2.]

[Further excerpts from *Vriend* are found in Chapter 16, The Advent of the Charter; Chapter 18, Application; and Chapter 25, Enforcement of Rights. For further commentary on *Vriend*, see Anna S Pellatt, "Equality Rights Litigation and Social Transformation: A Consideration of the Women's Legal Education and Action Fund's Intervention in *Vriend v R*" (2000) 12:1 CJWL 117; Timothy Macklem, "*Vriend v Alberta: Making the Private Public*" (1999) McGill LJ 197.]

NOTES AND QUESTIONS

1. In identifying some of the problems with recognizing adverse effects discrimination, Cory J noted that, although both heterosexual and gay and lesbian individuals were affected by the omission of sexual orientation as a ground of discrimination, the first group is not adversely affected (at para 82). In doing so, he acknowledged a significant difference between grounds and the different groups that might be included within those grounds. All individuals have a sexual orientation, but not all have a sexual orientation that leaves them vulnerable to a seemingly neutral law. The main point made by this passage, however, is that it is only when the relative impact of the statute on heterosexual and gay and lesbian individuals is examined that the adverse effects are seen. This also illustrates the value of comparison and of using many comparators, rather than the one "mirror comparator" that was required before *Withler*.

2. In *Vriend*, the government had argued the IRPA could not be understood as creating a distinction through omission and that, if any distinction was made on the basis of sexual orientation, that distinction existed because it was present in society and not because of the law (at para 75). This point about the need to demonstrate causation between the law and the disadvantage is a recurring one. For example, it was made 22 years later by Brown and Rowe JJ in their dissent in *Fraser* (excerpted in Section II.A above). In that case, the dissent identified the cause of the financial disadvantage experienced by job-sharing female RCMP members as the unequal distribution of parental responsibilities and the unavailability of quality childcare, both of which existed "outside ... the purview of the courts" (at para 215; see also para 168). Justices Brown and Rowe concluded that the state should not be responsible for discrimination it had not caused (at para 181).

3. At the time the Charter's equality guarantee was drafted and first interpreted and applied to issues involving sexual identity in cases such as *Egan* (recognizing sexual orientation as an analogous ground), *M v H*, and *Vriend*, it was conceptualized as two binary sets of identity, heterosexuality or homosexuality. Binary identities—such as heterosexual/gay and male/female—constructed and were constructed by the grounds approach and the category of "sex" as an enumerated ground (and later, sexual orientation as an analogous ground). Today, a continuum of identification has become a more common way to conceptualize sexuality and gender identities. What problems arise due to the law's requirement of bounded categories within which to classify individual or group claims for rights protection? See Heather Shipley, "One of These Things Is Not like the Other: Sexual Diversity and Accommodation," in Lori G Beaman, ed, *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: UBC Press, 2012) at 165.

Eldridge v British Columbia (AG)

[1997] 3 SCR 624, 1997 CanLII 327

[Three individuals who were born deaf and whose preferred means of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s 15 of the Charter. According to the *Medical and Health Care Services Act*, the power to decide whether a service was "medically required" and hence a "benefit" under the Act was delegated to the Medical Services Commission. In the case of the *Hospital Insurance Act*, 1996, c 204, hospitals were given discretion to determine which services should be provided free of charge. The Commission and the hospitals did not make sign language interpretation available as an insured service. The s 32 issue of whether the Charter applied to the funding decisions of hospitals or the Commission is discussed in Chapter 18, Application. The portions of La Forest J's

judgment excerpted below focus on the question of whether the failure to provide funding for sign language interpretation violated s 15 and, in particular, on the nature of adverse effects discrimination.]

La FOREST J (Lamer CJ and L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ concurring):

[53] Having concluded that the *Charter* applies to the failure of hospitals and the Medical Services Commission to provide sign language interpreters, it remains to be determined whether that failure infringes the appellants' equality rights under s. 15(1) of the *Charter*. ... I emphasize at the outset that s. 15(1), like other *Charter* rights, is to be generously and purposively interpreted

[54] In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment—deeply ingrained in our social, political and legal culture—to the equal worth and human dignity of all persons. ... Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society" While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important indicium of discrimination

[55] As deaf persons, the appellants belong to an enumerated group under s. 15(1)—the physically disabled

[56] It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed

[57] Deaf persons have not escaped this general predicament. Although many of them resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture, this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population. For many hearing persons, the dominant perception of deafness is one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

[Justice La Forest then reviewed the general analytic framework to s 15 and the different approaches adopted by various members of the Court in a trilogy of rulings released in 1995.]

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[59] In my view, in the present case the same result is reached regardless of which of these approaches is applied . . . There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual's physical disability.

[60] The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.

[Justice La Forest then reviewed the discussion of adverse effects discrimination in *Andrews*.]

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[65] ... [In *Eaton v Brant County Board of Education*, [1997] 1 SCR 241], Sopinka J. observed that in the case of disabled persons, it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination. He remarked, at paras. 66-67:

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The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. ...

[66] ... [I]n the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone. It is on this basis that the trial judge and the majority of the Court of Appeal found that the failure to provide medically related sign language interpretation was not discriminatory. Their analyses presuppose that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate . . .

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[69] ... Effective communication is quite obviously an integral part of the provision of medical services. ...

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[71] If there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can it be said that they receive the same level of medical care as hearing persons? Those who hear do not receive communication as a distinct service. For them, an effective means of communication is routinely available, free of charge, as part of every health care

service. In order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an "ancillary" service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.

[72] Once it is accepted that effective communication is an indispensable component of the delivery of medical services, it becomes much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.

[73] In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality . . . Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner . . . In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons. . . .

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[80] In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

[Justice La Forest went on to find that the s 15 violation could not be justified pursuant to s 1. He held that "the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights" (at para 87). In the result, he issued a declaration that the failure to fund sign language interpretation violated s 15(1). The government was given six months to ensure that "sign language interpreters will be provided where necessary for effective communication in the delivery of medical services" (at para 96).]

NOTES AND QUESTIONS

1. Dianne Pothier wrote about two types of adverse effects discrimination in "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17. She called the first type the "categorical exclusion" type and used *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 [O'Malley] as an example.

O'Malley's employer required its full-time sales clerks to work Friday evenings and Saturdays. O'Malley, a member of the Seventh-Day Adventist Church, observed the Sabbath from sundown Friday to sundown Saturday. The facially neutral condition of employment availability disproportionately impacted all members of that Church who, because of their religion, "were unable to work on Saturdays," even if it did not affect all people of faith (Pothier at 35).

Pothier called the second type of adverse effects discrimination the "disproportionate impact" type, as seen in a second human rights case: *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 [Meiorin]. In *Meiorin*, the government had established minimum physical fitness standards for its firefighters, including an aerobic standard which the claimant, a female firefighter, failed to meet. Evidence demonstrated that, due to physiological differences, most women have a lower aerobic capacity than most men and, unlike most men, most women cannot increase their capacity with training to meet the standard. In other words, "all the women disproportionately fail the test compared to men, [but] some women pass the tests" (Pothier at 35).

Pothier noted the role that the two different types of adverse effects discrimination played in the choice of comparators. In categorical exclusion cases such as *O'Malley*, almost all of those who are not Seventh Day Adventists do not face the consequences the claimant was challenging. Comparators that reveal the adverse impact are simple to identify. In choosing who to compare the claimant to, choosing almost any other religious sub-group, or non-religious employees, would reveal the adverse impact. However, in disproportionate impact cases such as *Meiorin*, it would be possible to compare the claimant to male firefighters who fail to meet the aerobic standard, that is, to those who face the same consequences as the claimant but not for the same gender-based physiological reasons. But that cannot be an appropriate comparison because that would preclude all findings of discrimination in disproportionate impact type of cases. The comparison must be made "between those fired for failing the test (disproportionately women) and those who kept their jobs upon passing the test (disproportionately men)" (Pothier at 36).

Which type of adverse affects discrimination claim did the claimants in *Fraser* make? Consider that not every RCMP member who job-shared was a female with child-care responsibilities, although most were. Is the appropriate comparison to male RCMP members who job-shared and could not buy back their pensions? To RCMP members on leave without pay, who could buy back their pension (disproportionately women)? Or is it to all full-time RCMP members with full pension benefits (disproportionately men)? To put it in Abella J's terms, does a comparison to RCMP members on leave without pay who could buy back (disproportionately women) reveal an "absence of accommodation" (at para 54)? Does a comparison to all full-time RCMP members (disproportionately men) reveal "built-in headwinds" (at para 53)?

In connection with the evidence required to prove adverse effects discrimination, in *Fraser* Abella J identified two types: "evidence about the situation of the claimant group" and "evidence about the results of the law" (at para 56). The latter may include statistics "especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups" (at para 58). She indicated both types of evidence would be preferable (at para 60) but that neither was always required (at para 61). What is not mentioned is that in the *O'Malley* categorical exclusion type of case—which *Fraser* was not—statistical or other evidence of the results of a law is always unnecessary. The very nature of the exclusion of the affected group is complete and total. One hundred percent of observant Seventh Day Adventists are adversely impacted by a requirement to work Saturdays due to a tenet of their faith. By definition, no one who does not hold such a belief can be adversely affected by it. It is only in disproportionate impact types of cases like *Meiorin* and *Fraser* that evidence of the results of the law—admitted as evidence in the case before the Court, accepted via judicial notice, or in precedents which the Court can follow—is needed, and in those cases, it is always needed.

2. Consider the relevance of these ideas about types of adverse effects discrimination and what it means for comparators and evidence requirements in the context of *R v Sharma*, 2020 ONCA 478, leave to appeal to SCC granted, 2021 CanLII 1101, [2020] SCCA No 311 (QL). Cheyenne Sharma, a 20-year-old First Nations woman who the sentencing judge described as "an intergenerational survivor of the government's residential school effort to eradicate the cultural heritage of her people" (at para 9) and who, along with her daughter, was facing homelessness, imported cocaine into Canada in exchange for \$20,000 from her boyfriend. She confessed and pled guilty. Her application for a conditional sentence was rejected, and a custodial sentence of 17 months was imposed. Before 2012, a conditional sentence would have been available, but s 742.1(c) of the *Criminal Code* removed its availability for offences carrying a maximum sentence of 14 years or life imprisonment. At her sentencing hearing, Sharma applied to have s 742.1(c) struck, arguing that the provision discriminated against Indigenous offenders on the basis of race. The sentencing judge, using the test from *Kapp*, held that the s 15 argument failed on the first step because of the absence of a statistical record demonstrating that the impugned provision had a differential impact on Indigenous offenders.

The Ontario Court of Appeal, however, accepted a distinction based on the ground of "race" without analysis of the suitability of this ground for Indigenous people. Is it less problematic to accept the ground of race as the appropriate ground in a case like *Sharma*, where the impugned law applies on its face to all those charged with specific offences, than it is to accept it without analysis in a case like *Kapp*, which involved a constitutionally recognized fishery priority for three First Nations? See Section II.C, Note 4 for further discussion of grounds and Indigeneity.

In the Court of Appeal, Sharma expanded her argument, contending that s 742.1(c) and s 742.1(e)(ii) violated s 15 as well as s 7 for being arbitrary and overbroad. Section 742.1(e)(ii) removed the availability of conditional sentences for offences involving the import of drugs, and therefore also applied to Sharma. A majority of the Court of Appeal accepted both of her arguments and found the two impugned sections were not saved by s 1.

The majority in the Court of Appeal, applying the tests from *Taypotat* and *Alliance*, acknowledged they were dealing with adverse effects discrimination because the impugned provisions were facially neutral. While the Crown had argued that the removal of the conditional sentence option did not "create" any distinction between Indigenous and other offenders and that the distinction existed because of the social circumstances of Indigenous people, the majority, relying on *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679, rejected those arguments. The majority noted that the purpose of the conditional sentencing provisions was to address the issue of overincarceration and particularly the overincarceration of Indigenous offenders (at para 77). It went on to find:

[79] The distinction that is created by the impact of the impugned provisions relates to the overincarceration of Aboriginal offenders, not their overrepresentation in the criminal justice system. By removing the ability to impose a conditional sentence instead of a prison sentence for an offence, the effect on an Aboriginal offender is to undermine the purpose and remedial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people manifested in overincarceration within the criminal justice system, which has been acknowledged by Parliament and the courts as requiring redress.

The majority also noted that giving the word "creates" in the first step of the *Taypotat* test the meaning the Crown argued for would require ignoring the second step of the test where the question was whether the distinction made on protected grounds reinforced, exacerbated, or perpetuated disadvantage for the affected group.

On the second step, the majority noted the "extensive evidentiary record detailing the relationship between the historic disadvantage endured by Aboriginal people in Canada and their overrepresentation in the criminal justice system" that had been put before the

sentencing judge (at para 90). The evidence included statistics on the number and percentage of incarcerated Indigenous women and how many of the conditional sentences granted before 2012 could have been granted after that year. However, the sentencing judge had wanted statistics on how many Indigenous offenders would have received conditional sentences had the impugned provisions not been enacted. The Court of Appeal found that such evidence would not have been helpful, even if it had been available. The majority indicated the most useful statistical evidence would have been about the population of Indigenous offenders who were incarcerated when they otherwise would have been eligible for a conditional sentence, which required them to have received a sentence of less than two years. Because Sharma had been convicted of an offence with a mandatory minimum of two years' imprisonment before that mandatory minimum was struck down as unconstitutional in a different case, the majority found (at para 104):

Statistics would ... have been unable to capture the impact of the impugned provisions on Aboriginal offenders, as it would be difficult to identify the population that was specifically deprived of a conditional sentencing option.

Given the lack of comparators and the impossibility of presenting the most useful type of statistical evidence, *Sharma* illustrates just how difficult a disproportionate impact case of adverse effects discrimination can be. See also Sonia Lawrence, "That Admittedly Unattainable Ideal": Adverse Impact and Race Under Section 15" (2017) Law Society of Upper Canada, Special Lectures 2017: Canada at 150: The Charter and the Constitution 547 at 548.

Consider the Crown's argument that the removal of the conditional sentence option does not "create" any distinction between Indigenous and other offenders and that the distinction existed because of the social circumstances of Indigenous people and was not caused by the law. That type of argument was also made by the federal government in *Fraser* and adopted by Brown and Rowe JJ in their dissent. Could that same type of argument be made using the facts in *O'Malley* or *Eldridge*, which are both categorical exclusion type of cases?

Sharma provides an opportunity for the Supreme Court to centre power in its analysis. What evidence would be needed to ground a discussion of how power works to deny substantive equality as part of an analysis of systemic discrimination?

3. *Eldridge* and *Vriend* were the first Supreme Court decisions in which the obligation to promote substantive equality—and not just simply prevent discrimination—was given real effect. For commentary, see Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*" (1997-98) 9:3 Const Forum Const 71; Isabel Grant & Judith Mosoff, "Hearing Claims of Inequality: *Eldridge v British Columbia (A.G.)*" (1998) 10 CJWL 229. However, *Vriend* and *Eldridge* would be the last cases in which the obligation to promote substantive equality was given material effect for the next 20 years. The following cases are illustrative of some losses during those two decades.

In *Symes v Canada*, [1993] 4 SCR 695, 1993 CanLII 55, the Court rejected a challenge brought by a female lawyer to provisions of the *Income Tax Act* that did not permit the full deduction of childcare expenses as a business expense. Writing for a majority of the Court, Iacobucci J concluded that the claimant had not established that the challenged provisions had a disproportionate impact on women. He acknowledged the evidence demonstrated that women bear a disproportionate share of the child care burden in Canada. But to establish that the limited deductibility of childcare expenses amounts to differential treatment on the basis of sex, he said Symes needed to show that women disproportionately paid child care expenses. Justice Iacobucci went on to suggest that a different sub-group of women, such as single mothers, might be more successful. For commentary, see Audrey Macklin, "Symes v MNR: Where Sex Meets Class" (1992) 5 CJWL 498; Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: University of British Columbia Press, 2002).

A claim of adverse effects discrimination was also dismissed by the Court in *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, [2007 SCC 27](#), excerpted in Chapter 21, Freedom of Association. At issue was the constitutional validity of legislation that interfered with the collective bargaining rights of unions representing health care workers. Over 90 percent of the employees affected by the legislation were women. The unions argued that the act discriminated on the basis of sex (among other grounds) and also violated their freedom of association. The Court held that parts of the Act violated freedom of association protected by s 2(d) of the Charter, and could not be upheld pursuant to s 1. After reaching this conclusion, McLachlin CJ and LeBel J, in their joint majority opinion, disposed of the s 15 argument in a single paragraph:

[165] ... Like the courts below, we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s 15 of the Charter. *The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics.* Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here. [Emphasis added.]

In this paragraph, we see the Court refusing to deal with the question of why some workers who were predominantly women were excluded from the full benefits of collective bargaining. The Court dismissed the argument that gender was not merely coincidental to who was included and who was excluded. For analysis of the Court's rejection of the sex discrimination argument in *BC Health Services*, see Brian G Langille, "Can We Rely on the ILO?" (2007) 13 CLELJ 273; Melina Buckley & Fiona Sampson, "LEAF and the Supreme Court of Canada Appeal of Health Services and Support Facilities Subsector Bargaining Assn v British Columbia" (2005) 17:2 CJWL 473; Judy Fudge, "Conceptualizing Collective Bargaining Under the Charter: The Enduring Problem of Substantive Equality" (2008) 42 SCLR (2d) 213.

Another one-paragraph rejection of a s 15(1) claim based on adverse effects discrimination is seen in *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#). The Alberta government repealed a regulation that allowed the Registrar of Motor Vehicles to grant exemptions to a requirement for a photograph on provincial operator's licences, making the requirement a universal one. The Hutterian Brethren claimed the mandatory photograph requirement was unconstitutional in light of their religious belief that having their photograph taken violates the Bible's second commandment. This facially neutral provision is a rare example of intentional adverse effect discrimination given the government's withdrawal of the benefit previously granted by the law. After analyzing the freedom of religion claim, a majority of the Court dismissed the s 15(1) claim in the following brief passage from McLachlin CJ's judgment:

[108] Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, *it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice.* There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, ... as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1). [Emphasis added.]

How could a law with a disproportionately burdensome impact on a vulnerable religious minority be defended as a "neutral" policy choice within s 15(1) and not raise the issue of adverse effects discrimination? For commentary, see Jennifer Kosman & Jonnette Watson

Hamilton, "‘Terrorism or Whatever’: The Implications of Alberta v Hutterian Brethren of Wilson Colony for Women’s Equality and Social Justice" (2010) 50 SCLR (2d) 221; Jennifer Kosan & Jonnette Watson Hamilton, "Alberta v Hutterian Brethren of Wilson Colony" (2018) 30:2 CJWL 292 (a Women’s Court of Canada judgment).

Other examples of Supreme Court of Canada rulings rejecting s 15(1) claims of adverse effects discrimination include *Taypotat*, discussed in Sections II.A, Note 12 following Andrews and II.C, Note 4, where a heavy evidentiary burden was placed on those attempting to bring claims of adverse impact discrimination, and *Carter v Canada (AG)*, [2015 SCC 5](#), where the Court concluded there was a violation of s 7, and it was unnecessary to consider whether the prohibition on physician-assisted dying deprived adults who are physically disabled of their right to equal treatment under s 15.

For discussion of the jurisprudence on adverse effects discrimination, see Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v BCGSEU" (2001) 46 McGill LJ 533; Jonnette Watson Hamilton & Jennifer Kosan, "Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination Under Section 15 of the Charter" (2015) 19 Rev Const Stud 191.

4. The decisions in *M v H*, *Vriend*, and *Eldridge* were each attacked by the media, politicians, and some scholars as undemocratic and illegitimate instances of judicial activism or overreach. The essence of these attacks was that the unelected members of the Supreme Court had usurped the legitimate role of elected governments and violated democratic principles. For different views on the controversy generated by these decisions and government resistance to implementing new legislation in conformity with them, see, for example, Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (Toronto: Oxford University Press, 2001); Brenda Cossman & Bruce Ryder, "M v H: Time to Clean Up Your Acts" (1998-99) 10 Const Forum Const 59.

5. Adverse effects claims do not rely on governments’ intent, and they do not rely on distinctions drawn by governments in their laws or policies. Adverse effects discrimination claims, therefore, open up the possibility of courts recognizing and remedying systemic discrimination. In *CN v Canada (Canadian Human Rights Commission)*, [\[1987\] 1 SCR 1114, 1987 CanLII 109](#) [Action Travail]—a human rights appeal considering whether a tribunal had the power to impose an “employment equity program” on an employer in order to address a problem of systemic discrimination in the hiring and promotion of women to certain “blue collar” jobs—the Supreme Court defined systemic discrimination in the employment context as “discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination” (at 1139). In *Meiorin*—the human rights case where a fitness test was structured in a way that had adverse employment consequences for some female firefighters—the Supreme Court recognized that adverse effects discrimination is a “more subtle type of discrimination, which rises in the aggregate to the level of systemic discrimination [and] is now much more prevalent than the cruder brand of openly direct discrimination” (at para 29).

Justice Abella began her discussion of adverse effects and systemic discrimination in *Fraser* by appearing to equate the two concepts, stating that “[h]ow adverse impact or systemic discrimination is applied has received extensive academic consideration” (at para 29). However, she went on to explain the relationship between the two concepts by quoting from Colleen Sheppard; see para 29 in *Fraser* (excerpted above).

Is the relationship between adverse effects discrimination and systemic discrimination that of a part to a whole, as suggested in *Meiorin*, or do the two concepts overlap partially or completely, as suggested in *Fraser*? Why might it matter in law whether or not the two concepts are separate or co-extensive? What is the relationship between direct discrimination and systemic discrimination?

6. As traditionally understood, negative rights focus on freedom *from* government interference with rights, while positive rights require government action and resource redistribution in order to be exercised. Positive rights include social and economic rights, such as women's right to equal pay for work of equal value (*Alliance, Centrale*), a right to housing (for example, *Tanudjaja v Canada (AG)*, 2014 ONCA 852, leave to appeal to SCC dismissed, 2015 CanLII 36780, [2015] SCCA No 39 (QL), holding a claim to a "freestanding" right to housing to be non-justiciable), and a right to action on climate change (Note 8 below). But many of the positive rights claims heard at the Supreme Court have had relatively modest and narrow redistributive consequences, such as those required when the Court compelled the Alberta government to include sexual orientation in its human rights legislation (*Vriend*), the British Columbia government to fund sign language interpreters in hospitals (an estimated \$150,000/year: *Eldridge* at para 4), and the federal government to allow RCMP job-sharers to use their own money to buy pension coverage (*Fraser*; but see the reasons of Brown and Rowe JJ at para 228 in the excerpt of *Fraser* in Section II.A for an argument to the contrary). For a discussion of the role of budgetary concerns in s 15 cases, see Hester A Lessard, "Dollars Versus [Equality] Rights: Money and the Limits on Distributive Justice" (2012) 58 SCLR (2d) 299.

The question of whether a government can be required to act, particularly in a context where claimants' disadvantages are seen by some to exist independent of state action, has resurfaced in the recent Supreme Court cases of *Alliance, Centrale*, and *Fraser*, and revealed mutually incompatible understandings of the Charter's equality guarantee. In general, the dissenting opinions in those cases took the position that equality rights are always negative rights and a government cannot be compelled to act, that governments are not required to act at all when the disadvantage suffered by a claimant group is not created by state action, and if the government does act when it need not, as long as its actions have an ameliorative purpose, then it may act incrementally without violating s 15(1). The dissenting justices would therefore have found against the claimants in all three of these cases, despite the fact that claims on public funds were involved only in some of these cases—specifically, the pay equity cases to the extent they involved public sector employment relationships.

This is not the vision of substantive equality that equality-seeking groups have. It is, to quote Cory J in *Eldridge*, "a thin and impoverished vision of s. 15(1)" (at para 73). Substantive equality cannot be achieved without the recognition of positive rights. But, even in *Eldridge*, the Supreme Court did not fully embrace positive equality rights, saying only that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner," even if that requires the government to take positive action (at para 73; see also *Schachter v Canada*, [1992] 2 SCR 679, 1992 CanLII 74).

Twenty years after *Eldridge*, the judgments in the 2018 pay equity cases provide examples of the same point. Justice Abella's majority opinion in *Alliance*, which uses *Vriend* and *Eldridge* as precedents to address arguments made by the dissent of Côté, Brown, and Rowe JJ, is illustrative:

[41] ... [M]y colleagues imply that there is no breach of s. 15(1) of the Charter because the Quebec legislature did not create pay discrimination against women. No one has suggested that it did. But when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance (*Vriend*, at para. 66).

[42] The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. But s. 15 does require the state to ensure that whatever actions it does take do not have a discriminatory impact (*Vriend*; *Eldridge* ... at paras. 72-80).

The acceptance of positive rights is crucially important in the context of systemic discrimination. If the Charter does not place positive duties on the state to act to remedy social and economic inequalities—inequalities that manifest, for example, in disproportionate homelessness rates among those with mental and physical disabilities, the overincarceration of Indigenous and racialized offenders, and the disproportionate burden of climate change on the young—then action against systemic discrimination is entirely dependent on the good will of the governments in power.

7. Many examples of systemic discrimination based on race have been drawn to Canadians' attention recently as a result of political action and advocacy around racial inequalities within the criminal justice system. To date, however, s 15 cases involving race as a ground of discrimination have been almost entirely absent from the Supreme Court's equality jurisprudence. There was a claim on the ground of race in *R v Kapp* (discussed in Sections II.A, Note 9 following *Andrews*, and II.C, Note 4), but the Court did not address whether race was the appropriate ground. There have been a number of other cases involving Indigenous claimants and race as a ground of discrimination, but in none of those cases has the ground been analyzed more than minimally, nor has the question of whether Indigeneity is a subset of race been analyzed. See Section II.C, Note 4.

The gap in s 15(1) Supreme Court decisions based on the ground of race may soon be filled by a decision in *R v Sharma* (discussed in Note 2 above), where the claimant, a member of the Saugeen First Nation, alleged discrimination against Indigenous offenders on the basis of race. *Sharma* claims race as the ground of discrimination even though Indigeneity as a racial category is contested, and a constitutional analysis in this context should often include s 25 of the *Constitution Act, 1982* as well as s 15 of the Charter (for a discussion of s 25 see Section III, Note 5). Nevertheless, most advocates and scholars agree that a similar analytical approach is appropriate in cases of racism and Indigenous subordination and oppression. See Sébastien Grammond, "Disentangling Race and Indigenous Status: The Role of Ethnicity" (2008) 33:2 Queen's LJ 487; Sonia Lawrence & Debra Parkes, "*R v Turtle: Substantive Equality Touches Down in Treaty 5 Territory*" (2020) 66 CR (7th) 430.

What might explain such a large gap in equality jurisprudence? Sonia Lawrence has posited a number of possible reasons for "the curious lack of racial discrimination claims under section 15," including the lack of community resources to build claims, difficulties in obtaining the necessary statistical data, and *Kapp*'s ten-year focus on prejudice and stereotyping to the detriment of adverse effects claims: see "'That Admittedly Unattainable Ideal': Adverse Impact and Race Under Section 15" (2017) Law Society of Upper Canada, Special Lectures 2017: Canada at 150: The Charter and the Constitution 547 at 548–50. Joshua Sealy-Harrington, in commenting on the race evasiveness of the Supreme Court's equality jurisprudence, argues that the substantive equality framework first provided by *Andrews* and now enhanced by *Fraser* is capable of commanding required structural changes in Canadian society, and needs to be put to use at strategic sites of systemic disparity and persisting legacies of oppression and dispossession: "The Charter of Whites: Systemic Racism and Critical Race Equality in Canada" in Emmett Macfarlane & Kate Puddister, eds, *The Constitution Act, 1982: 40 Years Later* (forthcoming). Do you think that Indigenous individuals and communities have been more successful in bringing claims under s 35 than s 15, and, if so, why that might be?

The examples of the overincarceration of racialized individuals and of youth-led climate change litigation (in Note 8 below) raise the issue of positive rights and hint at the extent of positive state action that might be required to create substantive equality. The response of a significant minority of the Supreme Court to the possibility of such far-reaching consequences is evident in, for example, Brown and Rowe JJ's "floodgates" argument in *Fraser*:

[144] The circumstances here are extraordinary, in that it is acknowledged that Parliament was not obliged to enact the Plan ... nor is it barred from repealing it. ... But is not the next extension of our colleague's line of reasoning that governments (federal and provincial)

have a positive duty under s. 15(1) to initiate measures that will remove all effects of historic disadvantage, and that they are constitutionally barred from repealing or even amending such measures? These are profoundly complex matters of public policy that no Canadian court is institutionally competent to deal with.

The views of Côté, Brown, and Rowe JJ on the nature of equality rights are perhaps most explicit in their dissent in *Alliance*, one of the two 2018 pay equity cases:

[65] At issue in this appeal is the nature of *Charter* rights. *Charter* rights are fundamentally negative in that they preclude the state from acting in ways that would impair them. They do not place the government under an obligation to act in order to obtain specific societal results such as the total and definitive eradication of gender-based pay inequities in private sector enterprises. An interpretation of the *Charter* that imposed a *positive* obligation such as that would change its nature and confer on the courts the unusual responsibility of overseeing compliance with it. Yet that is the consequence of our colleague's interpretation. Although government policies or legislation respecting human rights may be designed to eliminate pay inequities in private sector enterprises, there is no constitutional obligation to that effect: *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41.

As Joshua Sealy-Harrington summarizes in "The Alchemy of Equality Rights" (2021) 30.2 Const Forum Const 53 at 67, Brown and Rowe JJ reason that

government initiatives are immune from *Charter* scrutiny, seemingly, if they do any of the following: (1) intend to ameliorate; (2) involve policy; (3) take incremental steps; (4) target "private" rather than "public" discrimination; (5) lack demonstrated causation; or (6) lack the evils of "arbitrariness," "unfairness," or "wrongful[ness].

And, as he concludes, although Abella J critiques Brown and Rowe JJ's judgment for its formalism and they critique hers for indeterminacy, "their material disagreement is ideological" (at 73).

For further commentary on social and economic rights as equality rights, see, for example, David A Green & Jonathan R Kesselman, eds, *Dimensions of Inequality in Canada* (Vancouver: UBC Press, 2006); Margot Young, Susan B Boyd, Gwen Brodsky & Shelagh Day, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007); Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights Under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal Soc Issues 37; Jennie Abell, "Poverty and Social Justice at the Supreme Court During the McLachlin Years: Slipsliding Away" in Sandra Rogers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: LexisNexis Canada, 2010) at 257.

The stakes in the positive versus negative equality rights debate—and in the related controversies over judicial activism, incrementalism, institutional competence, and causation—are high. With Wagner CJ and Moldaver J joining frequent dissenters Brown and Rowe JJ in *R v CP* (discussed in Note 2 following *Fraser* in Section II.A) and examining the impugned law from the perspective of those other than the claimant, bringing the balancing of multiple interests into s 15(1) when determining if there was a rights violation, it seems that debate about the fundamental meaning and nature of the *Charter*'s equality guarantee might continue for some time. The claims in the pay equity cases and *Fraser* did not involve much, if any, call on the public purse. If future claims do make significant redistributive demands, we should expect them to evoke even more resistance. For commentary on the "unresolved fractures at the foundation of equality rights jurisprudence that threaten its stability going forward," see Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada," cited above, at 302. What are

the proper roles of courts and legislative bodies in responding to claims of positive rights and systemic inequality?

8. Five youth-led climate change lawsuits were before Canadian courts in early 2021 and included adverse effects discrimination claims that the impugned law or policies infringe the rights of youth and future generations guaranteed by s 15(1) of the Charter:

Government decisions allow and enable GHG emissions to continue at a rate that causes largely irreversible warming. This warming creates a cascade of serious social, economic, and health consequences of both a physical and mental nature. These consequences are (and will continue to be) disproportionately borne by younger and future generations, both because of the length of time they will live their lives on an impacted planet and, in the case of children, because of their unique vulnerabilities to some of the impacts.

See Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The Charter's Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 JL & Equality 1 at 5.

To date, the major stumbling block for youth climate change claims has been the issue of justiciability, an issue which is explored in detail by Chalifour, Earle, and Macintyre. Only *Environnement Jeunesse v Canada (AG)*, [2019 QCCS 2885](#) and *Mathur v Ontario*, [2020 ONSC 6918](#) initially survived government motions to strike the cases on the basis they were not justiciable. In *Mathur*, Brown J stated that a case for finding a positive obligation on the government could be made out in the context of climate change (at paras 228, 233, 234). However, although *Environnement Jeunesse* failed in the lower court on the basis that the proposed class defined by age 35 was arbitrary and not on the basis that the government refused to act, the appeal was dismissed on the basis the claim was not justiciable: *Environnement Jeunesse c Procureur général du Canada*, [2021 QCCA 1871](#). The work of Chalifour, Earle, and Macintyre indicates that the breadth or narrowness of the claims and the specificity of the impugned law and policies are two key factors in whether claims survive government charges of non-justiciability. In other words, did the claims challenge the federal government's overall approach to climate policy and fail to identify any specific government conduct, or did they target policy decisions that had been translated into law and were related to actions such as the setting of targets? These claims also illustrate the difficulty of challenging executive action on the part of government under s 15(1). For a discussion of justiciability, see the note following the *Quebec Secession Reference*, [\[1998\] 2 SCR 217, 1998 CanLII 793](#) in Chapter 2, Judicial Review and Constitutional Interpretation.

Justiciability issues can arise when s 15(1) claims challenge governments' failure to act—the omission or absence of laws or other state action—rather than specific statutes or regulations, and these youth climate change actions primarily focus on government inaction. Chalifour, Earle, and Macintyre classify the action/inaction spectrum as including claims challenging specific and direct state action at one end, claims alleging inadequate action in the middle, and claims based on the government's complete failure to act at the other end (at 41). As they point out, a successful claim based on a government failure to act would correspond to imposing a positive duty to act on the government and, as explored in Note 6 above, Canadian courts have been reluctant to impose positive duties in the context of s 15 claims.

Basing a s 15(1) claim on the failure of the government to act is supported by the Supreme Court's decision in *Vriend*; see above in this section. For example, Cory J rejected the argument that the Alberta legislature's "silence" was "neutral," holding (at para 57) that

questions which raise the issue of neutrality can only be dealt with in the context of the s. 15 analysis itself [because] [u]nless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not.

It is especially important that neutrality—i.e., no impact—not be assumed when the claim is a s 15(1) claim of adverse effects discrimination. That type of claim can only be seen in its impact.

Not only must the government's failure to act be shown to be a distinction that has adverse effects, but that distinction must be based on protected grounds. Youth-led climate change litigation raises unique issues with respect to the way the enumerated ground of age is used to demarcate a cohort that has been adversely affected by government inaction, and in raising "future generations" as a potential analogous ground. In addition, on the second step of the *Fraser* test, the claimants would have to show the disproportionate impact of the government's conduct, based on an argument that the burdens imposed by the government's inaction perpetuate or exacerbate young people's pre-existing disadvantage (for example, their inability to vote) (Chalifour, Earle, and Macintyre at 70). Does climate change law or policy have adverse impacts on other groups or grounds that could be challenged under s 15(1)?

C. GROUNDS OF DISCRIMINATION AND INTERSECTIONALITY

A crucial part of the s 15(1) analysis is to determine whether the differential treatment at issue is related to a personal characteristic that is either enumerated in s 15(1) or analogous to those grounds that are listed. This "grounds" stage of analysis has typically occurred as part of the first step of the test for discrimination, although during the era of the *Law* test, the grounds issue was a separate second step.

As set out in Section II.A, in *Andrews*, the Supreme Court found that the role of s 15 was to combat discrimination that was based on enumerated or analogous grounds, noting the connection between these grounds and prejudice or disadvantage (at 181). The *Andrews* Court rejected the view that s 15 should protect individuals from all laws that draw distinctions based on any personal characteristics, with the justification of all those distinctions to be assessed under s 1.

A focus on grounds has been criticized for failing to account for people's complex experiences of discrimination, and for ignoring the differences in discrimination experienced by, and within, the groups encompassed by the different grounds. This critique raises the issue of intersectionality, a term coined by Kimberlé Crenshaw to describe the idea that individuals and groups may experience inequality that is related to more than one aspect of their identity (or to more than one form of oppression), which may intersect in compounding and unique ways. Crenshaw's example was of Black women in the workplace who experienced systemic inequality based on the intersection of racism and sexism. One of her key points was that courts and other decision-makers have difficulty in seeing discrimination and inequality at the intersection of different grounds. As we will review in this section, the Supreme Court has not yet formally recognized intersecting grounds of discrimination under s 15, although Abella J did so informally in *Fraser* (at para 116). Intersectionality is also related to anti-essentialism and the importance of seeing the members of particular groups (such as women) in light of diverse identities and forms of oppression. For further discussion, see Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" [1989] U Chicago Legal F 139; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's LJ 179; Grace Ajele & Jena McGill, *Intersectionality in Law and Legal Contexts* (Toronto: Women's Legal Education and Action Fund, 2020); Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Can Bar Rev 893.

In the 1995 trilogy—*Miron*, *Egan*, and *Thibaudeau*, discussed above in Section II.A, Note 6 following *Andrews*—L'Heureux-Dubé J took the position that the courts could better analyze people's experiences of discrimination if they focused on the comparative impact of laws on different groups rather than on the basis of grounds. Others, such as Dianne Pothier, defended the role of grounds in focusing attention on the historical and social reality of unequal power relations. While the Supreme Court has generally maintained its focus on the need to show

differential treatment or impact based on an enumerated or analogous ground under s 15, it has sometimes used the language of "groups" rather than grounds. The Court has also differed in its approach to the issue of how analogous grounds should be identified, both over time and in particular cases. Pothier ties these points together in the following excerpt.

Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences"

(2001) 13 CJWL 37 at 40-41, 57-58

Justice L'Heureux-Dubé's concern, which was expressed in *Egan*, that a focus on grounds risks "being distanced and desensitised from real people's real experiences" assumes that grounds are disconnected from real people's real experiences. In contrast, I would contend ... that grounds are an important means of providing the necessary history and context of discrimination. This point is relevant with respect to both long-established and newly recognized grounds of discrimination. When, in *Egan*, Justice Sopinka described the recognition of same-sex relationships as "novel," thereby justifying non-intervention by the Court, he was indeed "distanced and desensitised from real people's real experiences." However, the distance and insensitivity of his judgment is not because sexual orientation is disconnected from the lives of lesbians and gay men. Rather, it reflects the fact that sexual orientation has for so long been either constrained by, or invisible to, the law.

Grounds of discrimination are not a purely legal construct. They reflect a political and social reality to which the law has, belatedly, given recognition. Discrimination was a fact of life long before the law decided that it should intervene to prohibit it. It is the grounds of discrimination that separate people who experience discrimination from those who do not. The focus on why something counts as a ground of discrimination should be a constant reminder of why discrimination is, legislatively and/or constitutionally, prohibited. Without a thorough understanding of the pertinent ground or grounds of discrimination, the discrimination analysis will be inadequate.

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Grounds of discrimination are obviously only one element of the analysis. Although, in theory, it would be possible to be attentive to the dynamics of such phenomena as racism and sexism without making grounds a separate element of analysis, in practice, it is attention to grounds that can help ensure that the history and context of discrimination do not simply fade into the background. Grounds of discrimination, as a legal construct, are markers of the dynamics of power. The exercise of identifying new analogous grounds forces an inquiry into the complexities of the dynamics of power. Although there are certain commonalities across different kinds of discrimination, discrimination operates in different ways in the context of different grounds of discrimination. It is through an understanding of the different ways in which discrimination operates that a more complex and comprehensive appreciation of equality can emerge.

In *Andrews*, the question of whether a personal characteristic such as citizenship should be recognized as an analogous ground for the purposes of s 15 was framed differently by different members of the Court. Justice McIntyre focused on non-citizens as a "discrete and insular minority" coming within the protection of s 15 (at 183). Justice La Forest argued that what makes a ground analogous is that it relates to a personal characteristic that is "not within the control of the individual and, in this sense, is immutable," as well as a relative lack of

power politically, noting the connection between citizenship, race, and national or ethnic origin (at 195). Justice Wilson also focused on non-citizens as "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated" (at 152). She noted that "the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances," in keeping with the purpose of s 15 in ensuring "the 'unremitting protection' of equality rights in the years to come" (at 152-53, quoting *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155, 1984 CanLII 33).

Since *Andrews*, the Court has recognized only three more analogous grounds of discrimination. As noted in Section II.A, Note 6 following *Andrews*, sexual orientation was unanimously accepted as an analogous ground in *Egan*, which involved the exclusion of same-sex spouses from benefits under the federal *Old Age Security Act*, RSC 1985, c O-9. Justice La Forest, writing for four members of the Court, stated (at 528) that sexual orientation

is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s 15 protection as being analogous to the enumerated grounds.

However, this group of four found that there was no discrimination at play in targeting a government benefit at heterosexual married and common law couples given the "biological and social realities that underlie the traditional marriage" (at 536). Justice Cory, writing for another four members of the Court, focused on the relationship between sexual orientation and stereotyping, historical disadvantage, and vulnerability to political and social prejudice. Noting that gays and lesbians had long been subject to harassment, violence, discrimination, and stigmatization, he concluded that they "form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (at 602). While a majority of the Court in *Egan* found that the law in question was discriminatory, Sopinka J provided a swing vote and upheld the law under s 1, based on the "novel" nature of the claim (as discussed by Pothier in the excerpt above).

Later rulings have been more favourable for claimants relying on discrimination on the basis of sexual orientation to ground violations of s 15(1). See, for example, two of the cases excerpted in Section II.B—*Vriend* (omission of sexual orientation from human rights legislation found to violate s 15(1)) and *M v H* (exclusion of members of same-sex couples from the definition of spouse in spousal support legislation found to violate s 15(1))—as well as *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 (administration of customs rules regarding obscene publications as applied to gay and lesbian erotica found to violate s 15(1)); *Canada (AG) v Hislop*, 2007 SCC 10 (exclusion of some same-sex partners from retroactive survivors benefits under the Canada Pension Plan found to violate s 15(1)); and *Reference re Same-Sex Marriage*, 2004 SCC 79 (extending the right to civil marriage to same-sex couples found to be consistent with s 15 equality rights). Would you categorize these cases as claims of formal or substantive equality? Of recognition or of redistribution? Were there costs associated with implementing these rulings, and who would pay? To what extent might these characterizations have affected the Court's decisions?

In *Miron v Trudel*, discussed in Section II.A, Note 6 following *Andrews*, a 5–4 majority of the Court recognized marital status as an analogous argument under s 15. Justice McLachlin, writing for four members of the majority, examined a number of factors in assessing the analogous ground issue. First, she found that marital status touches matters that are related to "the essential dignity and worth of the individual"—namely, "the individual's freedom to live life with the mate of one's choice in the fashion of one's choice" (at para 151). Second, she noted that marital status is associated with patterns of historical disadvantage and prejudice. Third, while marital status may not be immutable in a strong sense, it is a status over which "the individual exercises limited but not exclusive control" (at para 153). Justice McLachlin concluded that the exclusion of unmarried partners from the definition of spouse in insurance legislation was

discriminatory because it denied them equal benefits solely on the basis of their marital status. Writing for four dissenting members of the Court, Gonthier J focused on the importance of marriage as a social institution. In his analysis, analogous grounds are irrelevant personal characteristics' associated with historical disadvantage and stereotyping. He concluded that marital status may be an analogous ground in some circumstances, but not merely where particular benefits are attached to marriage without more. He also argued that marital status is a choice, which supported its relevance to the benefits provided by the impugned law (at paras 48-49).

Finally, in *Corbiere*, the Court recognized "Aboriginality-residence"—the status of being an off-reserve member of a First Nation regulated as an "Indian" band by the *Indian Act*—as an analogous ground of discrimination. While the Court agreed on this recognition, the following excerpt shows how the majority and concurring members of the Court differed in their approach to analogous grounds. *Corbiere* was decided shortly after *Law* and used the *Law* approach to s 15(1).

Corbiere v Canada (Minister of Indian and Northern Affairs)

[1999] 2 SCR 203, 1999 CanLII 687

[Section 77(1) of the *Indian Act*, RSC 1985, c I-5 required band members to be "ordinarily resident" on their reserve in order to be eligible to vote in band elections. Non-resident band members brought a challenge under s 15(1), alleging that residence was an inappropriate personal characteristic on which to deprive them of a voice in decisions that could deeply affect them—for instance, the sale of band-owned land or the expenditure of band-controlled monies. The entire Court agreed that the impugned provision violated s 15(1), and excerpted below are the portions of the two judgments that deal with the issue of analogous grounds.]

McLACHLIN and BASTARACHE JJ (Lamer CJ and Cory and Major JJ concurring):

[3] The narrow issue raised in this appeal is whether the exclusion of off-reserve members of an Indian band from the right to vote in band elections pursuant to s. 77(1) of the *Indian Act*, RSC 1985, c. I-5, is inconsistent with s. 15(1). ...

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[6] We agree with L'Heureux-Dubé J that Aboriginality-residence (off-reserve band member status) constitutes a ground of discrimination analogous to the enumerated grounds. However, we wish to comment on two matters: (1) the suggestion by some that the same ground may or may not be analogous depending on the circumstances; and (2) the criteria that identify an analogous ground.

[7] The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination

[8] The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well

not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

[9] We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. ... Sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory. To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296, suggested that residence *might* be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law, supra*, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding no analogous ground or no discrimination in fact going to essential human dignity.

[10] If it is the intention of L'Heureux-Dubé J's reasons to affirm contextual dependency of the enumerated and analogous grounds, we must respectfully disagree. If "Aboriginality-residence" is to be an analogous ground (and we agree with L'Heureux-Dubé J that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.

[11] Maintaining the distinction ... between the enumerated or analogous ground analysis and the ... contextual discrimination analysis, offers several advantages. Both stages are concerned with discrimination and the violation of the presumption of the equal dignity and worth of every human being. But they approach it from different perspectives. The analogous grounds serve as jurisprudential markers for suspect distinctions. They function conceptually to identify the sorts of claims that properly fall under s. 15. By screening out other cases, they avoid trivializing the s. 15 equality guarantee and promote the efficient use of judicial resources. And they permit the development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination. A distinction on an enumerated or analogous ground established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case.

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[13] What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15—race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated

against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[14] ... L'Heureux-Dubé J's discussion makes clear that the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.

[15] Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally inter-related form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

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L'HEUREUX-DUBÉ J (Gonthier, Iacobucci, and Binnie JJ concurring):

[After determining that the legislation imposed differential treatment, L'Heureux-Dubé J turned to the issue of analogous grounds.]

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[59] ... The analogous grounds inquiry, like the other ... stages of analysis, must be undertaken in a purposive and contextual manner The "nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society's treatment of that group" must be considered

[60] Various contextual factors have been recognized in the case law that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential. An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground: *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 148; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 90. It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked: *Andrews, supra*, at p. 152; *Law, supra*, at para. 29. Another indicator is whether the ground is included in federal and provincial human rights codes: *Miron, supra*, at para. 148. Other criteria, of course, may also be considered in subsequent cases, and none of the above indicators are necessary for the recognition of an analogous ground or combination of grounds: *Miron, supra*, at para. 149.

[61] I should also note that if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area, to give only a few examples. Here, to illustrate, the nature of the decisions band members make about whether to live on or off a

reserve are different from those made by many other Canadians in relation to their place of residence. So are other factors related to the analogous grounds analysis that still affect them. The [grounds] stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice. ...

[62] Here, several factors lead to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). From the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. It involves choosing whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that as discussed below during the third stage of analysis, band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost. For these reasons, the second stage of analysis has been satisfied, and "off-reserve band member status" is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this combination of traits. I note that in making this determination, I make no findings about "residence" as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.

[All members of the Court agreed that the distinction drawn by s 77(1) of the *Indian Act* discriminated against off-reserve band members, perpetuated their historical disadvantage, and treated them as less worthy and deserving than other band members.

The Court also agreed that the violation of s 15(1) could not be justified under s 1. While the restriction on voting was rationally connected to the objective of giving a voice in the affairs of the band only to the persons most directly affected by the band council's decisions, it was not minimally impairing in light of the complete denial of voting rights to off-reserve band members. As a remedy, the words "and is ordinarily resident on the reserve" were struck from the statute, but the order was delayed for 18 months to allow the government to conduct extensive consultations with the affected parties and "balance the affected interests in a manner that respects Aboriginal rights and all band members' equality interests" (at para 119).]

NOTES AND QUESTIONS

1. In *Corbiere*, McLachlin and Bastarache JJ took issue with L'Heureux-Dubé J on whether the recognition of a personal characteristic as an analogous ground should be context-specific. Justices McLachlin and Bastarache emphasized that once a personal characteristic is recognized as an analogous ground, it will be seen as a "constant marker" of discrimination across different kinds of government actions (at paras 8-9). Justice L'Heureux-Dubé suggested that whether a ground is analogous could depend on the social, legislative, or geographic context, also noting that personal characteristics could overlap and intersect (at para

61). Her illustration of this point was that residence could be seen as an analogous ground for First Nations band members even if residence was not more broadly recognized as an analogous ground, and she went on to say that "off-reserve band member status ... will hereafter be recognized as an analogous ground in any future case involving this combination of traits" (at para 62). How different do you think these two approaches are on the issue of whether the approach to analogous grounds should be contextual? What is the difference between an "embedded ground" as described by McLachlin and Bastarache JJ and the contextual approach of L'Heureux-Dubé J?

Since *Corbiere*, the Court has reiterated the view that new analogous grounds are permanent markers of discrimination, but it has not found any new analogous grounds: see, for example, *Lavoie v Canada*, 2002 SCC 23 at para 41 (Bastarache J on citizenship: "once a ground is found to be analogous, it is permanently enrolled as analogous for other cases"). The Court has not revisited its approach to analogous grounds since *Corbiere*.

2. In *Corbiere*, McLachlin and Bastarache JJ argued that the common feature of the enumerated grounds should also define the analogous grounds—and in their opinion, that was actual or constructive immutability. In their view, analogous grounds are personal characteristics "that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law," and other factors identified in the case law "may be seen to flow from the central concept of immutable or constructively immutable personal characteristics" (at para 13). In contrast, L'Heureux-Dubé J stated that a range of factors, none of them necessary, should be considered when determining whether a personal characteristic should be recognized as an analogous ground. In this respect, L'Heureux-Dubé J was following the approach articulated by McLachlin J in *Miron* above. What are the implications of the apparent shift from *Miron* to *Corbiere* from a broader, more flexible inquiry to one that focuses on the single criterion of actual or constructive immutability?

For academic commentary on this issue, see Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 (advocating a multi-factor approach to grounds); Jessica Eisen, "Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds, and Relational Theory" (2017) 42:2 Queen's LJ 41 (advocating a relational approach to grounds).

3. Another key point in *Corbiere* was that the "grounds" and "discrimination" stages of analysis under s 15(1) must be kept separate and that finding a new analogous ground does not automatically lead to finding a violation of s 15(1) (McLachlin and Bastarache JJ at paras 11-12). This point has been reiterated in different ways in subsequent cases. For example, in *Quebec (AG) v A*, Abella J critiqued LeBel J's argument that marital status is a choice that should influence the finding of discrimination (at paras 335-36), yet she suggested that choice "may be an important factor in determining whether a ground of discrimination qualifies as an analogous ground" (at para 343). Do you agree that "choice" should be relevant in determining whether a particular status or other personal characteristic is an analogous ground? Would your answer differ if immutability was only one of several factors in assessing analogous grounds, as L'Heureux-Dubé J advocated in *Corbiere*? How does Abella J's handling of choice in *Quebec v A* align with her treatment of choice in *Fraser*, excerpted in Section II.A? For further discussion of the role of choice under s 15(1), see Section II.A, Note 4 following *Fraser*.

4. The Supreme Court has decided a number of s 15(1) claims involving Indigenous persons and groups, each raising different types of discrimination and different articulations of the grounds at play. *Corbiere* dealt with the voting rights of band members that differed depending on whether they lived on or off reserve. Justice L'Heureux Dubé also introduced an element of intersectionality into the analysis by noting (at para 72) that

Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.

This point references the fact that many First Nations women and their descendants lost their status and/or their right to reside on-reserve under the *Indian Act* when they married non-Indian men or men from different Nations. See the discussion of *Attorney General of Canada v Lavell*, [1974] SCR 1349, 1973 CanLII 175 in Chapter 15. In another case, *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627, 1994 CanLII 27 (NWAC), the Court considered a Charter challenge to the federal government's failure to provide funding for an Indigenous women's group to allow their participation in constitutional talks alongside a number of other Indigenous organizations that were alleged to be male-dominated. Finding a lack of an evidentiary basis for NWAC's arguments, the Court dismissed their claim that the failure to provide funding violated s 15 and that it violated their equal right to freedom of expression, contrary to s 2(b) and s 28 of the Charter. How would you frame the grounds of discrimination at play in NWAC's claim, and how would you frame their arguments in intersectional terms? For a shadow judgment in this case on behalf of the Women's Court of Canada, see Mary Eberts, Sharon McIvor & Teressa Nahane, "Native Women's Association of Canada v Canada" (2006) 18:1 CJWL 67.

In *Kapp*, discussed in Section II.A, Note 9 following *Andrews*, and excerpted in Section III, the Court concluded without discussion that a 24-hour priority fishing license conferred on several First Nations amounted to differential treatment on the basis of race (at para 56). Would it have been preferable for the Court to recognize Aboriginality or Indigeneity as an analogous ground? For a critical analysis of the Court's finding of race-based discrimination in *Kapp*, see Sonia Lawrence's judgment for the Women's Court of Canada, "R v Kapp" (2018) 30:2 CJWL 268.

See also *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 (finding a distinction between "Indians and non-Indians" without elaborating on the relevant ground because the distinction was found to be non-discriminatory); *Lovelace v Ontario*, 2000 SCC 37 (involving benefits that were differentially available to First Nations communities depending on whether they were bands registered under the *Indian Act*, where the Court found that it was unnecessary to decide if the differential treatment was based on an enumerated or analogous ground because there was no discrimination in the circumstances of the case); *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 (assuming that registration as a "status Indian" constituted an analogous ground, but explicitly refraining from deciding the issue given the Court's finding that the impugned law was protected by s 15(2), as further discussed in Section III). What is the best way to frame the relevant grounds in these cases so that they would qualify as analogous grounds?

In *Taypotat*, discussed above in Section II.A, Note 12 following *Andrews*, the Court considered whether an educational requirement to run for the position of Chief or Band Councillor of a First Nation in Saskatchewan violated s 15(1). Taypotat initially argued that "educational attainment is analogous to race and age" (at para 10), and his claim was dismissed by the Federal Court for lack of evidence to support the argument that education level should be recognized as an analogous ground. The Federal Court of Appeal treated the educational requirement as a facially neutral rule that had an adverse impact on the basis of age and "Aboriginality-residence" based on statistical evidence of the lower education levels of older Indigenous persons and those living on First Nation reserves. On appeal to the Supreme Court, Abella J explicitly declined to apply the ground found to be analogous in *Corbiere*, "Aboriginality-residence," because *Corbiere* dealt with the unique disadvantages of persons residing "off-reserve" whereas *Taypotat* dealt with "on-reserve residence," about which there was a lack of evidence (at para 26). She also declined to look at the intersection between on-reserve residence, age, and status as a residential school survivor. For commentary, see Jonnette Watson Hamilton & Jennifer Koshan, "Kahkewistahaw First Nation v Taypotat: An Arbitrary Approach to Discrimination" (2016) 76 SCLR (2d) 243. See also *R v Kokopenace*, 2015 SCC 28, where the accused argued that the lack of jury representativeness for Indigenous persons living on reserve violated s 15(1), but the Court did not consider the relevant ground

because it found the accused had not “clearly articulated a disadvantage” related to the makeup of his jury and he did not have standing to argue on behalf of on-reserve residents who were potential jurors (at para 128). Should the analogous ground of “Aboriginality-residence” be extended to include residence on reserve based on the *Corbiere* tests? Would status as a residential school survivor meet the current test for analogous grounds?

5. In *Fraser* (excerpted above in Section II.A), the Court declined to recognize family or parental status as an analogous ground. For the majority, Abella J found that “a robust intersectional analysis of gender and parenting … can be carried out under the enumerated ground of sex,” so it was not necessary to consider family or parental status (at para 116). The federal government had conceded that parental status, a narrower subset of family status, could qualify as an analogous ground for the purposes of the claim. However, Abella J stated that she was “uncomfortable with this Court accepting a new analogous ground as a one-off” (at para 115). Although she did not cite *Corbiere*, her reasoning on this point is consistent with the Court’s holding in that case that grounds are constant markers of discrimination once they are recognized as analogous. Justice Abella also found that *Fraser* was not an appropriate case to consider a new analogous ground due to a lack of submissions and evidentiary record on parental or family status.

While they did not agree with the majority that the RCMP pension plan violated s 15(1) on the basis of sex, Brown, Rowe, and Côté JJ agreed that there was insufficient evidence and submissions to evaluate the analogous grounds issue. What would a consideration of family or parental status have added to the Court’s analysis in *Fraser*? Do you agree with Abella J that the ground of sex can sufficiently incorporate an intersectional analysis of caregiving responsibilities? For commentary, see Jennifer Koshan, “Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*” (2021) 30:2 Const Forum Const 29. See also Elaine Craig, “Family as Status in *Doe v Canada: Constituting Family Under Section 15 of the Charter*” (2007) 20 NJCL 197 (arguing that family status can be a preferable [or additional] ground to sexual orientation in cases involving same sex partners because of its potential to queer notions of family and to avoid heterosexist assumptions about sexual identity).

For other cases considering aspects of family status as analogous grounds, see *Thibaudeau v Canada*, [1995] 2 SCR 627, 1995 CanLII 99, McLachlin J, dissenting (separated or divorced custodial parenthood an analogous ground); *Schachter v Canada*, [1992] 2 SCR 679, 1992 CanLII 74 (discrimination based on adoptive parent status conceded by government); *Pratten v British Columbia (AG)*, 2011 BCSC 656 (manner of conception an analogous ground; differential treatment of adoptees and the offspring of donor insemination violates s 15), rev’d on other grounds, 2012 BCCA 480, leave to appeal to SCC dismissed, 2013 CanLII 30404, [2013] SCCA No 36 (QL). Do these aspects of family status meet the *Corbiere* tests for analogous grounds? Why might the Supreme Court be reluctant to consider family status as an analogous ground?

6. Sex is an enumerated ground, but as noted in Section II.A, a s 15 claim of sex discrimination by women was not successful at the Supreme Court until the 2018 pay equity cases. The Court found in favour of a man’s claim of sex discrimination long before it accepted a claim by women. In *Trociuk v British Columbia (AG)*, 2003 SCC 34, the Court ruled that limits on unmarried fathers’ rights to name their children constituted sex discrimination against men, contrary to s 15(1). For a critique see Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v British Columbia (Attorney General)*” (2004) 16:1 CJWL 165.

There are also some gaps in s 15 jurisprudence in the area of sex discrimination. For example, the Supreme Court has not ruled on any s 15 claims challenging restrictions or lack of access to reproductive health services, such as abortion. If some medical practitioners refused to provide reproductive health services or referrals for reasons of religion or conscience, how would you frame a s 15 claim? Consider that transgender individuals can also become pregnant and require reproductive health services. How would that influence your

framing of such a claim? Could you also mount an argument based on s 7 and s 28 of the Charter? For a discussion, see Daphne Gilbert, "Let Thy Conscience Be Thy Guide (but Not My Guide): Physicians and the Duty to Refer" (2016) 10 McGill JL & Health 47.

7. Gender identity/expression has not yet been considered as an analogous ground by the Supreme Court, but it has been recognized by lower courts. In *CF v Alberta (Vital Statistics)*, 2014 ABQB 237, the Alberta Court of Queen's Bench assessed the claim of a transgender woman that the requirement to undergo gender-affirming surgery before her birth certificate could be changed was discriminatory. The Court found that this requirement created a distinction based on sex, or alternatively, "if 'sex' in *Charter* s. 15(1) is interpreted so narrowly as to exclude the characteristics of transgendered persons that make them transgendered, then, at very least, the distinction is made on a ground analogous to sex" (at para 39). The Court went on to find that the distinction was discriminatory because it perpetuated the disadvantage, vulnerability, stereotyping, and prejudice suffered by transgender persons.

Gender identity/expression is included as a protected ground in human rights legislation across the country. For a decision finding a *prima facie* case of discrimination based on gender identity in this context, and discussing the differences between sex, gender, gender identity, and gender expression, see *Boulachanis v Canada (AG)*, 2019 FC 456 (involving the claim of a transgender woman to be incarcerated in a female rather than male prison).

8. The Court has ruled that employment status and occupation do not qualify as analogous grounds: see *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 1 SCR 922, 1989 CanLII 86; *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 1999 CanLII 649 (with respect to the RCMP); *Baier v Alberta*, 2007 SCC 31 (with respect to school employees); *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 (with respect to health care workers; discussed in Section II.B, Note 3 following *Eldridge*). See also *Fraser* (excerpted in Section II.A), where the dissent of Brown and Rowe JJ suggested that the differential treatment of job-sharing RCMP members as compared to those on leave without pay was based on their part-time employment status, without considering whether this was an analogous ground.

In *Dunmore v Ontario (AG)*, 2001 SCC 94, a majority of the Court found that the exclusion of agricultural workers from collective bargaining legislation was an unjustifiable violation of s 2(d) of the Charter (see Chapter 21). The majority opinion of Bastarache J found it unnecessary to address the s 15(1) argument. In her concurring opinion, L'Heureux-Dubé J agreed with Bastarache J's conclusion on s 2(d), and also explained why she would have found the occupational status of agricultural workers to be an analogous ground:

[169] ... Not unlike the off-reserve aboriginal band members faced with the challenge of changing their status to on-reserve band members identified in *Corbiere*, I believe that agricultural workers, in light of their relative status, low levels of skill and education, and limited employment mobility, can change their occupational status "only at great cost, if at all" (*Corbiere* ... at para. 14). The fact that the agricultural workforce may be highly transient only reflects the unstable nature of the industry, and does not change the basic point that the workers lack other employment options; indeed, many of the seasonal workers are students and the unemployed. In my view, it is abundantly clear that agricultural workers do not enjoy the same "labour market flexibility" as RCMP officers (*Delisle* ... at para. 44) or other more advantaged professionals, and I see no reason to disturb the trial judge's considered findings of fact regarding the predicament of agricultural workers.

In *Ontario (AG) v Fraser*, 2011 SCC 20, the Court dismissed a Charter challenge to Ontario's Agricultural Employees Protection Act, 2002, SO 2002, c 16 [AEPA] that responded to *Dunmore* by creating a separate labour relations regime for agricultural workers that maintained their exclusion from the collective bargaining regime in the Labour Relations Act, 1995, SO 1995, c 1, Sch A. The majority opinion of McLachlin CJ and LeBel J dismissed the claimants'

s 15(1) arguments because they believed that the record was insufficient to establish that the new legislative regime disadvantaged farm workers. In his concurring opinion, Rothstein J agreed, adding that "the category of 'agricultural worker' does not rise to the level of an immutable (or constructively immutable) personal characteristic of the sort that would merit protection against discrimination under s. 15" (at para 295). In her concurring opinion, Deschamps J suggested that the Court's attempt to deal with issues of economic inequality under s 2(d) might be better addressed by recognizing new analogous grounds in s 15:

[319] To redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s 15, as L'Heureux-Dubé J. proposed in *Dunmore* . . . This, of course, would entail a sea change in the interpretation of s. 15 of the *Charter*. The majority in the instant case resist such a change, referring to "Canadian values" and to the need to take a "generous and purposive" approach when interpreting *Charter* rights (at paras. 32, 90, 92 and 97), but to ensure consistency with the approach of the majority in *Health Services* (at paras. 81-96), they refer to equality in the s. 2(d) context without mentioning s. 15. . . [I]f the law needs to move away from *Dunmore*'s distinction between positive and negative rights, this should not be accomplished by conflating freedom of association with the right to equality or any other *Charter* right that may be asserted by a litigant. An analysis based on principles grounding the protection of rights and freedoms offers a better prospect of judicial consistency than one based on the more amorphous notion of "Canadian values."

For a discussion of *Dunmore* and *Ontario (AG) v Fraser*, see Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 109. Do you agree with Deschamps J that it would be appropriate to redress economic inequality by expanding consideration of analogous grounds under s 15(1), rather than using "equality values" in the interpretation of freedom of association and the rights of workers under s 2(d)?

9. Other personal characteristics that the Court has not accepted as analogous grounds include: province or municipality of residence (*Turpin; Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 1993 CanLII 58; *Siemens v Manitoba (AG)*, 2003 SCC 3); persons charged with war crimes or crimes against humanity outside Canada (*R v Finta*, [1994] 1 SCR 701, 1994 CanLII 129); persons bringing a claim against the Crown (*Rudolph Wolff & Co v Canada*, [1990] 1 SCR 695, 1990 CanLII 139); cannabis users (*R v Malmo-Levine*; *R v Caine*, 2003 SCC 74).

10. Should poverty, social condition, or homelessness be recognized as analogous grounds? How would the "constructive or actual immutability" approach apply here? Would this recognition involve the courts in deciding issues with complex socio-economic and political dimensions that are best left to legislatures? See Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2 Can J Poverty L 1; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter, and the Legacy of Gosselin" (2019) 39 NJCL 85; Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37.

In *Tanudjaja v Canada (AG)*, 2014 ONCA 852, leave to appeal to SCC dismissed, 2015 CanLII 36780, [2015] SCCA No 39 (QL), also discussed in Section II.B, Note 6 following *Eldridge*, and Chapter 22, The Right to Life, Liberty, and Security of the Person, a majority of the Ontario Court of Appeal dismissed a Charter challenge to federal and provincial housing policies on the basis that the issues raised were not justiciable. As a result, the s 7 and s 15(1) arguments the claimants sought to advance were never fully argued. The majority left open the question of whether homelessness might be recognized as an analogous ground under s 15(1) in a future case. Justice Feldman, dissenting, found that whether homelessness or being without adequate housing is an analogous ground "is an important issue" (at para 74)

that, along with the other Charter arguments, should be considered with a full evidentiary record. For analysis written by counsel for the claimants, see Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 *JL & Soc Pol'y* 10; Fay Faraday, Tracy Heffernan & Peter Rosenthal, "Winning the Right to Housing: Critical Reflections on a Holistic Approach to Public Interest Litigation" (2019) 90 *SCLR* (2d) 31.

Pending the recognition of poverty-related grounds as analogous, can other grounds be used to make s 15 arguments in the context of poverty? In *Gosselin v Québec (AG)*, [2002 SCC 84](#), discussed in Chapter 22, the Supreme Court held 5–4 that Quebec legislation that reduced the benefits available to social assistance recipients under the age of 30 unless they participated in education and welfare programs did not constitute age discrimination. For commentary, see, for example, Gwen Brodsky, "Gosselin v Quebec (Attorney General): Autonomy with a Vengeance" (2003) 15 *CJWL* 194; Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin v Quebec*" (2003) 20 *SCLR* (2d) 66. Does *Fraser v Canada (AG)* (excerpted in Section II.A) support the use of adverse effects discrimination arguments in this type of case, given what we know about how poverty disproportionately affects women, racialized and Indigenous persons, and persons with disabilities?

III. SECTION 15(2) AND AMELIORATIVE PROGRAMS

Section 15(2) of the Charter provides that s 15(1)

does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Since *Andrews*, the Supreme Court has viewed s 15(2) as supporting the conception of substantive equality that underlies s 15 as a whole. However, the Court's view of the precise nature of the relationship between ss 15(1) and (2) has changed over time. In *Law*, the Court treated the ameliorative purpose of a law as one of the contextual factors relevant to determining discrimination. One year later, in *Lovelace v Ontario*, [2000 SCC 37](#), the Court described s 15(2) as "confirmatory and supplementary to s 15(1)" (at para 105). In both cases, s 15(2)'s affirmation of ameliorative programs was encompassed in the s 15(1) analysis. In *Lovelace*, the Court left open the possibility that s 15(2) might be interpreted in a future case in a way that gave it an independent role (at para 100). It took this interpretive step in *Kapp*, excerpted below (also discussed above in Sections II.A, Note 9 following *Andrews*, and II.C, Note 4. Following *Kapp* are excerpts from two other Supreme Court decisions considering the role of s 15(2): *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011 SCC 37](#) and *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#)—one of the 2018 pay equity cases. In this section, the Notes and Questions for Discussion come after, rather than between, the three excerpted cases so that readers can think about the cases and contrast their approaches to s 15(2) collectively.

R v Kapp [2008 SCC 41](#)

McLACHLIN CJ and ABELLA J (Binnie, LeBel, Deschamps, Fish, Charron, and Rothstein JJ concurring):

A. Introduction

[1] The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998.

[2] The appellants base their claim on s. 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, ... require this Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination—a possibility left open in this Court's equality jurisprudence.

[3] We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. ...

[Justice Abella and McLachlin CJ then summarized the facts and the lower court rulings and discussed s 15(1). Their s 15(1) reasons are omitted here but are excerpted above in Section II.A, Note 9 following *Andrews*.]

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2. Section 15(2)

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[28] Rather than requiring identical treatment for everyone, in *Andrews*, McIntyre J. distinguished between difference and discrimination and adopted an approach to equality that acknowledged and accommodated differences. ... In other words, not every distinction is discriminatory. By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or "reverse discrimination." *Andrews* requires that discriminatory conduct entail more than *different* treatment. As McIntyre J. declared at p. 167, a law will not "necessarily be bad because it makes distinctions."

[29] In our view, the appellants have established that they were treated differently based on an enumerated ground, race. Because the government argues that the program ameliorated the conditions of a disadvantaged group, we must take a more detailed look at s. 15(2).

[30] The question that arises is whether the program that targeted the aboriginal bands falls under s. 15(2) in the sense that it is a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." As noted, the communal fishing licence authorizing the three bands to fish for sale on August 19-20 was issued pursuant to an enabling statute and regulations This qualifies as a "law, program or activity" within the meaning of s. 15(2). The more complex issue is whether the program fulfills the remaining criteria of s. 15(2)—that is, whether the program "has as its object the amelioration of conditions of disadvantaged individuals or groups."

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[32] The Royal Commission Report on *Equality in Employment* [the Abella Report], whose mandate was to determine whether there should be affirmative action in

Canada and on which McIntyre J. relied to develop his theories of discrimination and equality, set out the principles underlying s. 15(2), at pp. 13-14:

In recognition of the journey many have yet to complete before they achieve equality, and in recognition of how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints. While section 15(1) guarantees to individuals the right to be treated as equals free from discrimination, section 15(2), though itself creating no enforceable remedy, assures that it is neither discriminatory nor a violation of the equality guaranteed by section 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means treating them differently.

Section 15(2) ... encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers.

... [I]t does not create the statutory obligation to establish laws, programs, or activities to hasten equality, ameliorate disadvantage, or eliminate discrimination. But it sanctions them, acting with statutory acquiescence.

[33] In essence, s. 15(2) of the *Charter* seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups. This interpretation is confirmed by the language in s. 15(2), "does not preclude."

[34] This Court dealt explicitly with the relationship between s. 15(1) and s. 15(2) in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37. The Court, *per Iacobucci J.*, appeared unwilling at that time to give s. 15(2) independent force, but left the door open for that possibility, at para. 108:

[Alt this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However ... we may well wish to reconsider this matter at a future time in the context of another case. [Emphasis added.]

[35] Iacobucci J. in *Lovelace* perceived two possible approaches to the interpretation of s. 15(2). He believed that the Supreme Court could either read s. 15(2) as an interpretive aid to s. 15(1) (the approach adopted in *Lovelace*) or read it as an exception or exemption from the operation of s. 15(1).

[36] He favoured the interpretive aid approach, while acknowledging that the exemption approach had some support. ...

[37] In our view, there is a third option: if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all. As discussed at the outset of this analysis, s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it. ...

[38] But this confirmatory purpose does not preclude an independent role for s. 15(2). Section 15(2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

[39] Here the appellants claim discrimination on the basis of s. 15(1). The source of that discrimination—the very essence of their complaint—is a program that may be ameliorative. This leaves but one conclusion: if the government establishes that the program falls under s. 15(2), the appellants' claim must fail.

[40] In other words, once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

[41] We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. ...

[42] We build our analysis of s. 15(2) and its operation around three key phrases in the provision. The subsection protects "any law, program or activity that *has as its object the amelioration of conditions of disadvantaged individuals or groups*." While there is some overlap in the considerations raised by each of these terms, it may be useful to consider each of them individually.

(a) "Has as Its Object"

[43] In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation. The second is whether, in order to qualify for s. 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient.

[44] The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. ...

[45] Scholars and judges who have supported judicial examination of the actual effect of a program offer one primary argument to defend their view. They express concern that ... "if ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this Act has as its object the amelioration of the conditions of ... a disadvantaged group.'"

[46] In our opinion, this concern can be easily addressed. ... Courts could well examine legislation to ensure that the declared purpose is genuine. ...

[47] In that vein, proponents of the approach that focusses on the ameliorative goal of the program, rather than its effect, argue that doing so will prevent courts from unduly interfering in ameliorative programs created by the legislature. They note that Canadian Charter drafters wished to avoid the American experience, whereby judges overturned affirmative action programs under the banner of equality. The purpose-driven approach also reflects the language of the provision itself, which focuses on the "object" of the program, law or activity rather than its impact. Moreover, the effects of a program in its fledgling stages cannot always be easily ascertained. The law or program may be experimental. If the sincere purpose is to promote equality by

ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.

[48] Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the “purpose”-based approach is more appropriate than the “effect”-based approach: where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government’s goal in creating that distinction to improve the conditions of a group that is disadvantaged? In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage. ...

[49] Analysing the means employed by the government can easily turn into assessing the effect of the program. As a result, to preserve an intent-based analysis, courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.

[50] The next issue is whether the program’s ameliorative purpose needs to be its exclusive objective. ...

[51] We can find little justification for requiring the ameliorative purpose to be the sole object of a program. It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme. To prevent such programs from earning s. 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of s. 15(2).

[52] The importance of the ameliorative purpose within the scheme may help determine the scope of s. 15(2) protection, however. Consider that an ameliorative program may coexist with or interact with a larger legislative scheme. If only the program has an ameliorative purpose, does s. 15(2) extend to protect the wider legislative scheme? We offer as a tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.

(b) “Amelioration”

[53] Section 15(2) protects programs that aim to “ameliorate” the condition of disadvantaged groups identified by the enumerated or analogous grounds. Although the word does not at first seem liable to misunderstanding, courts have previously understood the term (and s. 15(2)) to apply in surprising circumstances. In *R. v. Music Explosion Ltd.* (1989), 62 Man. R (2d) 189, the Manitoba Court of Queen’s Bench upheld a Winnipeg bylaw that restricted young people under 16 from operating an amusement device without the consent of a guardian or a parent on the grounds that it was protected by s. 15(2). Smith J declared that the bylaw “is obviously for the benefit of the special needs of young persons” (para. 21). On appeal, the decision was reversed. The Court of Appeal explained: “[T]his legislation does not confer special benefits upon young people, but rather imposes a limitation. Nor is the purpose of

the legislation the amelioration of their condition" ((1990), 68 Man. R (2d) 203, at para. 18). ...

[54] ... We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.

(c) "Disadvantaged"

[55] The interpretation of "disadvantaged," explored in *Andrews, Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Law*, and other cases in the context of s. 15(1), requires little further elaboration here. "Disadvantage" under s. 15 connotes vulnerability, prejudice and negative social characterization. Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.

3. Application of Section 15(2) to This Case

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[Having found that the pilot sales program drew a distinction on the basis of race, satisfying the first step of the test for s 15(1), McLachlin CJ and Abella J turned to the application of s 15(2). They found that the program was part of the government's response to Aboriginal fishing rights claims, with the goal of promoting band self-sufficiency and redressing the social and economic disadvantage of the targeted bands. Furthermore, the means the government chose to achieve its purpose—beneficial fishing privileges for the bands—was seen to be rationally related to serving that purpose. The government had therefore established a genuine ameliorative purpose for the program. Finally, the program responded to the actual economic and social disadvantage suffered by members of the three targeted Aboriginal bands by addressing long-term goals of self-sufficiency and providing more immediate sources of income and employment. The majority also noted that although some individual band members may not have experienced personal disadvantage, this did not negate the group's disadvantage. It concluded that the impugned program was protected by s 15(2) and, therefore, that it did not violate s 15 of the Charter (at paras 57-61).

Justice Bastarache wrote separate reasons concurring in the result, but on the basis that s 25 of the Charter rather than s 15(2) barred the claim. For further discussion of his reasons and the majority's approach to s 25, see the Notes and Questions below.]

In *Kapp*, the Court indicated that its new approach to s 15(2) was a "basic starting point" that "leaves open the possibility for future refinement" (at para 41). That future arrived only three years later in *Cunningham*. In *Kapp*, the Court described the claim as one of "reverse discrimination" (at para 28), whereby a group of predominantly non-Indigenous fishers sought to altogether overturn the ameliorative program targeted at certain First Nations. *Cunningham* involved a different sort of claim—a claim of underinclusiveness—where the claimants alleged they were a sub-group that should have access to an ameliorative law they

were excluded from. As you read *Cunningham*, think about the factual differences between these two cases and how those differences influenced the Court's approach to, and articulation of the test for, s 15(2).

Alberta (Aboriginal Affairs and Northern Development) v Cunningham

2011 SCC 37

McLACHLIN CJ (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, and Cromwell JJ concurring):

I. Overview

[1] Section 35 of the *Constitution Act, 1982* recognizes three groups of Aboriginal peoples—Indians, Métis and Inuit. The claimants are members of the Métis settlement of Peavine, Alberta; they are also status Indians. The *Metis Settlements Act*, R.S.A. 2000, c. M-14 ("MSA"), does not permit status Indians to become formal members of any Métis settlement, including Peavine. The claimants now apply for a declaration that this denial of membership violates the *Canadian Charter of Rights and Freedoms* guarantees of equality, freedom of association and liberty, and is unconstitutional.

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[3] The claimants assert that the MSA's exclusion of Métis who are also status Indians from membership in the Peavine Métis Settlement violates the guarantee of equality of s. 15 of the *Charter*. I conclude that s. 15(2) of the *Charter*, which permits inequalities associated with ameliorative programs aimed at helping a disadvantaged group, provides a complete answer to this claim. The purpose and effect of the *MSA* is to enhance Métis identity, culture, and self-governance by creating a land base for Métis. The exclusion of status Indians from membership in the new Métis land base serves and advances this object and hence is protected by s. 15(2). ...

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[Chief Justice McLachlin summarized the legislative history of the *Metis Settlements Act* and the rulings of the lower courts. She then turned to s 15(2) of the *Charter*, beginning with its purpose.]

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[41] ... Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory—a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. ... Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.

B. The Steps Under Section 15(2)

[Chief Justice McLachlin described the Court's approach to s 15(2) in *Kapp* with some modifications.]

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[45] ... [Section] 15(2) protects all distinctions drawn on enumerated or analogous grounds that "serve and are necessary to" the ameliorative purpose: *Kapp*, at para. 52. In this phrase, "necessary" should not be understood as requiring proof that the exclusion is essential to realizing the object of the ameliorative program. What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. ... To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s. 15's purpose of promoting substantive equality.

[46] The fundamental question is this: up to what point does s. 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that the distinction must serve or advance the ameliorative goal. This will not be the case, for instance, if the state chooses irrational means to pursue its ameliorative goal. This criterion may be refined and developed as different cases emerge. But for our purposes, it suffices.

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[53] This brings us to the following propositions. Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization: *Lovelace*.

[54] These propositions, as discussed more fully below, suffice to resolve the issue that arises in this case. What is at issue here is a special type of ameliorative program—one designed to enhance and preserve the identity, culture and self-governance of a constitutionally recognized group. The group targeted by the program precisely corresponds to a group that is identified as one of the groups that make up the "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982*. The object of enhancing the identity, culture and self-governance of the Métis as a s. 35 group, of necessity, must permit the exclusion of other s. 35 groups since an essential part of their unique identity is that they are "not Indian" and "not Inuit."

[55] It is therefore unnecessary to embark on a lengthy consideration of precisely what considerations may enter into the issue of how distinctions are made for ameliorative programs in different types of cases. The law is best left to develop on an incremental basis.

C. Application

(1) Is the Distinction Based on an Enumerated or Analogous Ground of Discrimination?

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[58] I refrain from making a determination as to whether registration as a status Indian constitutes an analogous ground of discrimination. Since the case has proceeded on the assumption that an analogous ground was made out, I will assume that it has been, and consider the remaining aspects of s. 15 as they apply in this case.

(2) Is the Program a Genuinely Ameliorative Program?

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[60] I begin with the object of the *MSA* program. The discussion that follows establishes that the object of the program is to enhance Métis identity, culture and self-government through the establishment of a Métis land base. This is a special type of ameliorative program. Unlike many ameliorative programs, the object of the program is not the direct conferral of benefits onto individuals within a particular group, but the strengthening of the identity of Métis as a group—one of three aboriginal groups recognized in the Constitution.

[Chief Justice McLachlin reviewed the wording of the amending statute that created the MSA and the MSA itself. She noted the repeated reference to the aims of preserving and enhancing the “unique” Métis culture and identity and of enabling the Métis to attain self-governance through land set aside for Métis.]

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[65] The wording of the *MSA*’s provisions supports the view that the object of the ameliorative program was to benefit Métis, as distinct from Indians, by setting up a land base that would strengthen an independent Métis identity, culture and desire for self-governance. ...

[66] The history of the struggle that culminated in the *MSA* supports this view of the object of the challenged legislation. The *MSA*, as discussed earlier, is the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation. The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982*. Unlike Indians, however, they enjoyed no land base from which to strengthen their identity and culture or govern themselves. Nor did they enjoy the protection of an equivalent to the *Indian Act*. Their aboriginality, in a word, was not legally acknowledged or protected. Viewed in this perspective, the ameliorative program embodied in the *MSA* emerges as an attempt to provide to Alberta’s Métis settlements similar protections to those which various Indian bands have enjoyed since early times.

[Chief Justice McLachlin described a series of Commissions and enactments beginning in 1934 and culminating in the *MSA* in 1990, which granted a number of Métis communities fee simple title to the settlement lands as well as protecting Métis rights more broadly.]

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[71] I conclude that the *MSA*, while unique, is a genuinely ameliorative program. Provided that the means of implementation chosen by the legislature serves or advances this end, s. 15(2) protects the *MSA* against the charge of discrimination.

(3) Does the Distinction Serve or Advance the Object of the Ameliorative Program?

[72] The object of the *MSA* is to benefit the members of a constitutionally identified and protected group by enhancing the identity, culture and self-governance of the group. In order to achieve this object, the legislature has excluded Métis who are also status Indians from membership in the settlement for purposes of establishing a Métis land base. The question is whether this distinction serves or advances its object.

[73] In my view, the line drawn by the *MSA* ... serves and advances the object of the program. It is supported by historic distinctions between Métis and Indian culture; by the fact that, without the distinction, achieving the object of the program would be more difficult; and by the role of the Métis settlement in defining its membership.

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(a) The Program Recognizes the Historic Uniqueness of the Métis

[75] ... Since their emergence as a distinct people on the Canadian prairies in the 1700s, the Métis have claimed an identity based on non-Indianness. They have persistently distinguished themselves as a people from the other dominant Aboriginal group in their territory—Indians. The obverse side of the struggle of the Métis to preserve their distinct identity and culture is the fear that overlap and confusion with the larger Indian cultures would put their identity and culture at risk. ... Line drawing on this basis, far from being irrational, simply reflects the Constitution and serves the legitimate expectations of the Métis.

[76] The distinction in the *MSA* between Métis and status Indians ... serves to enhance Métis identity and to further the goal of the ameliorative program. The fact that some people may identify as both Métis and Indian does not negate the general correspondence underlying the distinction between the two groups.

(b) Realizing the Object of the Program

[77] To accord membership in the *MSA* communities to Métis who are also status Indians would undermine the object of the program of enhancing Métis identity, culture and governance, and would potentially hollow out the goal of the *MSA* of preserving and enhancing a distinct Métis culture, identity and governance.

[78] ... To the extent that status Indians are members of Métis settlements, the distinctive Métis identity, with its historic emphasis on being distinct from Indian identity, would be compromised. And to the extent that status Indians are members of Métis settlements, the goal of self-governance is hampered. For example, Indians who already enjoy the right to hunt off-reserve may have little interest in promoting the right of Métis to hunt outside settlement lands. The same may be ventured for other benefits and privileges. Because the *Indian Act* provides a scheme of benefits to status Indians, ranging from medical care to housing to tax-free status, status Indian members of Métis settlements may have less interest in fighting for similar benefits than Métis without Indian status.

(c) The Role of the Métis in Defining Their Community

[79] The exclusion of status Indians from membership in the new land-based Métis settlements was the product of a long period of consultation between the government and the Métis. According a measure of respect to this role serves and advances the object of the ameliorative program. It does not insulate the selection of beneficiaries from *Charter* review, to be sure, but it supports the connection between the object of the program and the means chosen to achieve it.

[Chief Justice McLachlin discussed the Court's decision in *R v Powley*, 2003 SCC 43, where it recognized that the term "Métis" in s 35 of the *Constitution Act, 1982* "refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears" (at para 10) and that "[t]he inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities" (at para 13).]

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[82] The self-organization and standardization of the Métis community in Alberta is precisely what the Alberta legislature and the Alberta Métis have together sought to achieve in developing, agreeing upon and enacting the membership requirements found in the *MSA* and challenged here. The significant role that the Métis must play in defining settlement membership requirements does not mean that this exercise

is exempt from *Charter* scrutiny. Nevertheless, it does suggest that the courts must approach the task of reviewing membership requirements with prudence and due regard to the Métis's own conception of the distinct features of their community.

(d) Conclusion: The Distinction Serves and Advances the Object of the Ameliorative Program

[83] I conclude that the exclusion from membership in any Métis settlement, including the Peavine Settlement, of Métis who are also status Indians serves and advances the object of the ameliorative program. It corresponds to the historic and social distinction between the Métis and Indians, furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people.

[84] It follows that the distinction between Métis and status Indians in the *MSA* does not fall outside the protective reach of s. 15(2). Rather, the distinction is the type of targeted ameliorative program s. 15 was intended to allow legislatures to adopt. Section 15(2) applies, and the exclusion of the claimants from membership in a Métis settlement does not constitute discrimination.

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[86] That people, including many Métis, include mixed ethnic and cultural strands in their particular individual identity is clear. However, this does not mean that every program must recognize everyone who holds some claim to a group targeted by an ameliorative program. Mixed identity is a recurrent theme in Canada's ongoing exercise of achieving reconciliation between its Aboriginal peoples and the broader population. It figures, for example, in land claims negotiations between particular Indian groups and the government. Residents of one Indian group frequently also identify themselves with other Indian groups for historical and cultural reasons. Yet lines must be drawn if agreements are to be achieved. The situation of Métis settlements is similar. In order to preserve the unique Métis culture and identity and to assure effective self-governance through a dedicated Métis land base, some line drawing will be required. It follows of necessity that not every person who is a Métis in the broad sense of having Indian-European ancestry and self-identifying with the Métis community, as discussed in *Powley*, may be entitled to the benefit of membership under the *MSA*.

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[88] ... It follows that the claimants' s. 15 claim must be dismissed.

[Chief Justice McLachlin went on to dismiss the claims under s 2(d) and s 7 of the Charter.]

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Many scholars and equality-seeking groups expressed concern that *Cunningham* might lead to a significant number of cases in which governments would seek to protect under-inclusive ameliorative programs under s 15(2)—i.e., those that target some disadvantaged groups to the exclusion of others. However, it was not until the pay equity decisions of 2018 that the Supreme Court again considered the role of s 15(2). Excerpted below is *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, where the majority and dissenting judges were divided on their approach to both s 15(1) and s 15(2). As you read this case, consider again how the factual context of a case can influence the Court's approach to s 15(2).

Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux

2018 SCC 17

[*Alliance* involved Quebec's *Pay Equity Act*, CQLR, c E-12.001, which sought to "redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes" (at para 29). For a description of the 2009 amendments that were subject to challenge, see Section II.A, Note 13 following *Andrews*.

Justice Abella wrote for a 6–3 majority in *Alliance* and found that the 2009 amendments violated s 15(1) of the Charter. At the first step of the s 15(1) test, she found that the amendments created a distinction based on sex:]

[29] ... They set out how deficiencies in women's pay, in comparison to men, will be identified. They set out when women will—and will not—receive compensation for those inequities. And they set out the information that will—and will not—be made available about when those inequities emerge to the women who may need to challenge them. The impugned provisions therefore draw distinctions based on sex, both on their face and in their impact. [Emphasis in original].

[Justice Abella then considered s 15(2):]

[30] Before turning to discriminatory impact, a brief word on s. 15(2). It has no application in cases such as this one.

[31] Its purpose "is to save ameliorative programs from the charge of 'reverse discrimination'" (*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 (CanLII), [2011] 2 S.C.R. 670, at para. 41; *Kapp*). It protects ameliorative programs for disadvantaged groups from claims by those the program was not intended to benefit that the ameliorative program discriminates against them.

[32] In the case before us, on the other hand, the argument is that parts of an ameliorative scheme violate s. 15(1) because they have a discriminatory impact on women, the disadvantaged group the scheme was intended to benefit. Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so.

[Justice Abella went on to address the second step of the s 15(1) analysis, finding that the 2009 amendments had a discriminatory impact because they perpetuated women's pre-existing disadvantage.

Justices Côté, Brown, and Rowe thought that s 15(2) was applicable. They also argued that in a case where the claimant group is the same group that is targeted by the ameliorative program in question, s 15(2) should not be addressed until after both steps of the s 15(1) test are completed. Their reasons for reordering *Kapp*'s stages of analysis and on the application of s 15(2) in *Alliance* follow.]

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[74] According to the principles that were laid down in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and reaffirmed in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, at para. 44, whether s. 15(2) applies should generally be determined before turning to the second step of the s. 15(1) analysis. In *Kapp*, the Court found that the advantage of dividing the analysis in this way was to make it unnecessary to conclude that the equality guarantee had been violated before saving the measure under s. 15(2) ...

[75] ... It is true that in [some] circumstances, there is a certain advantage to not explicitly acknowledging that a measure has discriminatory effects on one or more

groups to which it does not apply before concluding that those effects are justified by the objective of achieving substantive equality for another group that is disadvantaged. In that situation, the proposed approach is not really problematic.

[76] In the case at bar, it is the group to which an enumerated ground applies that raises the discriminatory nature of the effects of a law whose specific object is the amelioration of conditions of the group's members. If the approach proposed in *Kapp* were applied, it would have the effect of terminating the analysis prematurely. It is not impossible or unimaginable that even though a law genuinely has the amelioration of a group's conditions as its object, its effect might be to widen the prejudicial and discriminatory gap in relation to the rest of society . . . The group to which the measure or law applies would then find itself in a constitutional cul-de-sac: even though the effects of a government action would ultimately exacerbate the discrimination against the group, the courts would have to defer to the government because its intentions were benevolent. But such a situation would be contrary to the approach favoured by this Court in the equality context: *Andrews*, at p. 182; *Quebec v. A.*, at para. 333.

[77] It is our opinion that such circumstances require us to defer the s. 15(2) analysis until after the entire s. 15(1) analysis has been completed. First of all, that will make it possible to determine whether the government action creates or perpetuates a discriminatory disadvantage. It is, obviously, not necessary to "save" a measure that does not violate s. 15. In addition, the second step of the s. 15(1) analysis will help in identifying the law's real object. Thus, if a law establishes mechanisms that create no benefit for the group, it probably does not genuinely have the amelioration of the group's conditions as its object. It will be more difficult to rule on this point if the law creates both benefits and disadvantages. Although the test remains objective, and deferential to the legislature's preferences, there is no question that the true effect of the measures the legislature adopts can be taken into account: *Kapp*, at para. 49.

[78] Finally, the approach we recommend in this case is consistent with the combined effect of s. 15(1) and s. 15(2), namely to promote substantive equality: *Kapp*, at para. 16. It should be borne in mind that the Court acknowledged in *Kapp* that the test it was proposing at that time was only at an early stage in the development of the case law on s. 15(2) and that "future cases may demand some adjustment to the framework" (para. 41).

[79] In *Cunningham*, the Court was right to decline to alter the analytical framework for a group that was arguing that its exclusion from a program conferring a benefit on another group with characteristics similar to its own to which an enumerated ground applied was unconstitutional (para. 53). . . We are of the view that in such cases in which a group or subset of a group is included under one of the enumerated or analogous groups but is otherwise excluded from the group to which the measure specifically applies, it will always be appropriate to follow the approach from *Kapp*, because the advantage of doing so will remain relevant.

[80] In sum, it is only where the claimant is a member of the group to which the law specifically applies that the s. 15(2) analysis should be deferred until after that of s. 15(1). In any situation in which the claimant is not a member of the group, the order set out in *Kapp* should be followed.

[After finding that the amendments did not violate s 15(1), Côté, Brown, and Rowe JJ turned to s 15(2):]

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[107] Alternatively, even if it were to be held that the specific mechanism created by the statutory amendments can be considered discriminatory, the Act as a whole should be protected under s. 15(2).

[108] According to the principles laid down in *Cunningham*, what must be determined is whether the law has a *genuine* ameliorative object

[109] Furthermore, a distinction that serves or advances the ameliorative object has the effect of supporting the goal of s. 15 of the *Charter*, namely the promotion of substantive equality: *Cunningham*, at para. 45.

[110] In *Kapp*, the Court referred to the role of s. 15(2) in supporting the implementation of measures to combat systemic discrimination. Given that Quebec's National Assembly has answered the call in this regard, the entire Act should be protected

[111] There is no doubt that the Act genuinely has the promotion and achievement of substantive equality as its object. The correlation between that object and the chosen mechanism is clear, even if the mechanism is not *perfect*. The appeal should also fail at this stage of the analysis.

[Given their conclusion on ss 15(1) and 15(2), Côté, Brown, and Rowe JJ did not consider s 1. For the majority, Abella J found that the 2009 amendments could not be justified under s 1.]

NOTES AND QUESTIONS

1. In the companion pay equity decision to *Alliance, Centrale des syndicats du Québec v Quebec (AG)*, [2018 SCC 18](#), Abella J wrote for a majority of five and found that s 15(2) was inapplicable to the Pay Equity Act. She stated that the government could only invoke s 15(2) when there is a claim by a person or group who is excluded from the program that their exclusion is discriminatory (at paras 37, 39). The claimants, who were challenging the delay in the Act for women in workplaces with no male comparators, were not excluded from the scheme but were challenging its discriminatory impact. Justice Côté, writing for four justices, did not find it necessary to consider s 15(2) given her conclusion that the Act did not violate s 15(1), but she stated that this silence should not be taken as endorsing Abella J's reasons on s 15(2) (at para 152).

2. *Kapp*, *Cunningham*, and *Alliance/Centrale* could be seen as cases involving three different types of challenges to ameliorative programs—a program alleged to involve “reverse discrimination” (*Kapp*), an underinclusive ameliorative program (*Cunningham*), and an ameliorative program that is aimed at the group who is challenging some aspect of the program (*Alliance/Centrale*). Do you think this categorization is helpful in understanding the Court’s evolving approach to s 15(2)? Does it help explain why in *Kapp*, the Court deliberately avoided the language of “saving” because of the “symbolic problem of finding a program discriminatory before ‘saving’ it as ameliorative” (at para 40), but then used the language of “saving” in *Cunningham* and the pay equity cases? Does it help explain why in *Kapp*, the Court took the position that s 15(2) precludes the review of distinctions under s 15(1) that “serve and are necessary to” the ameliorative purpose (at para 52), but in *Cunningham*, this standard was revised to “serves or advances” (at para 45)? Does it help explain why in the pay equity cases, a majority of the Court found that s 15(2) should not apply in the third category of cases, where the ameliorative program is aimed at the same group who is challenging it? Do you agree that it is appropriate to approach ameliorative programs differently under s 15(2) depending on who is challenging the program and on what basis?

3. What is your reaction to the argument of the dissenting justices in *Alliance* that s 15(2) should not be assessed until after both steps of s 15(1), at least for the third type of case? Their rationale was that it is appropriate to assess the discriminatory impact of the program on the claimants before considering whether it can be saved. Does this rationale apply to the second type of case as well, that is, to “underinclusion” cases in which a different disadvantaged

group or subgroup seeks to have an ameliorative program or law extended to them? If so, should the steps be reordered in this type of case as well, with s 15(2) coming after a full s 15(1) analysis? For a discussion, see Jonnette Watson Hamilton & Jennifer Koshan, "The Supreme Court, Ameliorative Programs and Disability: Not Getting It" (2013) 25 CJWL 56; Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013) 63 SCLR (2d) 521; Jena McGill, "R v Kapp" (2018) 30:2 CJWL 221.

4. In *Kapp*, the Court characterized the claim as one of "reverse discrimination." This term has been popular in the United States, where—as noted in *Kapp*—the courts have tended to strike down affirmative action programs, using a "strict scrutiny" approach. But should the claims of relatively advantaged groups who seek to strike down ameliorative programs aimed at disadvantaged groups be seen as discrimination at all? What does a focus on substantive equality as the purpose of s 15 suggest about the use of the term "reverse discrimination"? For an alternative term, see the Women's Court of Canada judgment in *Kapp* by Kasari Govender and Tess Shelton, who propose that the term "equality regressive claim" be used instead: "R v Kapp" (2018) 30:2 CJWL 248.

In *Cunningham*, McLachlin CJ reiterated that "the purpose of s. 15(2) is to save ameliorative programs from the charge of 'reverse discrimination'" (at para 41); she also stated that s 15(2) ensures that "the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality" (at para 49). Section 15(2) was applied in *Cunningham* to "save" the *Metis Settlement Act*, RSA 2000, c M-14 [MSA] as an ameliorative program, but were the claimants in *Cunningham* making a charge of "reverse discrimination" or "abusing" the language of "discrimination"? Recall that McLachlin CJ characterized the MSA as a "special type of ameliorative program" aimed at a constitutionally recognized Aboriginal group (at paras 54, 60). Does this characterization suggest that *Cunningham* should be restricted to its facts, leaving open the possibility of a different outcome under s 15(2) for other claims of underinclusion?

5. Another alternative for protecting legislation and government policies involving Indigenous peoples is s 25 of the Charter. Section 25 provides:

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The first s 15(1) case where s 25 was argued in the Supreme Court was *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687, excerpted in Section II.C. An intervener, the Lesser Slave Lake Indian Regional Council, argued that s 25 should shield a First Nation's right to control its own membership, including who was entitled to live on the reserve and to vote in band council elections. The Court did not apply s 25, finding that it "would be inappropriate to articulate general principles" on the section because of the limited argument on the issue (at paras 20 [McLachlin and Bastarache JJ], 51-54 [L'Heureux Dubé JJ]).

In *Kapp*, Bastarache J wrote a concurring decision in which he decided the challenge to the 24-hour priority fishery was based on s 25 rather than s 15(2). After considering legislative history and academic and judicial commentary, Bastarache J found that s 25 was intended to work as a shield and not just as an interpretive provision, with the purpose of "protecting the rights of aboriginal peoples where the application of the Charter protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group" (at para 89). He was of the view that the words "aboriginal, treaty or other rights or freedoms" in s 25

should be interpreted broadly so as to protect "federal, provincial and Aboriginal initiatives that seek to further interests associated with indigenous difference from Charter scrutiny" (at para 103). Justice Bastarache formulated a three-step approach to s 25:

[111] ... The first step requires an evaluation of the claim in order to establish the nature of the substantive Charter right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.

Applying this test, he found that although the priority fishing licence constituted a *prima facie* breach of s 15(1), the case involved fishing rights that were protected by s 25, and the conflict between those rights triggered the shield in s 25 (at paras 112-23).

Chief Justice McLachlin and Abella J, writing in *obiter* in light of their holding that s 15(2) protected the fishery, viewed the scope of s 25 more narrowly. They questioned whether s 25 should operate as a shield rather than as an interpretive provision and suggested that s 25 might protect "only rights of a constitutional character" (at para 63), indicating that

[65] [t]hese issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians ... [and] are best left for resolution on a case-by-case basis as they arise before the Court.

For critiques of the majority's lack of full engagement with s 25, see Sophia Moreau, "*R v Kapp: New Directions for Section 15*" (2008-2009) 40:2 Ottawa L Rev 283 at 297-98; Dominique Nouvet, "*R v Kapp: A Case of Unfulfilled Potential*" (2010) 8:1 Indigenous LJ 81 at 91-93.

Kapp remains the only Supreme Court decision in which s 25 has been addressed at any length. In *Taypotat*, discussed in Sections II.A, Note 12 following *Andrews*, and II.C, s 25 was not invoked by the Kahkewistahaw First Nation, although their argument emphasized the First Nation's collective adoption of the community election code and its education requirement. Gordon Christie has argued that community election codes could be seen as "aboriginal, treaty or other rights" under s 25 (see "Aboriginal Citizenship: Sections 35, 25 and 15 of Canada's Constitution Act, 1982" (2003) 7:4 Citizenship Studies 481 at 485-87). Recalling that Bastarache J's approach in *Kapp* was developed in the context of a s 15(1) challenge to a Canadian government-issued licence by largely non-Indigenous fishers, should his approach to s 25 apply in the same way to claims in which a First Nation member challenges their own government's laws or policies under s 15(1)? Would s 25 have been a better basis for resolving the claim in *Taypotat*, rather than relying on the lack of "arbitrary disadvantage" under s 15(1)? See Jennifer Koshan & Jonnette Watson Hamilton, "Kahkewistahaw First Nation v Taypotat—Whither Section 25 of the Charter?" (2016) 25:2 Const Forum Const 39.

6. How would s 15(2) have applied in *Vriend* if the Alberta government had invoked it to defend its decision not to include sexual orientation as a prohibited ground in its human rights legislation? Is human rights legislation the sort of ameliorative program that s 15(2) was intended to protect or is it better seen as "broad societal legislation" beyond the scope of s 15(2), similar to the Court's example of social assistance programs in *Kapp* (at para 55)?

7. Section 15(2) was not considered in *Fraser v Canada (AG)* (excerpted in Section II.A). Could the pension buy-back rights targeted at job-sharing employees have been defended by the government under s 15(2)? How would this approach differ from Brown and Rowe JJ's approach of considering the ameliorative nature of the pension scheme under s 15(1)? What does the failure to consider s 15(2) in *Fraser* suggest about the ongoing relevance of s 15(2) in cases involving underinclusive benefit schemes? See Carissima Mathen, "Equality Before the Charter: Reflections on *Fraser v Canada*" (2021) SCLR (2d) (forthcoming).

8. Should s 15(2) have been considered in *R v CP* in relation to the YCJA? Recall from the discussion of this case in Section II.A, Note 2 following *Fraser*, that Wagner CJ found the YCJA to be ameliorative overall under s 15(1) while Abella J focused on the impugned section of the YCJA, s 37(10), which in her view denied young persons the benefit of an automatic right of appeal that is available to adults under the *Criminal Code*. How does Wagner CJ's view of the YCJA align with the Court's decision in *Kapp*, where they suggested that "laws designed to restrict or punish behaviour would not qualify for s 15(2) protection" (at para 54)? If a law cannot be protected as "an ameliorative program" under s 15(2), should it be seen as ameliorative under s 15(1)?

9. David Schneiderman has argued that equality rights claims for inclusion in

what the Court considers to be universalistic schemes—schemes which seemingly are intended to embrace everyone, including the middle class—are more likely to be successful than are claims seeking access to targeted or means-tested plans, where fundamental distinctions between classes, ... are built into the very structure of the program.

See "Universality vs Particularity: Litigating Middle Class Values Under Section 15" in Sheila McIntyre & Sandra Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis Canada, 2006) 367 at 369. How does this argument play out when you compare *Kapp* and *Cunningham* with *Vriend* and *Eldridge*? More generally, do you think the Court has shown the right amount of deference to governments under s 15(2)?

IV. THE INTERPLAY BETWEEN SECTION 15, SECTION 1, AND REMEDIES

NOTES AND QUESTIONS

1. In *Andrews* (excerpted in Section II.A), the judges agreed on their approach to s 15(1), including the point that it was inappropriate to consider the reasonableness of the differential treatment being reviewed under s 15(1); this was a matter for s 1 of the Charter. However, they split on the appropriate role for s 1 in equality cases. Justice McIntyre, dissenting in the result, favoured relaxing the *Oakes* test because "the section 15(1) guarantee is the broadest of all guarantees" and should not unduly hinder government from making the "innumerable legislative distinctions and categorizations" that are an unavoidable aspect of governing (at 185). He suggested that the "pressing and substantial objective" requirement of *Oakes* was "too stringent" in the context of equality claims (at 184). He favoured upholding violations of equality rights if governments were pursuing sound objectives in a reasonable manner. Applying this approach to the citizenship requirement at issue, McIntyre J concluded that it was a reasonable means of ensuring that members of the legal profession are qualified.

The majority judgments of Wilson and La Forest JJ disagreed with McIntyre J's approach to s 1. Justice Wilson stated (at 154) that the *Oakes* test

remains an appropriate standard when it is recognized that not every distinction between individuals and groups will violate s. 15. If every distinction between individuals and groups gave rise to a violation of s. 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation. This is not a concern, however, once the position that every distinction drawn by law constitutes discrimination is rejected as indeed it is in the judgment of my colleague, McIntyre J. Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.

Justice La Forest wrote that, in contrast to McIntyre J's departure from *Oakes*, he preferred "to think in terms of a single test for s. 1," although it "must be approached in a flexible manner" (at 198). In the end, both Wilson and La Forest JJ concluded that the citizenship requirement was not closely tailored to the objective of ensuring that candidates for admission to the bar had a sufficient understanding of and commitment to Canadian institutions.

2. Justice McIntyre's dissenting approach to s 1 in *Andrews* has now faded into history, with courts applying the *Oakes* test in those s 15 cases where a violation of equality rights is found. However, few s 15 cases have reached s 1. This is explained in part by the continuing importation of s 1 considerations into the s 15 analysis by the Supreme Court (or some members thereof) in spite of *Andrews*, as discussed throughout this chapter. Section 15(1) cases may also fail to reach s 1 where s 15(2) is used to defend against the claimant group's challenge to an ameliorative program, or where s 25 is applied to shield Aboriginal rights claims from s 15 challenges (see Section III).

In s 15 cases that do reach s 1, the analysis may differ depending on the nature of the claim and whether it involves benefits or burdens. In the remainder of this note we review a number of cases discussing the justifiability of exclusions from benefits based on sex and sexual orientation. Cases involving justifications of burdens are dealt with in the next note.

In cases involving the deprivation of benefits or the failure to include a group in a benefit scheme, courts will typically focus on the overall purpose of the law, the impugned provisions, and the purpose of the exclusion.

One example of this approach is *Vriend* (excerpted in Section II.B), where the Court considered the purpose of Alberta's human rights legislation as a whole, the purpose of the protections against discrimination for specific groups, and the purpose of omitting sexual orientation from those provisions. Looking at the government's purpose at these different levels can assist courts in identifying whether a discriminatory omission or exclusion was made for a pressing and substantial reason, whether it was rationally connected to the overall objective of the legislation, and whether it met the minimal impairment and proportionality stages. The Court was unanimous that the omission of sexual orientation from Alberta's human rights legislation did not have a pressing and substantial objective, which was sufficient to dispose of the government's s 1 arguments. According to Iacobucci J:

[116] Often, the objective of an omission is discernible from the Act as a whole. Where it is not, one can look to the effects of the omission. ... As I noted above, the overall goal of the IRPA is the protection of the dignity and rights of all persons living in Alberta. The exclusion of sexual orientation from the Act effectively denies gay men and lesbians such protection. In my view, where, as here, a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights. Thus, on either analysis, the respondents' case fails at the initial step of the *Oakes* test.

Recall that in *Egan* (discussed in Section II.A, Note 6 following *Andrews* and II.C), decided just three years before *Vriend*, five members of the Court found that the exclusion of same-sex couples from spousal benefits under the *Old Age Security Act* violated s 15(1), but one of those five—Sopinka J—found the violation justified under s 1. Because four other members of the Court had found no s 15 violation, Sopinka J's swing vote determined the outcome. He focused on the overall objective of the legislation, which was seen as the "alleviation of poverty of elderly spouses" (at 574). Justice Sopinka believed that it was reasonable for the government to take an incremental approach to achieve this objective, which it had done over time through the extension of the benefits from married spouses to those in common law relationships, for example. If Sopinka J had also examined the objective of excluding

same-sex couples, do you think the result in *Egan* would have been different? Justice Sopinka also noted (at 572) that

[i]t is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes.

Another example of a case involving underinclusive benefit-conferring legislation is *M v H* (excerpted in Section II.B). A majority of the Court found the exclusion of same-sex partners from the definition of "spouse" in the spousal support provisions of family legislation violated s 15. Under s 1, the objectives of both the spousal support scheme and the omission were considered by the majority (Iacobucci J) and in separate concurring judgments by Major and Bastarache JJ. Justice Iacobucci found that the objective of the scheme was

[4] ... the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down, and alleviating the burden on the public purse to provide for dependent spouses.

The exclusion of same-sex partners was not rationally connected to these objectives. According to Iacobucci J, "If anything, the goals of the legislation are undermined by the impugned exclusion" (at para 4). Justice Major generally concurred with these reasons.

Justice Bastarache wrote a lengthy s 1 analysis, in which he found that the primary legislative purpose of having extended spousal support obligations from married to common law couples was to address the disadvantaged economic position of women in nonmarital, opposite-sex relationships. He found that this objective was pressing and substantial. However, he agreed that it was necessary to also examine the reasons for excluding same-sex partners from the definition of spouse, and he could find no pressing and substantial reason for this exclusion. Even if the purposes of the exclusion were to promote the traditional family or economic equality in family relationships, the exclusion of same-sex partners bore no rational connection to these objectives. Justice Gonthier, dissenting, agreed with Bastarache J on the overall purpose of the law, but he applied this purpose under s 15(1) in accordance with the "correspondence factor" from the *Law* test and found that the exclusion of same-sex partners did not violate s 15.

The cost to government of extending the legislative benefits in *Vriend* and *M v H* were negligible—indeed, in *M v H* extending private spousal support obligations to same-sex couples was found to alleviate the burden on the public purse. Is the cost of extending the benefits in question another way to explain the difference between the outcomes in *Vriend* and *M v H* as compared with *Egan*?

More recently, in *Fraser* (excerpted in Section II.A), the majority decision of Abella J also focused on the purpose of excluding job-sharing RCMP members from full pension benefits and had difficulty identifying a pressing and substantial basis for this exclusion. Justice Abella reiterated that "it is the *limitation* on equality rights that must be justified, not the legislative scheme as a whole" (at para 125, emphasis in original). She went on to state:

[128] Job-sharing was clearly intended as a substitute for leave without pay for those members who could not take such leave "due to personal or family circumstances." It is unclear, then, what purpose is served by treating the two forms of work reduction differently when extending pension buy-back rights. The RCMP's plan provides buy-back rights when a full-time member reduces her hours from 40 to 0 to care for her child, but, inexplicably, withholds such rights if the same member for the same reasons reduces her hours from 40 to 10, 20, 30 or some other number. And this despite the RCMP benefitting from the member's services in the latter scenario. I see no justification for this limitation, let alone a pressing and substantial one.

How significant do you think it was to Abella J's s 1 analysis that job-sharing RCMP members had to pay the costs of "buying back" their full pension benefits themselves, paying both the employer's and the employee's contributions? For a discussion, see Sonia Lawrence, "Critical Reflections on Fraser: What Equality Are We Seeking?" (2021) 30:2 Const Forum Const 43.

In one of the 2018 pay equity cases—*Centrale* (discussed in Section II.A, Note 13 following *Andrews*)—the issue was also the exclusion of a particular group from benefits, namely employees in female-dominated positions where there were no male comparator groups, such as child care workers. These employees were not altogether excluded from pay equity benefits, however; rather, they were subject to a six-year delay in their receipt of pay equity while the Pay Equity Commission developed a methodology for assessing "work of equal value" in this context. Of the five-person majority who found that this delay violated s 15(1), four of the five found the delay to be justifiable under s 1. Justice Abella, writing for this group, accepted the government's argument that the delay was "necessary to finding the right approach" (at para 43). She also accepted that "the delay in developing and implementing a credible methodology is rationally connected to the objective of creating the possibility of an effective remedy" (at para 44). At the minimal impairment stage, while the six-year delay was "troubling," it was within reasonable bounds (at paras 48–50). Justice Abella also found that the delay struck a reasonable balance at the proportionality stage between the positive effects of Quebec's efforts to take a pioneering approach to pay equity and the negative consequences of the delay for employees, even though they would not get retroactive compensation for their unequal pay over the six-year period. Chief Justice McLachlin dissented on this point and found that the six-year delay could not be justified under s 1.

Although it was not cited by Abella J, the Court came to a similar conclusion that a delay in pay equity payments was justified under s 1 in *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 [NAPE]. In *NAPE*, a legislated delay in pay equity was found to be justified under s 1 in light of a "fiscal crisis" in Newfoundland and Labrador (at para 85). For commentary on this decision, see Jennifer Kosan's Women's Court of Canada judgment, "Newfoundland (Treasury Board) v NAPE" (2006) 18:1 CJWL 321; Fay Faraday, "One Step-Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada."

Does it help to think of *Centrale* and *NAPE* as examples of justifiable incrementalism in extending government benefits, similar to Sopinka J's reasoning in *Egan*? Do you think government arguments about budgetary or administrative considerations should be a pressing and substantial basis for refusing to extend, or delaying, benefits to members of disadvantaged groups? What are the implications of these decisions for cases involving positive obligations, such as *Tanudjaja* (discussed in Sections II.B, Note 6 following *Eldridge* and II.C)? Would it be more appropriate for courts to deal with cost concerns at the remedy stage, rather than under s 15 and/or s 1? See *Schachter v Canada*, [1992] 2 SCR 679, 1992 CanLII 74, discussed in Chapter 25.

3. In cases involving legislation that imposes discriminatory burdens rather than benefits, the legislation typically has a different sort of purpose. Many of these cases involve criminal or quasi-criminal legislation that has the objective of protecting other groups.

For example, in *Ontario (AG) v G*, discussed in Section II.A, Note 1 following *Fraser*, the sex offender registry could be seen as a "headwinds" or "burdens" type of case for persons found not criminally responsible by reason of mental disorder (NCRMD). However, because the burdens of the registry could be alleviated by way of "exit ramps" for some persons found guilty of sexual offences, but not for persons found NCRMD, this could also be seen as a case involving the discriminatory deprivation of a benefit. The Court unanimously agreed that the ongoing burden of the registry without the benefit of exit ramps for persons found NCRMD could not be justified under s 1, with the legislation failing at the minimal impairment stage. The same could be said of *R v CP*, also discussed in Section II.A at Note 2 following *Fraser*.

where at least some members of the Court considered the requirement to apply for leave to appeal to be a burden for young persons charged with criminal offences, but also saw this burden as the denial of the benefit of an automatic right of appeal that was accorded to adults in some circumstances.

A more straightforward case of government action imposing burdens would be the criminal cases discussed as examples of adverse effects discrimination in Section II.B, Note 2 following *Eldridge*, where laws such as mandatory minimum sentences may have an adverse impact on members of groups who are disproportionately criminalized—i.e., those who are racialized and Indigenous. In these types of cases, the government's overall goals of protecting victims of crime may be easily identified, but it may be harder to discern any objective behind the discriminatory impact of the law because, by definition, that impact is unintentional. How would the *Oakes* test apply in cases involving legislation that imposes burdens that adversely impact members of disadvantaged groups? Given what we know about the systemic inequalities of the criminal justice system, can the *Oakes* framework be used to require governments to justify their failure to consider how criminal law reforms will adversely impact racialized and Indigenous persons?

Generally speaking, is it helpful to think about cases involving benefits and burdens differently under s 1?

4. As we have seen in this chapter, courts have continued to struggle with whether considerations related to the government's objectives and actions—such as the ameliorative purpose of legislation and the reasonableness or relevance of distinctions—belong under s 15(1), s 15(2), or s 1. This debate has led to some decisions where the Court has split in many different directions. For example, in *Quebec (AG) v A* (discussed in Section II.A, Note 11 following *Andrews*), three members of the Court joined LeBel J in stating choice of relationship status was best considered under s 15, which led to a finding that the exclusion of common law couples from the provisions did not violate s 15. Four members of the Court, including McLachlin CJ, joined Abella J in holding that autonomy and choice of personal relationships were best considered under s 1 and concluded that the exclusion did violate s 15. Chief Justice McLachlin then used personal autonomy to justify the exclusion under s 1, with Deschamps and Charron JJ agreeing that the property exclusion could be justified, but not the support exclusion. Overall, the exclusion of common law couples from Quebec's family law provisions on spousal support and family property division was upheld by a majority of the Court.

We see a similar split in *R v CP*, where four judges in a decision written by Wagner CJ considered the ameliorative nature of the YCJA for accused young persons, complainants, and society under s 15(1) and concluded that there was no violation of s 15. Writing for three judges, Abella J postponed the consideration of the ameliorative nature of the YCJA to s 1 and found a violation of s 15(1). Justice Kasirer agreed with Abella J as to the violation of s 15 but found that the violation could be justified under s 1. Overall, the requirement for young persons to apply for leave to appeal was upheld by a 5–3 majority of the Court (with Côté J not addressing the Charter issues).

In his reasons in *R v CP*, Kasirer J observed that "there is something of a 'normative mismatch'" between s 15 and s 1 of the Charter because "section 15 could be seen as an attempt to protect from the 'tyranny of the majority' ... and section 1 brings back the idea that the needs of the whole might, on balance, justify discrimination" (at para 174, quoting Sonia Lawrence, "Equality and Anti-discrimination: The Relationship Between Government Goals and Finding Discrimination in Section 15" in P Oliver, P Macklem & N Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 815 at 829). What is your reaction to Kasirer J's "normative mismatch" point? Is this an explanation for why courts continue to struggle with the interplay between equality/discrimination and justification analyses? Is this struggle in analytical approach inevitable in the context of systemic inequality and differing judicial ideologies about the role of governments and courts in this context?

5. Recall that in *Ontario (AG) v G* and *R v CP*, the Courts were presented with arguments under s 7 of the Charter in addition to s 15. This is not uncommon in equality rights claims that challenge laws and other government actions in the criminal justice context. Indeed, before these two recent cases, courts often ruled on the s 7 issue but not the s 15 issue (see Jennifer Kosan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Charter Showdown" (2013) 22 Const Forum Const 31). For example, in *Carter v Canada (AG)*, [2015 SCC 5](#) (discussed in Chapter 22), the Court found that the criminal prohibition against assisted suicide violated s 7, but it did not consider the claimants' s 15 arguments. At trial, Smith J had found that the prohibition adversely affected persons with disabilities because they often could not die by suicide without assistance. At the Supreme Court, the s 7 violation was not justified under s 1, and the prohibition was struck down with a suspended declaration of invalidity.

In *Ontario (AG) v G*, the majority (Karakatsanis J) indicated that violations of different Charter rights might make a difference to the appropriate remedies:

[77] Given that I have concluded that *Christopher's Law* violates s. 15(1) in its application to persons found NCRMD and that G's s. 7 claim does not extend beyond those persons, it is not necessary to address whether *Christopher's Law* also violates s. 7. As I will explain, because the privacy and liberty interests of those found NCRMD are the very interests that are unequally burdened by *Christopher's Law*, they inform the remedy for the breach of s. 15(1). It is therefore not necessary to determine whether there is also a breach of s. 7 in order to inform the appropriate remedy. Further, addressing some of the s. 7 arguments would have an impact on the broader issue of the nature of the registry's effects on all registrants and whether the entire scheme complies with s. 7; such determinations are best left for another case.

How might the finding of multiple Charter violations affect the s 1 analysis and/or the analysis of remedies? For example, if the Court had considered s 15 arguments and adverse effects discrimination against persons with disabilities in *Carter*, rather than focusing on s 7, how might that have made a difference to the s 1 analysis and remedies? At what stage should we consider the concerns of persons with disabilities who argue that medical assistance in dying (MAiD) perpetuates systemic inequality by diminishing the value of disabled lives? See Isabel Grant & Elizabeth Sheehy, "Focus on Dignified Lives, Not Facilitated Deaths" The Lawyers Daily (24 March 2021), arguing that the new approach to MAiD adopted in Bill C-7 in 2021, which removed the requirement of a reasonably foreseeable natural death, has "dubious benefits" for people with disabilities and that, because women and Indigenous peoples experience disability at disproportionate rates, they are "less likely to have access to the resources necessary to ameliorate suffering and more likely to need to resist 'Do Not Resuscitate' orders and to justify the value of their lives." For the view that persons with disabilities "must have the same right to autonomy and end-of-life choice" as persons without disabilities and that the new MAiD regime includes adequate safeguards for persons with disabilities, see "Bill C-7: Myths and Facts," online: *Dying with Dignity Canada* <https://www.dyingwithdignity.ca/bill_c7_myths_and_facts#safeguards>. See also David Lepofsky, "Carter v Canada (Attorney General), The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee" (2016) 76 SCLR (2d) 89.

6. In addition to cases in which courts must consider the justification of violations of s 15 under s 1, there are other cases where violations of other Charter rights or freedoms have included consideration of equality interests under s 1. See, for example, one of the freedom of expression cases discussed in Chapter 20, *R v Keegstra*, [\[1990\] 3 SCR 697, 1990 CanLII 24](#). In *Keegstra*, the majority found the criminal prohibition against hate speech to be justified under s 1, recognizing the importance of protecting the target groups from hate speech and Canada's "strong commitment to the values of equality and multiculturalism" under s 15

and s 27 of the Charter (Dickson CJ at 755). Can you think of other cases where the Court has considered equality values under s 1 of the Charter?

7. In *Doré v Barreau du Québec*, [2012 SCC 12](#), excerpted in Chapter 17, The Framework of the Charter, the Court developed an approach for Charter challenges to the actions of administrative decision-makers that was elaborated on in *Loyola High School v Quebec (AG)*, [2015 SCC 12](#). The *Doré/Loyola* approach requires the Court to determine (1) if the administrative decision limits Charter rights or values, and (2) whether the limitation reflects a proportionate balancing of the Charter protections at issue in light of the statutory objectives and factual context.

There have been no Supreme Court cases to date where the *Doré/Loyola* approach has been used to assess administrative actions that are alleged to violate s 15(1). However, the *Doré/Loyola* approach was employed in *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#) [LSBC v TWU] and *Trinity Western University v Law Society of Upper Canada*, [2018 SCC 33](#) [TWU v LSUC], in the context of decisions by two Canadian law societies to deny accreditation to a proposed law school at an evangelical Christian university. Trinity Western University (TWU) required students to abide by a Community Covenant Agreement, which prohibited "sexual intimacy that violates the sacredness of marriage between a man and a woman" (*LSBC v TWU* at para 1). TWU and a prospective law student argued that the law societies' decisions violated s 2(a) of the Charter. At the Supreme Court, a majority held that the decisions not to approve TWU's proposed law school struck a proportionate balance between the limit on religious freedom under s 2(a) and the statutory objectives that the law societies pursued, which included protection of the equality rights of LGBTQ2+ law students and their equal access to the legal profession. See *LSBC v TWU* (at para 40); *TWU v LSUC* (at para 20) (Abella, Moldaver, Karakatsanis, Wagner, and Gascon JJ). Imagine that TWU law school was approved and that an LGBTQ2+ law student faced disciplinary consequences from TWU for violating the Community Covenant's prohibition against sexual intimacy outside of heterosexual marriage. Assuming the *Doré/Loyola* approach applied to TWU's disciplinary decision, how would it apply to these facts? See Heather Shippley, "Sites of Resistance: LGBTQI+ Experiences at Trinity Western University" (2020) 35:1 CJLS 111. For a critique of the TWU decisions and their approach to "administrative constitutionalism," see Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2:1 J Commonwealth L 1.

CHAPTER TWENTY-FOUR

LANGUAGE RIGHTS

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I. INTRODUCTION

At every stage of Canada's constitutional development, language has been a matter of the highest importance. Surprisingly, this preoccupation with language does not appear explicitly in those parts of the Constitution where one might expect it. For example, neither ss 91 nor 92 of the *Constitution Act, 1867* contains a specific enumerated power on the subject of language. Instead, language is treated as an ancillary matter, permitting both levels of government to legislate with respect to it, subject to any specific limitations in the Constitution.

Section 133 of the *Constitution Act, 1867* marked a compromise essential to Confederation by setting down rules for language use in government and judicial proceedings both federally and in Quebec. As noted in Chapter 4, *The Late Nineteenth Century: The Courts Set an Initial Course*, similar guarantees were inserted in the *Manitoba Act, 1870*.

The Charter provisions relating to language (ss 16-23) present a more modern understanding of entitlements for those who are members of French and English minority language communities. This pattern is reflected in the amendment provisions of the *Constitution Act, 1982*, which make special provision for changes to the Constitution with respect to language (ss 41(c), 43(b)).

In addition to these specific provisions, more general provisions may apply. While language is not included in the prohibited grounds of discrimination in the equality guarantee (s 15), it could someday be treated as an analogous ground, and language cases have arisen as division of powers concerns as well as freedom of expression claims under the Charter.

Before turning to language rights litigation in our courts, this chapter provides an introduction to the values and history underlying claims to constitutional protection of language rights. When you read the cases, you will see that the Supreme Court, at times, treats language claims like fundamental human rights and, at others, approaches them as less universal forms of entitlements not subject to the purposive mode of interpretation. The latter approach is based on the idea that language rights are rooted in historical, political compromises particular to Canada. As well, while language rights may involve individuals, they are also a form of group rights.

A Braën, "Language Rights"

in Michel Bastarache, ed, *Language Rights in Canada* (Montreal: Éditions Yvon Blais, 1987) 3 at 25-30 (footnotes omitted)

The language issue has always been a dominant theme in Canadian life. Indeed, it was raised during the colonial period, from the first contacts between the French and English settlers and the native populations. ...

The French language arrived in this country at the beginning of the colonial period, with the first settlers from France. Contacts were quickly established between the French and English settlers who, in disregard of the native inhabitants, were in conflict over the possession of the territory. In 1713, by the *Treaty of Utrecht*, France surrendered to England its territory of Acadia which comprised, at that time, a large part of what are today the Maritime Provinces. The treaty preserved the freedom of the catholic religion, subject to the laws of England. No provision of the treaty referred to the language question but by the change in sovereignty, English became the language of administration. The English language rapidly became, especially after the Deportation of 1755, the only language of legislation and of the courts in the Maritime Provinces.

In Canada, with the surrender of Quebec in 1759, the evolution was different. The *Articles of Capitulation of Quebec* guaranteed the freedom of exercise of the catholic religion but did not refer to the question of language. Section 42 of the *Articles of Capitulation of Montreal, 1760*, provided for the continuation of the customs of the French population. Did this terminology form the basis for a certain protection of the French language? In any event, General Amherst merely stated that the inhabitants had become subjects of the king. Under the military government, caution seems to have been the guiding principle. The government allowed the use of the French language in the courts and in the drafting of ordinances. Indeed, this constitutes the origin of functional bilingualism in the legislation and in the administration of justice in Quebec.

In 1763, the *Treaty of Paris* officially ceded Canada to England. As in the former documents, freedom of exercise of the catholic religion is guaranteed but nothing is said on the issue of language. The *Royal Proclamation of October 7, 1763*, *Murray's Commission* on November 21, 1763 and the *Instructions to Governor Murray*, December 7, 1763 granted full scope to the Governor to introduce English private law and to promote the assimilation of the francophone population. This policy of assimilation, however, was rapidly overcome by the authorization to use the French language in the administration of justice. Increasing discontent on the part of the French-speaking population, political disturbances in the New England colonies and the desire to gain the trust of the francophone population of Canada resulted in the adoption by the British Parliament of the *Quebec Act of 1774*. This Act re-established French private law and guaranteed freedom of exercise of the catholic religion. None of its provisions dealt with language. At that time, however, language and religion were closely related. The debates and statutory registers of the legislative council were drafted in French and in English, as were the ordinances; bilingualism became established as a matter of course in the administration of justice.

After the Rebellion of 1837-1838, the constitution of 1791 was suspended. Lord Durham was appointed to conduct an inquiry. In his report he recommended, *inter alia*, the establishment of responsible government and the union of both provinces to ensure that the francophone population became a minority, in order to hasten its assimilation. In 1840, London adopted the *Act of Union*. Section 41 of that imperial Act abolished French as a language of legislation and provided that English be the

only official language. The United Parliament mitigated this measure by adopting in 1848 an Act designed to establish a process of translation and of publication of the laws in both languages. The British Parliament repealed section 41 in 1848 and the courts seemed to pursue, during this period, a bilingual tradition. This system continued until Confederation, in 1867. Noting the fact, the Royal Commission on Bilingualism and Biculturalism has stated that Ontario, during 18 years, experienced a bilingual system.

The *Constitution Act, 1867*, contains only one provision granting language rights, section 93 of this Act [not being ...] germane to this issue. Section 133 specifies that everyone has a right to use the French or the English language in the debates or the business of the houses of Parliament of Canada and of Quebec. It provides moreover that the records and journals of those assemblies must be kept in both languages. Finally, everyone is entitled to the use of French or English before the courts established under the authority of the Parliament of Canada or that of Quebec. These provisions constitute, at the most, what has been termed "seminal official bilingualism."

Manitoba was created in 1870. Section 23 of the *Manitoba Act, 1870* is analogous to section 133. Despite this, the French-speaking population having become a minority, the Legislative Assembly of that province adopted in 1890 an Act declaring English to be the only official language of legislation and the courts. The same year, the system of confessional schools was abolished and replaced by a public school system where the language of instruction was English. Except during a brief period where the Greenway-Laurier compromise was applied, that system was maintained. Only since the recent judicial challenges of the Act of 1890 has there been any important movement on the language question in that province.

The Northwest Territories and part of Rupert's Land were integrated with Canada in 1870 and placed under the authority of the Canadian Parliament. In 1877, the latter instituted bilingualism in the council and courts of those territories. A campaign on the part of opponents of the French fact incited the Canadian Parliament to amend its legislation in 1891 in order to enable the council to regulate its debate and records. Soon after that, in 1892 English unilingualism was decreed.

Saskatchewan and Alberta were admitted into the Union in 1905. The acts creating these provinces provide that the laws in force in those territories shall continue to apply thus making it arguable that the French language is endowed with some legal status. Recent judicial decisions have confirmed this point of view.

In Ontario, anti-catholic and anti-French pressure resulted in the adoption in 1912-1913, of regulation 17 which reduced to insignificant proportions the use of French as a language of instruction. Apart from the issue of official bilingualism, language in the educational context continued to be a problem in that province even after the adoption of the *Constitutional Act, 1982*. In 1986 a bill concerning government services in French was introduced.

Following the Laurendeau-Dunton report, the Canadian Parliament adopted, in 1969, its *Official Languages Act*. The Act was severely tested at the time of the air controllers' crisis in 1976. Also inspired by that report and directed by the Robichaud Government, New Brunswick, in 1968, adopted French and English as its two official languages. In 1981, an Act went as far as to recognize the equality of both official language communities. Despite this, the establishment of true bilingualism in that province appears a difficult objective, judging by the reactions to a recent report *Towards Equality of Official Languages in New Brunswick* (Bastarache-Poirier report).

On many occasions, Quebec has legislated in matters of language. However, the national question took on a new dimension with the adoption of the *French Language Charter* (*Loi 101*), in 1977. This Act provides that French be the only official language of legislation, of the administration of justice and of public administration.

Even if the language rights of the English-speaking minority are generally recognized, in particular its educational rights, some aspects of that Act are heavily criticized, such as the provisions dealing with the language of business signs and the language of instruction of new immigrants. An impressive series of court challenges has partly dismantled this legislative scheme.

Patriation of the Canadian constitution was effected by the adoption of the *Constitution Act, 1982*. Sections 16 to 22 of this Act set out the language guarantees of Canadians with respect to the Federal Government and the Government of New Brunswick. Section 23 affirms the right to instruction in an official minority language and to minority administered educational facilities. Since then, a number of court challenges have attempted to determine the scope of this section.

Pierre A Coulombe, Language Rights in French Canada

(New York: Peter Lang, 1995) at 90-94 (endnotes omitted)

Justifying Strong Language Rights

Whether we are talking about official bilingualism at the federal level, Quebec's Bill 101, or New Brunswick's Bill 88, community rights such as these are often perceived as illiberal attacks on universal moral rights that protect autonomy. While it is true that an important strand of democratic tradition is conceived along those lines, it tends to obfuscate the justifications for these rights. Anglophones living in North America do not need to think about protecting the English language simply because market forces always privilege the dominant linguistic group. Moreover, allophone immigrants will choose to learn English as the dominant language in order to maximize their chances of integration and upward mobility. This process guarantees a continued supply (so to speak) of new anglophones and brings further pressures to assimilate all linguistic minorities, including French. Given these ... conditions, how could the Quebec state afford to be culturally neutral? How could the New Brunswick government not recognize community rights for Acadia? The rationale for state intervention in linguistic matters is no different from the rationale for intervening in matters such as social welfare, education, the environment and security: market forces benefit the powerful and, in this particular case, are incapable of sustaining linguistic minorities and of fostering proper relations between the various language groups of a given polity.

Many will object to such arguments, invoking the danger that strong language rights pose to individual freedoms. Language rights, they will say, should be limited to the protection of some of the conditions for personal autonomy, such as the right to freedom of action within one's own private affairs. These would include the rights against undue interference in private language use and against discrimination on the basis of language. Few are those who will deny us the right to speak our language at home and on the streets, to use it in letters and on the telephone, to keep our native names and surnames, to use our language within our cultural and religious institutions, newspapers, radio stations, and community centres. We could also add to this list the right to an interpreter in judicial proceedings, a language right derived from the right to a fair trial.

Why are these language rights more easily defensible? Because they are typically associated with state tolerance, or, put differently, they are rights *against* state interference rather than ones that require a positive state intervention. The right not to be interfered with within one's private sphere of language activity and that of not being

discriminated against on the basis of language are derived from the right to privacy and fairness, respectively. They can be grounded in the interests of all citizens of a liberal polity, regardless of their particular community status. Were I the last person speaking my language, I would still have the right against undue interference and discrimination. For our purposes such rights can be called negative language rights, for the duties they involve are negative duties: *not interfering in a person's language use, and treating everyone equally regardless of the language spoken* . . .

... Positive state intervention is necessary to promote minority languages, for their vulnerability in a free market environment cannot be disputed. Unrestrained competition between languages will not bring about linguistic harmony, but a subordination of minority languages to the dominant language, and a subordination of the minority community to the dominant community. The idea of state neutrality is deceitful in this context, for laissez-faire de facto prejudices the dominant language in terms of its use and status. . .

As far as Quebec is concerned, the reasons for active state language planning are many, but most are primarily socioeconomic: despite its solid majority status—approximately 80% of the Quebecois have had French as a mother tongue during this century—French was long subordinate to English, especially in the economy where English was the language of those who held economic power. Before state intervention, French was used in the lower echelons of economic life, while English was used in the upper echelons, and so bilingualism was experienced differently depending if one was French- or English-speaking: "The social pressures for using French as a language of communication at work are more strongly felt by lower status anglophones, while the pressures to use English increases as francophones rise in the corporate world." In this cultural division of labour, the subordinate position of the French language and the subordinate position of French Canadians appeared as two sides of the same coin since francophones and anglophones were not equals in the economic realm. In short, French would tend to be relegated to the private sphere, in the homes, schools, and churches. . .

This situation was compounded by the widely held belief that even in French-speaking Quebec English is the language of prestige. As Gerard Bergeron notes, it was natural to believe so when generations after generations saw that all important things happen in English, and that knowing English opens the doors to the good life. Moreover, a study comparing French- and English-speakers of equal education and job status revealed that English-speakers were perceived by both anglophones and francophones as being more intelligent, having a better job and a higher education. The inferiority complex of French Canadians, reflecting a low self-esteem, led some to despise their origins and to identify with the Anglo-American lifestyle. There was some truth to the idea that capital spoke English and labour spoke French, and linguistic identity and self-esteem were certain to suffer from it. Not surprisingly, diagnosing this disequilibrium motivated a corresponding state intervention.

Another reason for state language planning remains the need to respond to [certain] factors which threaten Quebec's relative weight in the federation, not to mention French Canada's cultural security within Quebec itself. The decline of Quebec's population relative to the Canadian whole translates itself into a greater minority status for Quebec within the federation. Quebec's share of members of Parliament went from 33.5% in 1867 to 25.4% in 1990, and is expected to go down to 20% or less in about a century. In addition to weakening Quebec's political power in the federation, the demographic decline of the Quebecois population of French origins creates a cultural insecurity insofar as traditional cultural traits are lost.

Jacques Henripin cites three demographic challenges facing Quebec. First, the birth rate of the Quebecois (1.6 children per couple) is inferior to the required rate

for replacing generations (2 children per couple); as a result, the population is growing old. A second problem is the high emigration rate towards other provinces. Anglophones leave Quebec at a rate fifteen times higher than francophones, allophones (those who have neither French nor English as a mother tongue) at a rate five times higher. This means that immigration, despite what is often believed, contributes little to counteracting the low birth rate since Quebec must accept three immigrants in order to keep one. A third problem relates to the difficult integration of immigrants in Montreal, in part because of the attraction that the English language has there. English is still the language which most immigrants adopt, although the situation is improving.

Before Bill 101, immigrant parents, especially those living in Montreal, would often choose English as the language of schooling for their children. In 1970, 8.3% of students in Montreal's English schools were French, while only 1.9% of students in French schools were English. Significantly, 22.5% of students in English schools were allophones, compared to merely 0.9% in French schools. And in 1961, language transfers of allophones toward French were in the proportion of 23.2% in Montreal, as compared with 56.6% in the rest of Quebec. Between 1945 and 1966, 80% of immigrants integrated into the anglophone community of Quebec, the great majority of them in Montreal.

Various studies and governmental reports have concurred that these concerns were and still are legitimate and, thus, that there are grounds for taking steps to ensure that the French language is protected in Quebec, namely by sending an unequivocal message to immigrants: French, not English, is the majority language in Quebec. Even the Supreme Court of Canada argued that the circumstances discussed above "favoured the use of the English language despite the predominance in Quebec of a francophone population ... prior to the enactment of the legislation at issue [Bill 101] ..." No one seriously challenges the difficulties French is facing in Quebec; what is debated is the scope of language legislation and its impact on other language rights.

As can be expected, Acadians also have had to face major sociodemographic obstacles, but with little or no collective means at their disposal. Assimilation has reached high levels in Prince Edward Island and Nova Scotia, where by 1961 the majority of those of French extraction no longer declared French as their mother tongue. And of those who could still speak French, less than 40% spoke it at home by 1971.

II. LANGUAGE RIGHTS AND THE CONSTITUTION

A. THE FEDERAL BARGAIN

As noted above, although federalism as a system of government was adopted in part to deal with the claims of French-speaking Canadians, ss 91 and 92 of the *Constitution Act, 1867* are silent in respect to language. As noted in Chapter 3, From Contact to Confederation, the 1867 arrangements became acceptable to many Quebecois due to the opportunity that federalism offered for French-speakers to form a majority in Quebec and thus to make laws on a wide range of subjects, as opposed to the content of the division of powers in respect to language specifically.

As described earlier, s 133 of the *Constitution Act, 1867* is the express, original constitutional bargain in respect to language. The section addresses the language issue in the context of parliamentary debate, legislative enactment, and court proceedings. It provides:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

This final version of s 133 was more stringent than its earlier drafts, which had merely permitted, as opposed to mandated, publication of legislative journals and laws in both English and French. The mandatory provision prevailed in order to preclude the possibility that the majority in the federal or Quebec legislatures might choose to publish parliamentary proceedings and enactments only in its own language and thus prejudice the minority language group.

Jones v AG of New Brunswick, [1975] 2 SCR 182, 1974 CanLII 164 addressed the ability of the federal Parliament to enact the *Official Languages Act* (now RSC 1985, c 31 (4th Supp)), which made English and French the official languages of Canada within federal institutions, such as Parliament and the courts under federal jurisdiction. The Supreme Court of Canada upheld the federal Act, as well as New Brunswick legislation (enacted under the s 92(14) class of subject "Administration of Justice in the Province"), which similarly stipulated that both French and English were the official languages of the courts of that province. The Court made clear that s 133 of the *Constitution Act, 1867* set down minimum constitutional protection for language, but this did not preclude Parliament or a legislature from conferring additional "rights or privileges" or imposing additional "obligations" (at 192) in respect to the English and French languages. The only proviso was that the enacting legislature must conform to the rules of the division of powers.

The Court returned to the question of general legislative jurisdiction in respect to language in *Devine v Quebec (AG)*, [1988] 2 SCR 790, 1988 CanLII 20. One issue before the Court was the legislative jurisdiction of the National Assembly to enact those parts of Quebec's *Charter of the French Language*, CQLR c C-11 that mandated the use of French, and in some instances French only, in commercial dealings. The Court ruled unanimously that this legislation fell within provincial legislative jurisdiction:

[14] ... In order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction.

• • •

[16] ... It is true, as the preamble of the *Charter of the French Language* indicates, that one of its objects is "to make of French the language of ... commerce and business" but that object necessarily involves the regulation of an aspect of commerce and business within the province, whatever the nature of the effect of such regulation may be. The purpose and effect of the challenged provisions of Chapter VII of the *Charter of the French Language* entitled "The Language of Commerce and Business" is to regulate an aspect of the manner in which commerce and business in the province may be carried on and as such they are in relation to such commerce and business. That the overall object of the *Charter of the French Language* is the enhancement of the status of the French language in Quebec does not make the challenged provisions any less an intended regulation of an aspect of commerce within the province. As such, they fall within provincial legislative jurisdiction under the *Constitution Act, 1867*.

The 1867 language strictures set down in s 133 were applicable only to the federal government and to Quebec. Similar requirements were later applied to Manitoba, Saskatchewan,

and Alberta. The *Manitoba Act, 1870*, SC 1870, c 3, s 23, passed by Parliament and confirmed by the UK Parliament, applied the s 133 type requirements to the new province of Manitoba: see *British North America Act, 1871*, ss 5 and 6. The *North-West Territories Act*, RSC 1886, c 50, s 110, a non-entrenched enactment, provided similar language guarantees for the territory that would become Saskatchewan and Alberta. These provisions reflected the fact that the population of these provinces at the time was largely French-speaking and was expected to stay that way.

In deliberate contradiction to the terms of the *Manitoba Act, 1870*, Manitoba passed the *Official Language Act* in 1890, which set down that English only would be the language of the legislature and the courts. Lower court rulings in 1892, 1909, and 1976 invalidated this enactment, finding it inconsistent with the requirements of the entrenched *Manitoba Act*. The Manitoba governments did not treat these decisions as authoritative, although they did not appeal them either. One might have expected that these decisions, and the failure of the Manitoba government to comply or appeal, would have become the subject of intense political debate, both in Manitoba and nationally. The demographic makeup of the province had changed so much in the intervening decades, however, that the French-speaking minority lacked the political clout to press their cause further. Moreover, as described in Chapter 4, the energy of that community was at the time directed at opposing provincial policies diminishing the opportunity for education in French in the denominational schools.

The question of the validity of the 1890 legislation finally reached the Supreme Court of Canada in *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032, 1979 CanLII 242. The Court ruled that the entrenched *Manitoba Act* provisions prevailed over the provincial enactment. This ruling raised the possibility that all the enactments of the Manitoba legislature since 1890 were invalid because they had been enacted only in English. In *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33 [Manitoba Language Reference], the Supreme Court considered this possibility. It characterized the strictures of the *Manitoba Act*, requiring the enactment of all legislation in both English and French, as mandatory and not merely directory—with the consequence that the body of Manitoba legislation passed in breach of the language enactment requirement was invalid. To avoid a legal vacuum, the Court went on to recognize the temporary validity of these laws until the language requirements could be satisfied by translation, through a temporary suspension of the declaration of invalidity. (This aspect of the decision is discussed further in Chapter 25, Enforcement of Rights.) The Court identified the purpose of both s 133 of the *Constitution Act, 1867* and of the *Manitoba Act, 1870* as “to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike” (at 739). The Court stated (at 744):

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

Similar litigation arose in Saskatchewan and Alberta in respect to the availability of French-language court proceedings. In *R v Mercure*, [1988] 1 SCR 234, 1988 CanLII 107, the accused applied to have the provincial court proceed with his trial in French on the basis of s 110 of the *North-West Territories Act*. The Supreme Court found that this Act was continued in force by s 16 of the *Saskatchewan Act, 1905*. Section 110 provided language rights substantially the same as s 133 of the *Constitution Act, 1867*. However, the Court differentiated the legal regime of language requirements in Saskatchewan from that in Manitoba. The *Manitoba Act* was constitutionally entrenched and bound the legislature of Manitoba; the Saskatchewan legislature, however, was free to alter the terms of the *North-West Territories Act* because it was not

entrenched. Following this ruling, the Saskatchewan legislature enacted legislation dispensing with the language stipulations mirroring s 133—in part to avoid the necessity of having to translate and re-enact all its statutes passed only in English (*Language Act*, SS 1988-89, c L-6.1).

A similar holding with regard to Alberta, in *R v Paquette*, [1990] 2 SCR 1103, 1990 CanLII 37, led to similar legislation in that province (*Languages Act/Loi linguistique*, SA 1988, c L-7.5).

B. CHARTER LANGUAGE RIGHTS

As noted in Chapter 16, The Advent of the Charter, a number of commentators view language rights as the original core of the Charter project. Whether or not that is correct, ss 16 to 23 of the Charter constitute strong recognition of the major importance of language in Canadian constitutionalism. These sections recognize the official, equal status of English and French in the business of the federal and New Brunswick governments and also guarantee a level of minority language education throughout Canada. The detail and range of these provisions reflect fidelity to the idea of Canada as a country founded by English- and French-speaking people. With respect to minority language education, at least, the Constitution also espouses a form of “personality principle” of language, rather than a solely territorial one—provinces cannot opt for unilingualism, and an individual’s right to French or English education can be exercised throughout the country.

The provisions pose interesting questions about the continuing role of this idea of Canada in the context of a country that today possesses a dramatically different demographic makeup than it did in 1867, as well as greater sensitivity to both the historical and current claims of its Indigenous inhabitants.

Sections 16 to 23 contain a number of striking features. For example, s 16 introduces the language of equality into the formulation of language entitlements: “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.” Sections 16(2), 17(2), 18(2), 19(2), and 20(2) bring New Brunswick into the regime of institutional bilingualism, discussed earlier in reference to the Prairie provinces. Added to the legislative and judicial contexts is the availability of communication with federal and New Brunswick government institutions in either English or French. Considerable pressure was brought to bear upon Ontario to take on these constitutional strictures as well, but the Ontario government has resisted on the ground that incremental, statutory adherence to institutional bilingualism was more acceptable in the prevailing political climate.

A further section concerning linguistic rights in New Brunswick was added on April 7, 1993, when the *Constitution Act, 1982* was amended (under s 43 of that Act) to include the following:

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

III. INTERPRETING LANGUAGE RIGHTS

As you read the cases that follow, note the different approaches taken by the Supreme Court of Canada in the interpretation of language rights. The first case deals with s 133, while those following interpret Charter provisions.

Att Gen of Quebec v Blaikie[\[1979\] 2 SCR 1016, 1979 CanLII 21](#)

[*Blaikie No 1* raised three issues regarding the interpretation of s 133 of the *Constitution Act, 1867* in the context of Quebec's *Charter of the French Language*, which made French the official language of the province. The first issue was the content of s 133's requirement that "Acts" of "the Legislature of Quebec"—that is, the Quebec National Assembly—"be printed and published" in both English and French. The Supreme Court determined that the National Assembly of Quebec did not comply with s 133 when it produced merely unofficial English translations of its enactments, including subordinate legislation. The second issue was whether regulations issued under the authority of Quebec statutes were held to be "Acts" within s 133; the Court held that they were. The excerpt below deals with the third issue—whether the right to use English or French before "any of the Courts of Quebec" extended to adjudicative tribunals.]

THE COURT (Laskin CJ and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte, and McIntyre JJ):

[T]he reference in s. 133 to "any of the Courts of Quebec" ought to be considered broadly as including not only so-called s. 96 [of the *Constitution Act, 1867*] Courts but also Courts established by the Province and administered by provincially appointed Judges. It is not a long distance from this latter class of tribunal to those which exercise judicial power, although they are not courts in the traditional sense. If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies. In the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them. The guarantee given for the use of French or English in Court proceedings should not be liable to curtailment by provincial substitution of adjudicative agencies for Courts to such extent as is compatible with s. 96 of the *British North America Act, 1867*.

Two judgments of the Privy Council, which wrestled with similar questions of principle in the construction of the *British North America Act, 1867* are, to some degree, apposite here. In *Edwards v. Attorney General of Canada*, [1930] A.C. 124, the "persons" case (respecting the qualification of women for appointment to the Senate under s. 24), there are observations by Lord Sankey of the need to give the *British North America Act* a broad interpretation attuned to changing circumstances: "The *British North America Act*," he said, at p. 136, "planted in Canada a living tree capable of growth and expansion within its natural limits." Dealing, as this Court is here, with a constitutional guarantee, it would be overly technical to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society, and to refuse to extend to proceedings before them the guarantee to the right to use either French or English by those subject to their jurisdiction.

In *Attorney General of Ontario v. Attorney General of Canada*, [1947] A.C. 127 (the *Privy Council Appeals Reference*), Viscount Jowitt said in the course of his discussion of the issues, that "it is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the *British North America Act*. To such

an organic statute the flexible interpretation must be given which changing circumstances require" (at p. 154).

Although there are clear points of distinction between these two cases and the issue of the scope of s. 133, in its reference to the Courts of Quebec, they nonetheless lend support to what is to us the proper approach to an entrenched provision, that is, to make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies. In our opinion, therefore, the guarantee and requirements of s. 133 extend to both.

It follows that the guarantee in s. 133 of the use of either French or English "by any person or in any pleading or process in or issuing from ... all or any of the Courts of Quebec" applies to both ordinary Courts and other adjudicative tribunals. Hence, not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec or its other adjudicative tribunals (and this covers both written and oral submissions) but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders.

NOTES

1. In *Attorney General of Quebec v Blaikie*, [1981] 1 SCR 312, 1981 CanLII 14 [Blaikie No 2], the Court further elaborated on its earlier pronouncement by finding that subordinate legislation made by non-governmental officials or bodies, but subject to government approval, fell within the requirements of enactment in both English and French as did the rules of practice in the courts. In contrast, municipal by-laws and school board by-laws fell outside the requirements of s 133 because those regulations did not require governmental approval to be legally effective. In reaching these conclusions, the Court rejected the argument put forward by Quebec that its authority to amend its provincial constitution, under then s 92(1) of the *Constitution Act, 1867*, extended to alteration of the provisions of s 133 applicable to the province. A similar argument was rejected in the companion case, *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032, 1979 CanLII 242, with respect to the *Manitoba Act*.

2. The case that follows, *Société des Acadiens*, deals with language rights under s 19(2) of the Charter in court proceedings. It was decided on the same day as *MacDonald v City of Montreal*, [1986] 1 SCR 460, 1986 CanLII 65, which interpreted s 133 of the *Constitution Act, 1867*. In *Société des Acadiens*, the appellants objected that a member of the New Brunswick Court of Appeal, who sat on a leave to appeal application, did not have sufficient knowledge of French to understand their argument in that language, and thus their rights under s 19(2) of the Charter were infringed. In *MacDonald*, the appellant relied on s 133 of the *Constitution Act, 1867* to object to the validity of a summons issued only in French by the Municipal Court of Montreal. Both cases reached the same result—the provisions guarantee the litigant the right to choose to use French or English in the course of judicial proceedings, but they do not guarantee that the proceedings themselves will be conducted in the language that they choose.

Société des Acadiens v Association of Parents

[1986] 1 SCR 549, 1986 CanLII 66

BEETZ J (Estey, Chouinard, Lamer, and Le Dain JJ concurring):

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[53] It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867*

with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

[54] I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language.

[55] I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1:

13(1) Subject to section 15, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.

[56] Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

[57] The only other provision, apart from s. 20, in that part of the *Charter* entitled "Official Languages of Canada," which ensures communication or understanding in both official languages is that of s. 18. It provides for bilingualism at the legislative level. In *MacDonald* one can read the following passage, in the reasons of the majority, at p. 496:

Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

[58] The scheme has now been made more comprehensive in the *Charter* with the addition of New Brunswick to Quebec—and Manitoba—and with new provisions such as s. 20. But where the scheme deliberately follows the model of s. 133 of the *Constitution Act, 1867*, as it does in s. 19(2), it should, in my opinion, be similarly construed.

[59] I must again cite a passage of the reasons of the majority, at p. 500, in *MacDonald* relating to s. 133 of the *Constitution Act, 1867* but which is equally applicable, *a fortiori*, to the official languages provisions of the *Charter*:

This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

[60] The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*

[61] The fundamental nature of this common law right to a fair hearing was stressed in *MacDonald*, in the reasons of the majority, at pp. 499-500:

It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the *Charter* such as s. 7, relating to life, liberty and security of the person and s. 14, relating to the assistance of an interpreter. While Parliament or the Legislature of a province may, pursuant to s. 33 of the *Charter*, expressly declare that an Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*, it is almost inconceivable that they would do away altogether with the fundamental common law right itself, assuming that they could do so.

[62] While legal rights as well as language rights belong to the category of fundamental rights,

[i]t would constitute an error either to import the requirements of natural justice into ... language rights ... or vice versa, or to relate one type of right to the other Both types of rights are conceptually different To link these two types of rights is to risk distorting both rather than re-enforcing either.

[63] ... Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination.

[64] Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.

[65] This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause

before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.

[66] Such an attitude of judicial restraint is in my view compatible with s. 16 of the *Charter*, the introductory section of the part entitled "Official Languages of Canada."

[67] Section 19(2) being the substantive provision which governs the case at bar, we need not concern ourselves with the substantive content of s. 16, whatever it may be. But something should be said about the interpretative effect of s. 16 as well as the question of the equality of the two official languages.

[68] I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.

[69] One should also take into consideration the constitutional amending formula with respect to the use of official languages. Under s. 41(c) of the *Constitution Act*, 1982, the unanimous consent of the Senate and House of Commons and of the legislative assembly of each province is required for that purpose but "subject to section 43." Section 43 provides for the constitutional amendment of provisions relating to some but not all provinces and requires the "resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies." It is public knowledge that some provinces other than New Brunswick—and apart from Quebec and Manitoba—were expected ultimately to opt into the constitutional scheme or part of the constitutional scheme prescribed by ss. 16 to 22 of the *Charter*, and a flexible form of constitutional amendment was provided to achieve such an advancement of language rights. But again, this is a form of advancement brought about through a political process, not a judicial one.

[70] If however the provinces were told that the scheme provided by ss. 16 to 22 of the *Charter* was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).

[71] In my opinion, s. 16 of the *Charter* confirms the rule that the courts should exercise restraint in their interpretation of language rights provisions.

[72] I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

[73] Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

[Chief Justice Dickson and Wilson J each wrote separate reasons concurring in the conclusion that the appeal should be dismissed. However, both took the view that the right to use either English or French in court included the right to be understood by the judge or judges hearing the case. Chief Justice Dickson left open the question of what techniques might satisfy this obligation—for example, the use of interpreters or simultaneous translation. Wilson J held that the judge's level of understanding "must be such that the full flavour of the argument can be appreciated."]

NOTES AND QUESTIONS

1. Whose interests are understood to be protected by s 19(2) of the Charter in this case, or by s 133 in *MacDonald*? Is the Court's approach to interpretation here consistent with its earlier approach in *Blaikie*?

2. What is the significance of the characterization of language rights as forged by historic political compromise? Is this characterization valid? Is the interpretive posture that flows from it inevitable?

3. The restrictive approach taken by *Société des Acadiens* and *MacDonald* to the interpretation of language rights attracted the Court's criticism in two judgments. The first is *R v Beaulac*, [1999] 1 SCR 768, 1999 CanLII 684. *Beaulac* concerned the interpretation of ss 530(1) and (4) of the *Criminal Code* which govern the language of criminal trials. In discussing the correct interpretation to be given to those provisions, Bastarache J (speaking for seven members of the Court) stated in *obiter* that "the existence of a political compromise is without consequence with regard to the scope of language rights" (at para 24); "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada"; and "[t]o the extent that *Société des Acadiens du Nouveau-Brunswick* ... stands for a restrictive interpretation of language rights, it is to be rejected" (at para 25). Chief Justice Lamer and Binnie J, although concurring in Bastarache J's interpretation of the relevant provisions of the *Criminal Code*, expressly distanced themselves from this aspect of Bastarache J's judgment, stating that "[a] re-assessment of the Court's approach to Charter language rights developed in *Société des Acadiens* and reiterated in subsequent cases is not necessary or desirable in this appeal" (at para 5). However, in *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, a case arising under s 23 of the Charter (discussed below), the Court unanimously approved Bastarache J's statements in *Beaulac*, stating that "the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope" (at para 27). Neither *Beaulac* nor *Arsenault-Cameron* dealt squarely with s 19(2) of the Charter or s 133 of the *Constitution Act, 1867*, the two constitutional provisions at issue in *Société des Acadiens* and *MacDonald*, and so the specific holdings in those decisions have not been overruled. But in light of *Beaulac* and *Arsenault-Cameron*, would those cases be decided the same way today?

4. Michael MacMillan notes that there are two ways to justify language rights—on the theoretical basis that they share the essential elements of human rights, and on a more empirical or inductive basis that supports language rights on the basis of public attitudes and social practices: see Michael MacMillan, "Linking Theory to Practice: Comments on 'The Constitutional Protection of Language'" in David Schneiderman, ed, *Language and the State: The Law and Politics of Identity* (Cowansville, Que: Éditions Yvon Blais, 1991) at 59.

5. In *MacDonald*, Beetz J made a distinction between language rights and legal rights, explaining their interaction as follows:

[110] Suppose that a person is charged with a criminal offence drafted in either the French or the English language and that person does not understand the language of the charge. It goes without saying that this person cannot be asked to plead and be tried upon

the charge in these circumstances. What will happen as a matter of practice as well as of law is that the judge will call upon a sworn interpreter to translate the charge into a language that the accused can understand. But this is so whether the accused speaks only German or Cantonese and has nothing to do with what s. 133 stands for. Provision is made for this different purpose by other enactments relating for instance to interpreters and under other principles of law some of which are now enshrined in the provisions of distinct constitutional or quasi-constitutional instruments, such as s. 2(g) of the *Canadian Bill of Rights* and s. 14 of the Charter, also relating to interpreters. ...

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[114] It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.

The constitutional right to an interpreter in s 14 of the Charter is discussed in *R v Tran*, [1994] 2 SCR 951, 1994 CanLII 56. For a skeptical treatment of "legislative bilingualism" in historically English-speaking provinces, see *Caron v Alberta*, 2015 SCC 56.

Does the above discussion of English and French, as differentiated from other languages, reflect the special place of English and French in the history of the Canadian Constitution, or does it depart from that history in recognition of Canada as a multicultural—and thus multilingual—society?

6. Section 23 of the Charter contains the minority language education guarantees. It is distinctive in that it imposes obligations on all provinces, unlike the institutional bilingualism provisions that currently apply to Quebec, New Brunswick, and Manitoba. But not all of s 23 applies in Quebec. By virtue of s 59 of the *Constitution Act, 1982*, s 23(1)(a) does not come into effect in Quebec until authorized by the "legislative assembly or government of Quebec." This provision reflects Quebec's concern that immigrants have tended to gravitate to the anglophone community. Therefore, access to English language education in Quebec depends on the parents being citizens who received primary school instruction in English in Canada.

Section 23 was the focus of one of the earliest Charter cases to reach the Supreme Court of Canada, *AG (Que) v Quebec Protestant School Boards*, [1984] 2 SCR 66, 1984 CanLII 32. The Court struck down the portions of Quebec's *Charter of the French Language* that gave access to English language schools only to the children of persons who had been educated in English in Quebec. This provision, known as the "Quebec clause," clashed with the "Canada clause" contained in s 23(1)(b), which offered minority language schooling in Quebec to the children of parents who had received primary instruction in English, not just in Quebec but in any other part of Canada. The judgment of the Court characterized the legislation as having the purpose of ousting the Canada clause of the Charter, rather than limiting its reach. Therefore, s 1 of the Charter could not save it.

7. The major Supreme Court judgment on s 23 of the Charter is *Mahe v Alberta*, immediately below. For the Court, this case was the first attempt at determining the scope of the rights to educational facilities for minority language groups. Note how the Court tries to set out some general principles for application in this and the many other fact situations that will arise across the country—in effect, initiating an ongoing dialogue between courts and legislatures about the appropriate design of minority language educational systems.

Mahe v Alberta[1990] 1 SCR 342, 1990 CanLII 133

DICKSON CJ (Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, and Cory JJ concurring):

Section 23 is one component in Canada's constitutional protection of the official languages. The section is especially important in this regard, however, because of the vital role of education in preserving and encouraging linguistic and cultural vitality. It thus represents a linchpin in this nation's commitment to the values of bilingualism and biculturalism.

The appellants claim that their rights under s. 23 are not satisfied by the existing educational system in Edmonton nor by the legislation under which it operates, resulting in an erosion of their cultural heritage, contrary to the spirit and intent of the *Charter*. In particular, the appellants argue that s. 23 guarantees the right, in Edmonton, to the "management and control" of a minority-language school—that is, to a Francophone school run by a Francophone school board. Our task then is to determine the meaning of s. 23 of the *Charter*.

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The appellants Jean-Claude Mahe and Paul Dubé are parents whose first language learned and still understood is French. The appellant Angeline Martel is a parent who received her primary school instruction in French. All three have school age children, and thus qualify under s. 23(1) of the *Charter* as persons who, subject to certain limitations, "have the right to have their children receive primary and secondary school instruction" in the language of the linguistic minority population of the province—in this case, the French language. They may therefore conveniently be called "s. 23 parents," and their children "s. 23 students." ...

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At the heart of this appeal is the claim of the appellants that the term "minority language educational facilities" referred to in s. 23(3)(b) includes administration by distinct school boards. The respondent takes the position that the word "facilities" means a school building. The respondent submits that the rights of the Francophone minority in metropolitan Edmonton have not been denied because those rights are being met with current Francophone educational facilities.

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The primary issue raised by this appeal is the degree, if any, of "management and control" of a French language school which should be accorded to s. 23 parents in Edmonton. (The phrase "management and control," it should be noted, is not a term of art: it appears to have been introduced in earlier s. 23 cases and has now gained such currency that it was utilized by all the groups in this appeal.) The appellants appear to accept that, with a few exceptions, the government has provided whatever other services or rights might be mandated in Edmonton under s. 23: their fundamental complaint is that they do not have the exclusive management and control of the existing Francophone schools. ...

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There are two general questions which must be answered in order to decide this appeal: (1) do the rights which s. 23 mandates, depending upon the numbers of students, include a right to management and control; and (2) if so, is the number of students in Edmonton sufficient to invoke this right? I will begin with the first question.

It appeared to be common ground between the parties that if a right to management and control is provided by s. 23, it must be found in the right to "minority

language educational facilities" set out in subs. (3)(b). Before this particular subsection can be examined, however, it is essential to consider two general matters: (1) the purpose of s. 23; and (2) the relationship between the different subsections and paragraphs which comprise s. 23. In interpreting s. 23, as in interpreting any provision of the *Charter*, it is crucial to consider the underlying purpose of the section. As to the second matter, the structure of s. 23 makes it imperative that each part of the section be read in the context of all of the constituent parts.

(1) The Purpose of Section 23

The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49:

Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a *means by which a people may express its cultural identity*. [Emphasis added.]

Similar recognition was granted by the Royal Commission on Bilingualism and Biculturalism, itself a major force in the eventual entrenchment of language rights in the Charter. At page 8 of Book II of its report, the Commission stated:

Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture.

And at p. 19, in a comment on the role of minority language schools, the Commission added:

These schools are essential for the development of both official languages and cultures; ... the aim must be to provide for members of the minority an education appropriate to their *linguistic and cultural identity*. ... [Emphasis added.]

In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.

A further important aspect of the purpose of s. 23 is the role of the section as a *remedial* provision. It was designed to remedy an existing problem in Canada, and hence to alter the *status quo* ...

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In my view the appellants are fully justified in submitting that "history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the 'equal partnership' of the two official language groups in the context of education."

The remedial aspect of s. 23 was indirectly questioned by the respondent and several of the interveners in an argument which they put forward for a "narrow construction" of s. 23. ...

[Reference to Beetz J's comments on the political nature of language rights and the restrictive role of the courts in their interpretation is omitted.]

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I do not believe that these words support the proposition that s. 23 should be given a particularly narrow construction, or that its remedial purpose should be ignored. Beetz J makes it clear in this quotation that language rights are not cast in stone nor immune from judicial interpretation. ... Beetz J's warning that courts should be careful in interpreting language rights is a sound one. Section 23 provides a perfect example of why such caution is advisable. The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

(2) The Context of Section 23(3)(b): An Overview of Section 23

The proper way of interpreting s. 23, in my opinion, is to view the section as providing a general right to minority language instruction. Paragraphs (a) and (b) of subs. (3) qualify this general right: para. (a) adds that the right to instruction is only guaranteed where the "number of children" warrants, while para. (b) further qualifies the general right to instruction by adding that where numbers warrant it includes a right to "minority language educational facilities." In my view, subs. (3)(b) is included in order to indicate the upper range of possible institutional requirements which may be mandated by s. 23 (the government may, of course, provide more than the minimum required by s. 23).

Another way of expressing the above interpretation of s. 23 is to say that s. 23 should be viewed as encompassing a "sliding scale" of requirement, with subs. (3)(b) indicating the upper level of this range and the term "instruction" in subs. (3)(a) indicating the lower level. The idea of a sliding scale is simply that s. 23 guarantees whatever type and level of rights and services is appropriate in order to provide minority language instruction for the particular number of students involved.

The sliding scale approach can be contrasted with that which views s. 23 as only encompassing two rights—one with respect to instruction and one with respect to facilities—each providing a certain level of services appropriate for one of two numerical thresholds. On this interpretation of s. 23, which could be called the "separate rights" approach, a specified number of s. 23 students would trigger a particular level of instruction, while a greater, specified number of students would require, in addition, a particular level of minority language educational facilities. Where the number of students fell between the two threshold numbers, only the lower level of instruction would be required.

The sliding scale approach is preferable to the separate rights approach, not only because it accords with the text of s. 23, but also because it is consistent with the purpose of s. 23. The sliding scale approach ensures that the minority group receives the full amount of protection that its numbers warrant. Under the separate rights approach, if it were accepted, for example, that "X" number of students ensured a right to full management and control, then presumably "X - 1" students would not

bring about any rights to management and control or even to a school building. Given the variety of possible means of fulfilling the purpose of s. 23, such a result is unacceptable. Moreover, the separate rights approach places parties like the appellants in the paradoxical position of forwarding an argument which, if accepted, might ultimately harm the overall position of minority language students in Canada. If, for instance, the appellants succeeded in persuading this Court that s. 23 mandates a completely separate school board—as opposed to some sort of representation on an existing board—then other groups of s. 23 parents with slightly fewer numbers might find themselves without a right to any degree of management and control—even though their numbers might justify granting them some degree of management and control.

The only way to avoid the weaknesses of the separate rights approach would be to lower the numbers requirement—with the result that it would be impractical to require governments to provide more than the minimum level of minority language educational services. In my view, it is more sensible, and consistent with the purpose of s. 23, to interpret s. 23 as requiring whatever minority language educational protection the number of students in any particular case warrants. Section 23 simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education.

There are outer limits to the sliding scale of s. 23. In general, s. 23 may not require that anything be done in situations where there are a small number of minority language students. There is little that governments can be required to do, for instance, in the case of a solitary, isolated minority language student. Section 23 requires, at a minimum, that “instruction” take place in the minority language: if there are too few students to justify a programme which qualifies as “minority language instruction,” then s. 23 will not require any programmes be put in place. However, the question of what is the “minimum” programme which could constitute “instruction,” and the further question of how many students might be required in order to warrant such a programme, are not at issue in this appeal and I will not be addressing them. The question at issue here concerns only the “upper level” of the possible range of requirements under s. 23—that is, the requirements where there are a relatively large number of s. 23 students.

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In my view, the words of s. 23(3)(b) are consistent with and supportive of the conclusion that s. 23 mandates, where the numbers warrant, a measure of management and control. Consider, first, the words of subs. (3)(b) in the context of the entire section. Instruction must take place somewhere and accordingly the right to “instruction” includes an implicit right to be instructed in facilities. If the term “minority language educational facilities” is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in s. 23. This common sense conclusion militates against interpreting “facilities” as a reference to physical structures. Indeed, once the sliding scale approach is accepted it becomes unnecessary to focus too intently upon the word “facilities.” Rather, the text of s. 23 supports viewing the entire term “minority language educational facilities” as setting out an upper level of management and control.

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The foregoing textual analysis of s. 23(3)(b) is strongly supported by a consideration of the overall purpose of s. 23. That purpose, as discussed earlier, is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is

vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.

Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority. . . .

Section 23 clearly encompasses a right to management and control. On its own, however, the phrase "management and control" is imprecise and requires further specification. This can be accomplished by considering what type of management and control is needed in order to fulfill the purpose of s. 23.

The appellants argue for a completely independent Francophone school board. Much is to be said in support of this position and indeed it may be said to reflect the ideal. . . . Historically, separate or denominational boards have been the principal bulwarks of minority language education in the absence of any provision for minority representation and authority within public or common school boards. Such independent boards constitute, for the minority, institutions which it can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and being afforded the fullest measure of representation and control. These are particularly important in setting overall priorities and responding to the special educational needs of the minority.

In some circumstances an independent Francophone school board is necessary to meet the purpose of s. 23. However, where the number of students enrolled in minority schools is relatively small, the ability of an independent board to fulfill this purpose may be reduced and other approaches may be appropriate whereby the minority is able to identify with the school but has the benefit of participating in a larger organization through representation and a certain exclusive authority within the majority school board. Under these circumstances, such an arrangement avoids the isolation of an independent school district from the physical resources which the majority school district enjoys and facilitates the sharing of resources with the majority board, something which can be crucial for smaller minority schools. By virtue of having a larger student population, it can be expected that the majority board would have greater access to new educational developments and resources. Where the number of s. 23 students is not sufficiently large, a complete isolation of the minority schools would tend to frustrate the purpose of s. 23 because, in the long run, it would contribute to a decline in the status of the minority language group and its educational facilities. Graduates of the minority schools would be less well-prepared (thus hindering career opportunities for the minority) and potential students would be disinclined to enter minority language schools.

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Perhaps the most important point to stress is that completely separate school boards are not necessarily the best means of fulfilling the purpose of s. 23. What is essential, however, to satisfy that purpose is that the minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture. This degree of control can be achieved to a substantial extent by guaranteeing representation of the minority on a shared school board and by

giving these representatives exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns.

To give but one example, the right to tax (which would accompany the creation of an independent school district), is not, in my view, essential to satisfy the concerns of s. 23 with linguistic and cultural security. Section 23 guarantees that minority schools shall receive public funds, but it is not necessary that the funds be derived through a separate tax base provided adequate funding is otherwise assured. Similar observations can be made in respect of other features of separate school districts.

It is not possible to give an exact description of what is required in every case in order to ensure that the minority language group has control over those aspects of minority language education which pertain to or have an effect upon minority language and culture. Imposing a specific form of educational system in the multitude of different circumstances which exist across Canada would be unrealistic and self-defeating. The problems with mandating "specific modalities" have been recognized by all of the courts in Canada which have considered s. 23. At this stage of early development of s. 23 jurisprudence, the appropriate response for the courts is to describe in general terms the requirements mandated. It is up to the public authorities to satisfy these general requirements. Where there are alternative ways of satisfying the requirements, the public authorities may choose the means of fulfilling their duties. In some instances this approach may result in further litigation to determine whether the general requirements mandated by the court have been implemented. I see no way to avoid this result, as the alternative of a uniform detailed order runs the real risk of imposing impractical solutions. Section 23 is a new type of legal right in Canada and thus requires new responses from the courts.

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In my view, the measure of management and control required by s. 23 of the Charter may, depending on the numbers of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board. In this latter case:

- (1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
- (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible;
- (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:
 - (a) expenditures of funds provided for such instruction and facilities;
 - (b) appointment and direction of those responsible for the administration of such instruction and facilities;
 - (c) establishment of programs of instruction;
 - (d) recruitment and assignment of teachers and other personnel; and
 - (e) making of agreements for education and services for minority language pupils.

I do not doubt that in future cases courts will have occasion to expand upon or refine these words. It is impossible at this stage in the development of s. 23 to foresee all of the circumstances relevant to its implementation.

There are a few general comments I wish to add in respect of the above description. First, the matter of the quality of education to be provided to the minority students was not dealt with above because, strictly speaking, it does not pertain to the issue of management and control. It is, of course, an important issue and one which was raised in this appeal. I think it should be self-evident that in situations where the above degree of management and control is warranted the quality of education provided to the minority should in principle be on a basis of equality with the majority. This proposition follows directly from the purpose of s. 23. However, the specific form of educational system provided to the minority need not be identical to that provided to the majority. The different circumstances under which various schools find themselves, as well as the demands of a minority language education itself, make such a requirement impractical and undesirable. It should be stressed that the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools. Special circumstances may warrant an allocation for minority language schools that exceeds the per capita allocation for majority schools. I am confident that this will be taken into account not only in the enabling legislation, but in budgetary discussions of the board.

With respect to funding, the reference point for determining the number of students will normally be the pupils actually receiving minority language education. During the period in which a minority language education programme is getting started, however, it would seem reasonable to budget for the number of students who can realistically be seen as attending the school once operations are well established. This may be one example of a special circumstance which calls for a higher allocation of funds for minority education programmes. It could also be seen, however, as a consideration which would equally be extended to a majority language programme during its start-up period.

Second, provincial and local authorities may, of course, give minority groups a greater degree of management and control than that described above. Section 23 only mandates a minimum level of management and control in a given situation; it does not set a ceiling.

Third, there are a variety of different forms of institutional structures which will satisfy the above guidelines. I have stressed this aspect of the flexibility of s. 23 before, but this feature bears repeating. The constant in any acceptable scheme of minority representation, however, will be the granting of representation proportional to the number of minority language students who fall under the responsibility of the particular school board.

Fourth, the persons who will exercise the measure of management and control described above are "s. 23 parents" or persons such parents designate as their representatives. I appreciate that because of the wording of s. 23 these parents may not be culturally a part of the minority language group. This could occasionally result in persons who are not, strictly speaking, members of the minority language group exercising some control over minority language education. This would be a rare occurrence, and is not reason to lessen the degree of management and control given to s. 23 parents.

Fifth, I wish to emphasize that the above description is only meant to cover the degree of management and control which, short of a separate school board, is required under s. 23 where the number of s. 23 students is significant enough to warrant moving towards the upper level of the sliding scale. Other degrees of management and control may be required in situations where the numbers do not justify granting full rights of management and control. What is required in any case will turn on what the "numbers warrant."

Finally, it should be noted that the management and control accorded to s. 23 parents does not preclude provincial regulation. The province has an interest both in the content and the qualitative standards of educational programmes. Such programmes can be imposed without infringing s. 23, in so far as they do not interfere with the linguistic and cultural concerns of the minority.

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Appeal allowed.

Denise Réaume & Leslie Green, "Education and Linguistic Security in the Charter"

(1989) 34 McGill LJ 777 (footnotes omitted)

I. The Value of Linguistic Security

Two mischievous notions about language rights have some currency in Canada. The first is that language rights are a mere product of political compromise and have no foundation in principle. The second contradicts the first. According to it, language rights are founded on the principle of survival: governments have a duty to ensure that minority languages continue into the future. These are not politically innocent notions, for each has implications for the way in which language rights should be interpreted and the weight they should be given. But they are both founded on mistakes.

The first confuses the *genesis* of constitutional rights with their *justification*. All rights entrenched in positive law have a particular form that attempts to make concrete certain abstract values which the law prizes. Every constitutional right thus marks a kind of compromise between competing interpretations of the values it protects; every one strikes some balance between legislative sovereignty and minority protections; every one can be protected only by a combination of non-interference and positive action on the part of government. Because these are features of all constitutional rights, they do not distinguish language rights from the rest and therefore provide no ground for interpreting them differently. That is why the Supreme Court of Canada, to whom this first mistake is due, has not been able to draw the proposed distinction between "compromise- and principle-based" rights in a consistent and persuasive way. Such truth as there is in the idea amounts to this: the courts must give effect to the terms of a constitutional agreement without, under the guise of interpretation, amending them. That claim is as harmless as it is sound. It does nothing to show what those terms are, nor how courts should proceed when they are equivocal. Thus, the claim that they originate in a compromise does not in fact justify the Court's recent policy of reading some language rights restrictively.

The second view, according to which minority language rights are rooted in the principle of survival, makes a different error. It confuses the *justification* of a right with the likely *by-product* of its exercise. Minority languages are under threat from a variety of sources, but they die out for a common reason: they are abandoned by their speakers. Language rights aim to protect speakers from certain pressures to abandon their languages. When linguistic choices are made in a secure environment, roughly, one without unfair pressure to conform to majority practices, they will in fact typically lead to a higher rate of survival. Does it follow, then, that the aim of language rights is to protect the endangered species of the linguistic world?

We can test that hypothesis by considering some policies aimed at ensuring language survival. Suppose, for example, that one of the majority English provinces

required all French speakers to send their children to French schools and denied them access to English instruction. Or suppose that by residential zoning it attempted to reduce ... declining minorities [from marrying outside their group]. Set aside the question of whether these measures would violate other rights, and let us ask simply whether *as far as language goes*, they are aimed in the right direction. Could they be said to take at least one step towards justice? On reflection that seems dubious. The problem is not simply that language rights and other liberties are here in conflict, but that moral rights to language use are *themselves* violated by the policies in question. Prohibiting the minorities from learning the majority language and banning minority-language instruction offend common principles: they attack linguistic security by creating unfair pressures to conform. These pressures do not become acceptable when they are inflicted on a minority within the minority community itself. Draconian measures to promote minority languages may evince a kind of concern for the health of the languages, but they do not give appropriate concern for the interests of their speakers.

That security and not survival is the root value is suggested by considering the importance of language. Apart from its instrumental value in communication, language is also an important marker of identity. Those who wish to use minority languages do so partly as an expression of belonging to and identifying with a community. But language use has this valuable expressive dimension only if rooted in a free and fair context. Those who are forced to use a particular language cannot be thought thereby to express their identity. That does not mean that language must be consciously chosen. Language is only partially a realm of free choice. Children have a mother tongue long before they develop the capacity for reflective and informed choice about ethnic identification, and parents typically transmit their mother tongues as a matter of course. But these normal processes of social development contribute value to their outcomes only in circumstances which are fair and unbiased. Thus, while facilitating minority language education and requiring it both promote the survival of minority languages, this equivalence in consequences does not establish an equivalence in aim. The point of language rights is to give speakers a secure environment in which to make choices about language use, and in which ethnic identification can have positive value.

The confusion of survival and security is easily made, for the conditions threatening security also make survival less likely. Evidence of assimilation and decline among the francophone minorities made it clear that the lack of adequate protection in the 1867 constitution had exacerbated their demographic fragility, and the desire to remedy this was a driving force of the language rights provisions. Nonetheless, the decline of the minorities is a symptom and not itself a disease. It is presumptive evidence that there is strong and potentially unfair social pressure to abandon their language. But this evidence is rebuttable. It is possible (though not probable under normal circumstances) that even in a completely secure environment, some members of minority language groups would still make free and informed decisions to integrate with a majority community. The need to identify with a community may be deeply rooted in human nature, but we know that there is nonetheless much flexibility regarding the community with which one identifies.

These considerations suggest that it is not the survival of languages but the security of their speakers that justifies language rights. To have linguistic security in the fullest sense is to have the opportunity, without serious impediments, to live a full life in a community of people who share one's language. This opportunity is taken for granted by those in linguistically homogeneous societies and by those who speak the majority language in multilingual societies. Through sheer numbers they enjoy *de facto* linguistic security without need for special legal protections. No doors are

closed, and no aspects of human fulfillment are unavailable on account of language. Abandoning one's mother tongue (oneself or on behalf of one's children) is of course a conceivable option for them, but not one to which they are driven by force of social circumstance and not one which will even be considered in the normal course of life. It is otherwise for members of linguistic minorities. Without special protections, minority language speakers are inevitably placed under strong pressures to abandon their mother tongue. Because of its central role in every aspect of human co-operation, people share a common interest in communicating with others. To be excluded from this is to be denied most of what is valued in life. The more restricted the existence available in one's mother tongue the more rational it becomes to take up the language that offers greater opportunities. This does not mean that the minority language speakers do not value their language or communities, any more than the decision of hold-up victims to part with their wallets means that they do not value their money. It means simply that there are some burdens that outweigh it, and some costs that it is unjust to expect them to bear. ...

The role of government in protecting linguistic security is thus easily explained. The familiar official language rights serve the interests of linguistic security by facilitating participation in activities under government control. Participation in political life involves communication with officials. A community that could not participate in the political life of its country would be severely handicapped, and, if participation must be on the majority's terms, then the incentive to assimilate is obvious. Similarly, the denial of government services, whether the court system or the kind of everyday help and advice that many government departments provide, turns the use of one's mother tongue into a handicap and sometimes even a source of shame. But, unlike ethnic groups, government has no mother tongue of its own. The choice of its working languages is a matter over which the government has complete control. Participation can therefore be guaranteed in one's own language without sacrificing the legitimate interests of others. How does education fit into the emerging picture?

The system of education, particularly at the primary and secondary levels, makes major contributions to the security of one's linguistic environment. Provision for minority language education is a complex good with many different facets. For convenience, we distinguish two main aspects. There are powerful *individual benefits* of children being able to learn in their mother-tongue The absence of minority language education is quite obviously a powerful assimilative force. Children grow up with a grasp of their mother tongue which is inadequate for the kind of adult pursuits which require strong communication skills. In such circumstances it is hardly surprising that people abandon their first language and do not teach it to their children. Before long, such a community ceases to be viable and its language, if it persists at all, has merely folkloric status.

Education cannot however be fully understood as an individual good. Minority language instruction benefits the linguistic group as well. It has *collective benefits* which flow from the language being a vehicle of instruction. For example, it provides and renews cultural capital. This is true at the level of both "high" and "popular" culture: the productive and appreciative capacities must be nurtured and trained through a comprehensive education. Musicians, writers, artists obviously depend on and draw on common cultural capital in representing and contesting the life of the community. But even folk and oral traditions, sporting culture, etc., all draw on a stock of common forms and images. In modern societies this capital is largely controlled by the educational system.

Other direct collective benefits are more instrumental: the education system provides jobs for members of the minority community. There are also indirect collective benefits For one thing, a community with public institutions will have greater visibility and status. More importantly, an educational facility such as a neighbourhood school is an important focus of social and cultural activities for the community, especially in smaller towns. And managing a school system by electing trustees, hiring teachers, setting policy, etc. are all important parts of the political life of such communities and contribute to their richness and vitality.

These are only some of the ways in which minority-language education enters the collective life of the community. Many of them exhibit interesting structural features. Some collective benefits are *public goods* in the economists' sense: none can be excluded from their benefits and they do not diminish with consumption. This is clearly the case with respect to the diffuse effects of a minority language education system on the security, status, and vitality of the community. And, where publicly funded education is the norm, it is true of educational options themselves: they become available to any parents who wish to take advantage of them. Moreover, the existence of these schools makes the entire community more vital in diffuse ways which generate benefits even for those who do not directly participate in its activities. For example, the increased use of minority languages obviously increases the instrumental value of being able to speak them, and this benefit accrues to all.

But minority-language instruction has further collective benefits which, though excludable, are social and non-rival. Where these flow from the inherent value of participating with others in some social activity, we call them *participatory goods*. A school plays a significant role in fostering human relationships, teaching co-operation, and imparting other social skills in a way that could not be achieved under a system of private individual tuition. Public education is the central means by which children are introduced to and can participate in the cultural traditions of their community. Management and control of an education system, similarly, provides a forum in which parents can exercise and develop skills of self-government. In all these ways, minority language education has a significant social role.

NOTES AND QUESTION

1. *Mahe*, in effect, sets up a dialogue between the legislative and judicial branches on the meaning of s 23, as governments attempt to implement the section. For further discussion by the Supreme Court of Canada, see *Reference re Public Schools Act (Man)*, s 79(3), (4) and (7), [1993] 1 SCR 839, 1993 CanLII 119, where the Court was asked to determine the meaning of s 23(3)(b), the right to receive instruction in "minority language educational facilities." The Court concluded that s 23 requires that the educational facilities be of or belong to the minority group and includes a right to a distinct physical setting. However, as in *Mahe*, it declined to elaborate on what this might mean in a given fact situation. Again, the Court emphasized that the determination of whether facilities are appropriate can only be undertaken on the basis of a distinct geographic region. The Court also determined that the Manitoba *Public Schools Act* did not meet the province's constitutional obligations. Given the number of potential French-language students, s 23 required the establishment of an independent French-language school board under the exclusive management and control of the French-speaking language minority.

2. For a critique of the *Mahe* decision on the grounds that it is overly activist and a departure from the appropriate judicial reading of history, legislative purpose, and constitutional text, see Robert G Richards, "Mahe v Alberta: Management and Control of Minority Language Education" (1991) 36 McGill LJ 216 at 224:

The Court chose to overlook a fundamental point when it said that management and control must be read into section 23 because the historical absence of these rights had led to a failure to provide minority language education. Section 23 *itself* guarantees minority language instruction and facilities. Minority language groups no longer need political influence or control of school boards to get instruction and facilities. They have a constitutional right to them which can be enforced in court if necessary. The very purpose of section 23 is to break the link between the availability of minority language education and political control of school boards or legislatures.

Thus, it seems clear that the purpose and focus of section 23 would have been more appropriately stated in more concrete and specific terms than those chosen by the Chief Justice. As the section itself says, it is aimed at guaranteeing rights to primary and secondary education in the official minority language of each province. The preservation of cultural and linguistic integrity is not the *direct* object of section 23. The availability of minority language education will have an impact on assimilation but that is the *effect* of the section rather than its immediate purpose. Section 23 can easily become over-inflated if it is seen as being aimed directly at guaranteeing linguistic and cultural vitality.

3. Joseph Magnet, in *Official Language of Canada* (Cowansville, Que: Éditions Yvon Blais, 1995) at 80-83, is critical of the principle of linguistic security discussed by Réaume and Green, above. He argues that to create true linguistic security for minority language communities, government would have to intervene in language policy in an ambitious manner—and this is an unrealistic expectation. Moreover, he criticizes their attempt to justify language rights on a single basis because this approach ignores the complexity of the issue. For example, he identifies an additional justification for language rights—namely, that they manage conflict between Canada's linguistic communities.

4. The Supreme Court applied *Mahe* in *Arsenault-Cameron* (discussed above), in which the Court held that the right of a minority language community to management and control encompassed a right to control over the location of minority language instruction and facilities. In *Arsenault-Cameron*, parents from Summerside, Prince Edward Island and its environs challenged the decision of the provincial minister of education to provide bus transportation to a French-language school in a neighbouring district, as opposed to establishing a school in the Summerside area. The Court held that this decision was for the minority language community (in that case, acting through a French-language school board) to make because it would likely be based on "cultural or linguistic considerations" (at para 47) that are better understood by the minority language community itself. In addition to this purposive argument, the Court pointed to the text of s 23, in particular the term "wherever in the province" in s 23(3)(a), to support the conclusion that the right to management and control included a right to choice of location. Do you agree? The Court, however, stated that the right to choice of location is "subject to objective provincial norms and guidelines that are consistent with s. 23" (at para 54)—for example, those regarding "[s]chool size, facilities, transportation and assembly of students" (at para 53).

5. In both *Mahe* and the *Manitoba Language Reference*, above, the Court gave only declaratory relief that set out guidelines for future action by government in consultation with the minority language population. In other cases, plaintiffs have sought structural remedies. Indeed, the majority of claims for structural relief under the Charter have arisen in the context of minority language education rights. For example, in *Marchand v Simcoe County Board of Education*, [1986 CanLII 2671, 29 DLR \(4th\) 596 \(Ont H Ct J\)](#), Sirois J ordered the defendant school board to provide the facilities and funding necessary to achieve instruction and facilities in the French-language secondary school equivalent to those in the English stream and to establish industrial arts and shop programs at the French-language secondary school

equivalent to those in the English schools. In *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003 SCC 62](#), discussed in Chapter 25, a majority of the Court found that a trial judge was justified in retaining jurisdiction over the case and requiring the government to report back to the Court and the parties on its progress in making minority language schools available after the judge had issued a declaration that the s 23 minority language educational rights of francophones in Nova Scotia had been violated.

6. *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001 CanLII 21164, 56 OR \(3d\) 505 \(CA\)](#) presents an interesting variation on the language rights cases discussed above. In *Lalonde*, the Ontario Court of Appeal struck down the decision of the Ontario Health Services Restructuring Commission to close the Montfort Hospital. The hospital was the only hospital in the province where French-language services were available on a full-time basis. Moreover, because the working language of the hospital was French, it was the only hospital in the province where health care professionals were trained in French. The Court rejected constitutional challenges to the discussion to close the hospital on the basis of ss 15 and 16(3). However, the Court found that the commission had exercised its statutory discretion unreasonably by failing to consider, and to justify, any departure from the unwritten constitutional principle of the "protection of minorities" (at para 79) laid down by the Supreme Court in the *Reference re Secession of Quebec*, [\[1998\] 2 SCR 217, 1998 CanLII 793](#), excerpted in Chapter 2, Judicial Review and Constitutional Interpretation. The Government of Ontario decided not to appeal this judgment.

7. The legislative measures in the *Ford* case, immediately below, could be seen as an example of Quebec's vigorous efforts to protect linguistic security for francophones. Its importance in this chapter is to show how the Supreme Court has extended language rights protection beyond the explicit guarantees described so far and how it has tried to reconcile the interests of different linguistic communities when they come into conflict.

In interpreting s 2(b), the guarantee of freedom of expression, to include protection against the suppression of one's language by the state, the Court has given added protection not only to English and French minorities but also to other linguistic communities. Note, however, that there is a difference between s 2(b) and the language rights described so far because the latter confer positive rights whereas the guarantee in s 2(b) has been understood in primarily negative terms, restricting the state's ability to prevent the use of a language but not requiring that the state confer services. As well, the language rights guaranteed through s 2(b) are vulnerable to legislative override under s 33.

Ford v Quebec (AG)

[\[1988\] 2 SCR 712, 1988 CanLII 19](#)

[This case involved a challenge to ss 58 and 69 of the Quebec *Charter of the French Language*, which required that signs, posters, and commercial advertising be solely in the French language and that only the French version of a firm name be used. The legislation was attacked under both the Charter and the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12. The editing here emphasizes the former. The override power found in s 33 of the Charter was also involved, and the parts of the judgment dealing with that issue are found in Chapter 17, The Framework of the Charter. The case also involved important rulings on freedom of expression, discussed in Chapter 20, Freedom of Expression.]

THE COURT (Dickson CJ and Beetz, McIntyre, Lamer, and Wilson JJ):

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VII Whether the Freedom of Expression Guaranteed by Section 2(b) of the Canadian Charter of Rights and Freedoms and by Section 3 of the Quebec Charter of Human Rights and Freedoms Includes the Freedom to Express Oneself in the Language of One's Choice

[39] In so far as this issue is concerned, the words "freedom of expression" in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* should be given the same meaning. As indicated above, both the Superior Court and the Court of Appeal held that freedom of expression includes the freedom to express oneself in the language of one's choice. ...

[40] The conclusion of the Superior Court and the Court of Appeal on this issue is correct. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2 and to "freedom of conscience" and "freedom of opinion" in s. 3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.

[41] The Attorney-General of Quebec made several submissions against the conclusion reached by the Superior Court and the Court of Appeal on this issue, the most important of which may be summarized as follows: (a) in determining the meaning of freedom of expression the court should apply the distinction between the message and the medium which must have been known to the framers of the Canadian and Quebec Charters; (b) the express provision for the guarantee of language rights in ss. 16 to 23 of the Canadian *Charter* indicate that it was not intended that a language freedom should result incidentally from the guarantee of freedom of expression in s. 2(b); (c) the recognition of a freedom to express oneself in the language of one's choice under s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter* would undermine the special and limited constitutional position of the specific guarantees of language rights in s. 133 of the *Constitution Act, 1867* and ss. 16 to 23 of the Canadian *Charter* that was emphasized by the Court in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 and *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; and (d) the recognition that freedom of expression includes the freedom to express oneself in the language of one's choice would be contrary to the views expressed on this issue by the European Commission of Human Rights and the European Court of Human Rights.

[42] The distinction between the message and the medium was applied by Dugas J. of the Superior Court in *Devine v. Procureur général du Québec*, [[1982] SC 355, aff'd 1986 CanLII 395, [1987] RJQ 50 (CA), rev'd in part [1988] 2 SCR 790, 1988 CanLII 20], in holding that freedom of expression does not include freedom to express oneself in the language of one's choice. It has already been indicated why that distinction is inappropriate as applied to language as a means of expression because of the intimate relationship between language and meaning. As one of the authorities on language quoted by the appellant Singer in the *Devine* appeal, J. Fishman, *The Sociology of Language* [Rowley, Mass: Newbury House Publishers, 1972], at p. 4, puts it: "... language is not merely a means of interpersonal communication and

influence. It is not merely a *carrier* of content, whether latent or manifest. Language itself *is* content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community." As has been noted this quality or characteristic of language is acknowledged by the *Charter of the French Language* itself where, in the first paragraph of its preamble, it states: "Whereas the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity."

[43] The second and third of the submissions of the Attorney-General of Quebec, which have been summarized above, with reference to the implications for this issue of the express or specific guarantees of language rights in s. 133 of the *Constitution Act, 1867*, and ss. 16 to 23 of the *Canadian Charter of Rights and Freedoms*, are closely related and may be addressed together. These special guarantees of language rights do not, by implication, preclude a construction of freedom of expression that includes the freedom to express oneself in the language of one's choice. A general freedom to express oneself in the language of one's choice and the special guarantees of language rights in certain areas of governmental activity or jurisdiction—the legislature and administration, the courts and education—are quite different things. The latter have, as this court has indicated in *MacDonald, supra*, and *Société des Acadiens, supra*, their own special historical, political and constitutional basis. The central unifying feature of all of the language rights given explicit recognition in the Constitution of Canada is that they pertain to governmental institutions and for the most part they oblige the government to provide for, or at least tolerate, the use of both official languages. In this sense they are more akin to rights, properly understood, than freedoms. They grant entitlement to a specific benefit from the government or in relation to one's dealing with the government. Correspondingly, the government is obliged to provide certain services or benefits in both languages or at least permit use of either language by persons conducting certain affairs with the government. They do not ensure, as does a guaranteed freedom, that within a given broad range of private conduct, an individual will be free to choose his or her own course of activity. The language rights in the Constitution impose obligations on government and governmental institutions that are in the words of Beetz J. in *MacDonald*, a "precise scheme," providing specific opportunities to use English or French, or to receive services in English or French, in concrete, readily ascertainable and limited circumstances. In contrast, what the respondents seek in this case is a freedom as that term was explained by Dickson J. (as he then was) in *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 336: "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or constraint." The respondents seek to be free of the state imposed requirement that their commercial signs and advertising be in French only, and seek the freedom, in the entirely private or non-governmental realm of commercial activity, to display signs and advertising in the language of their choice as well as that of French. Manifestly the respondents are not seeking to use the language of their choice in any form of direct relations with any branch of government and are not seeking to oblige government to provide them any services or other benefits in the language of their choice. In this sense the respondents are asserting a freedom, the freedom to express oneself in the language of one's choice in an area of non-governmental activity, as opposed to a language right of the kind guaranteed in the Constitution. The

recognition that freedom of expression includes the freedom to express oneself in the language of one's choice does not undermine or run counter to the special guarantees of official language rights in areas of governmental jurisdiction or responsibility. The legal structure, function and obligations of government institutions with respect to the English and French languages are in no way affected by the recognition that freedom of expression includes the freedom to express oneself in the language of one's choice in areas outside of those for which the special guarantees of language have been provided.

[44] The decisions of the European Commission of Human Rights and the European Court of Human Rights on which the Attorney-General of Quebec relied are all distinguishable on the same basis, apart from the fact that, as Bisson J.A. observed in the Court of Appeal, they arose in an entirely different constitutional context. They all involved claims to language rights in relations with government that would have imposed some obligation on government. ...

[The discussion about whether the guarantee of freedom of expression extends to commercial expression has been omitted. The Court concluded that the fact that the signs in issue had a commercial purpose did not remove the expression contained therein from the scope of protected freedom. Having found an infringement of freedom of expression, the Court turned to s 1 of the Canadian Charter and s 9.1 of the Quebec Charter.]

• • •

[72] The section 1 and s. 9.1 materials consist of some fourteen items ranging in nature from the general theory of language policy and planning to statistical analysis of the position of the French language in Quebec and Canada. The material deals with two matters of particular relevance to the issue in the appeal: (1) the vulnerable position of the French language in Quebec and Canada, which is the reason for the language policy reflected in the *Charter of the French Language*; and (2) the importance attached by language planning theory to the role of language in the public domain, including the communication or expression by language contemplated by the challenged provisions of the *Charter of the French Language*. As to the first, the material amply establishes the importance of the legislative purpose reflected in the *Charter of the French Language* and that it is a response to a substantial and pressing need. Indeed, this was conceded by the respondents both in the Court of Appeal and in this court. The vulnerable position of the French language in Quebec and Canada was described in a series of reports ... beginning ... in 1969 ... It is reflected in statistics referred to in these reports and in later studies forming part of the materials, with due adjustment made in the light of the submissions of the appellant Singer in *Devine* with respect to some of the later statistical material. The causal factors for the threatened position of the French language that have generally been identified are: (a) the declining birth rate of Quebec francophones resulting in a decline in the Quebec francophone proportion of the Canadian population as a whole; (b) the decline of the francophone population outside Quebec as a result of assimilation; (c) the greater rate of assimilation of immigrants to ... the anglophone community of Quebec; and (d) the continuing dominance of English at the higher levels of the economic sector. These factors have favoured the use of the English language despite the predominance in Quebec of a francophone population. Thus, in the period prior to the enactment of the legislation at issue, the "visage linguistique" of Quebec often gave the impression that English had become as significant as French. This "visage linguistique" reinforced the concern among francophones that English was gaining in importance, that the French language was threatened and that it would ultimately disappear. It strongly suggested to young and ambitious francophones

that the language of success was almost exclusively English. It confirmed to anglophones that there was no great need to learn the majority language. And it suggested to immigrants that the prudent course lay in joining the anglophone community. The aim of such provisions as ss. 58 and 69 of the *Charter of the French Language* was, in the words of its preamble, "to see the quality and influence of the French language assured." The threat to the French language demonstrated to the government that it should, in particular, take steps to assure that the "*visage linguistique*" of Quebec would reflect the predominance of the French language.

[73] The section 1 and s. 9.1 materials establish that the aim of the language policy underlying the *Charter of the French Language* was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. Moreover, they indicate a rational connection between protecting the French language and assuring that the reality of Quebec society is communicated through the "*visage linguistique*." The s. 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials. Indeed, in his factum and oral argument the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French. He concentrated on the reasons for the adoption of the *Charter of the French Language* and the earlier language legislation, which, as was noted above, were conceded by the respondents. The Attorney General of Quebec relied on what he referred to as the general democratic legitimacy of Quebec language policy without referring explicitly to the requirement of the exclusive use of French. Insofar as proportionality is concerned, the Attorney General of Quebec referred to the American jurisprudence with respect to commercial speech . . . He did, however, refer in justification of the requirement of the exclusive use of French to the attenuation of this requirement reflected in ss. 59 to 62 of the *Charter of the French Language* and the regulations. He submitted that these exceptions . . . indicate the concern for carefully designed measures and for interfering as little as possible with commercial expression. The qualifications of the requirement of the exclusive use of French in other provisions of the *Charter of the French Language* and the regulations do not make ss. 58 and 69 any less prohibitions of the use of any language other than French as applied to the respondents. The issue is whether any such prohibition is justified. In the opinion of this Court it has not been demonstrated that the prohibition . . . is necessary to the defence and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose. Since the evidence put to us by the government showed that the predominance of the French language was not reflected in the "*visage linguistique*" of Quebec, the governmental response could well have been tailored to meet that specific problem and to impair freedom of expression minimally. Thus, whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under [s 9.1 of] the Quebec *Charter* and [s 1 of] the Canadian *Charter*, requiring the exclusive use of French has not been so justified. French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the "*visage linguistique*" reflected the demography of Quebec: the predominant language is French. This reality should be communicated to all citizens and non-citizens alike, irrespective of their mother tongue. But exclusivity for the French language has not survived the scrutiny of a proportionality test and does not reflect the reality of Quebec society. Accordingly, we are of the view that the limit imposed on freedom of expression by

s. 58 of the *Charter of the French Language* respecting the exclusive use of French on public signs and posters and in commercial advertising is not justified under s. 9.1 of the Quebec *Charter*. In like measure, the limit imposed on freedom of expression by s. 69 of the *Charter of the French Language* respecting the exclusive use of the French version of a firm name is not justified under either s. 9.1 of the Quebec *Charter* or s. 1 of the Canadian *Charter*.

• • •

Appeal dismissed.

NOTE

When Quebec enacted new legislation restricting the use of English in outdoor signs—and protected it from Charter scrutiny through the use of s 33 of the Charter—several anglophones from Quebec brought a complaint under the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976). Their argument, *inter alia*, was that the sign law violated art 19 of the Covenant, which reads in part:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health and morals.

The United Nations Human Rights Committee took a position similar to the Supreme Court of Canada (*Ballantyne v Canada*, 359/1989, 385/1989), stating:

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3(a) and 3(b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

In 1993, Quebec changed its language legislation once again so as to permit the use of English on signs, provided French was predominant (*Charter of the French Language*, RSQ 1985, c C-11, s 58, as amended by SQ 1993, c 40). The override of the Charter, enacted in 1988 (SQ 1988, c 54, s 10), was not renewed. A constitutional challenge to s 58, on the basis of, *inter alia*, s 2(b), was rejected by the Quebec Court of Appeal in *Enterprises WFH Ltée c Québec (Procureur Général du)*, [2001 CanLII 17598](#), [\[2001\] RJQ 2557 \(QL\) \(CA\)](#). The controversial aspect of the decision is that the Court permitted the Quebec government to rely on the factual findings of the trial Court in *Ford*, instead of requiring it to adduce new evidence.

IV. PROPOSALS FOR CONSTITUTIONAL AMENDMENT

As discussed in Chapter 26, Amending the Constitution, there have been two major efforts to amend the Constitution since 1982. Neither constitutional round included explicit provisions dealing with language. However, both the Meech Lake Accord (the 1987-90 round) and the Charlottetown Accord (the 1991-92 round) proposed amendments to recognize Quebec as a distinct society. These clauses proved controversial politically, which contributed to the demise of both proposals.

The Charlottetown Accord's distinct society clause was part of the "Canada clause" that was to be added to the *Constitution Act, 1867*:

2(1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

- (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
- (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada;
- (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
- (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
- (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
- (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
- (g) Canadians are committed to the equality of female and male persons; and
- (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

(2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language and, for greater certainty, nothing in this section derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

Opinion on the possible legal effect of the distinct society clauses was divided. Proponents variously indicated that the clauses would have only, or mainly, symbolic effect. Some argued that the clause did no more than affirm what the Supreme Court had said in *Ford*,

above—that Quebec, with a French-speaking majority constituting a minority in North America, might take special steps to protect its distinctive language and culture.

Critics viewed the clauses as designed to undermine the commitment to individual rights, including freedom of choice in the use of language, embodied in the Charter. Some critics were apprehensive that the clauses would create a hierarchy of more favoured rights at the expense of other rights and freedoms. For discussion of the history of constitutional amendments, including these controversial provisions, see Peter Russell, *Constitutional Odyssey*, 3rd ed (Toronto: University of Toronto Press, 2004).

Following the narrow defeat of the sovereignty proposal in the October 1995 Quebec referendum, the federal Parliament, on December 6, 1995 (*House of Commons Debates*, 35-1 at 17288), passed a resolution on the distinct society in the following terms:

That whereas the people of Quebec have expressed the desire for recognition of Quebec's distinct society:

- The House recognize that Quebec's is a distinct society within Canada;
- The House recognize that Quebec's distinct society includes its French-speaking majority, unique culture and civil law tradition;
- The House undertake to be guided by this reality;
- The House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly.

NOTE AND QUESTION

In 2019, Quebec enacted the *Act respecting the laicity of the State*, SQ 2019, c 12, initially known as Bill 21. The law bans the wearing of religious dress or symbols by persons performing certain public service functions where they are deemed to occupy a position of authority, such as police officers, government lawyers, and public school teachers. Widely viewed as a reaction to widespread disapproval of face-covering by Muslim women, the law has been criticized as impinging on religious freedom. When it enacted the law, however, the Quebec legislature invoked s 33 of the Charter—the notwithstanding clause—which appeared to eliminate the possibility of a constitutional challenge based on s 2 or ss 7-15 of the Charter. In 2021, a Quebec Superior Court judge confirmed this effect of the notwithstanding clause, although he was highly critical of the law's impact on minority groups. However, the judge went on to find that the law's application to teachers employed by anglophone school boards was contrary to the Charter's s 23. In his view, s 23 protects the autonomy of those school boards with respect to hiring decisions and, thus, was engaged by the ban. As s 33 does not apply to s 23, and the ban was not a "reasonable limit" under s 1, that portion of the law was declared unconstitutional. What do you think of this result?

CHAPTER TWENTY-FIVE

ENFORCEMENT OF RIGHTS

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I. INTRODUCTION

This chapter examines the remedial issues that arise after an unjustified constitutional violation has been established. Following this introduction, Section II deals with remedies available under s 52(1) of the *Constitution Act, 1982* for unconstitutional legislation. That section reads:

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section III deals with the range of remedies under s 24(1) of the Charter for governmental acts that unjustifiably violate Charter rights. Fundamental human rights and freedoms are meaningless absent effective means for their enforcement. In contrast to the *Canadian Bill of Rights*, SC 1960, c 44, the Charter includes, in s 24, an explicit remedial provision, which reads as follows:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(2) goes on to make explicit provision for the remedy of exclusion of evidence obtained in violation of Charter rights, a remedy that is often sought in the criminal law context, but which this chapter does not further consider.

Section 24 of the Charter does not apply to the enforcement of Aboriginal and treaty rights under s 35(1), but the courts have used similar remedies including injunctions, declarations,

and damages to enforce s 35 rights. See Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2013) ch 15. Note that art 40 of the *United Nations Declaration on the Rights of Indigenous Peoples*, UN GA res 61/295 provides:

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

What would effective and bi-jural remedies that respect both Indigenous laws and human rights look like? For arguments that they would seek prior and informed consent of Indigenous people and incorporate Indigenous law, see Brenda Gunn, "Remedies for Violations of Indigenous Peoples' Human Rights" (2019) 69 1 Supp UTLJ 150.

A. REMEDIES AND STANDING

In *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69, excerpted in Chapter 19, Freedom of Religion, the Court concluded that s 52 was available in cases where the constitutionality of the legislation was at issue and a declaration of invalidity was sought. Chief Justice Dickson, for the majority, commented at 313-14:

Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the *Charter* have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. ...

Any accused ... may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the *Charter* and by reason of s. 52 of the *Constitution Act, 1982*, it is of no force or effect.

Thus, a declaration of invalidity sought under s 52 is governed by more generous standing requirements than the relief available under s 24(1), which can only be brought by those whose own personal rights are infringed.

The Supreme Court has, however, placed some limits on the *Big M* expansion of standing under s 52(1). Corporations that cannot claim an infringement of their own Charter rights have not been allowed to bring independent civil actions seeking declarations of a law's invalidity, despite the fact that they are subject to regulation under the law in issue and to possible criminal or penal sanctions should they violate it: see *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 1989 CanLII 87; *Hy and Zel's Inc v Ontario (AG); Paul Magder Furs Ltd v Ontario (AG)*, [1993] 3 SCR 675, 1993 CanLII 30. This is in contrast to federalism cases where the fact that a corporation's interests are directly affected by a law is sufficient to ground standing, and, indeed, in *Irwin Toy* the corporation was granted standing to bring a federalism challenge to provincial legislation that prohibited advertising aimed at children, but not to bring a s 7 Charter challenge. Opinion is divided on this restriction of standing in Charter cases—for some, it is an unjustifiable limitation on judicial review; for others, it is a positive attempt to prevent the Charter, intended to protect individual rights and dignity, from being used to benefit corporate, economic interests. These issues of standing are further discussed in June M Ross, "Standing in Charter Declaratory Actions" (1995) 33 Osgoode Hall LJ 151.

Another way in which individuals or corporations may be allowed to argue the violation of another person's Charter rights, in addition to reliance on the *Big M* standing rule, is through a grant of public interest standing, discussed in Chapter 13, The Role of the Judiciary.

B. RELATIONSHIP BETWEEN SECTIONS 24 AND 52

Section 52 provides a variety of remedies for unconstitutional *laws* (including delegated legislation), while s 24(1) provides a variety of remedies for unconstitutional *acts* by public officials. This understanding was articulated by McLachlin CJ, writing for the Court in *R v Ferguson*, [2008 SCC 6](#), a case that raised the issue of whether a stand-alone remedy could be granted under s 24(1) (the remedy sought on the facts was a constitutional exemption) after a law was found to violate the Charter:

[58] ... [R]emedies for breaches of the *Charter* are governed by s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.

[59] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. ... Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties

[60] Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

[61] It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights

As will be seen, however, s 24(1) remedies such as damages and exemptions from a suspended declaration of invalidity can be combined with s 52 remedies invalidating legislation to the extent of its inconsistency with the Charter in some cases.

C. JURISDICTION TO AWARD CHARTER REMEDIES

There are also complex rules governing jurisdiction to award Charter remedies. As a basic rule, the provincial superior courts will always have jurisdiction to award both a Charter remedy under s 24(1) and to declare laws of no force and effect to the extent of their inconsistency with the Constitution under s 52(1). Legislation that attempted to strip superior courts of such a core role would likely itself be found to be unconstitutional: see Chapter 13, The Role of the Judiciary.

At the same time, however, clear legislation can deprive other courts and tribunals of jurisdiction to award s 24(1) or s 52(1) remedies. In *R v Conway*, [2010 SCC 22](#), the Supreme Court attempted to clarify this complex area of law and concluded, given the important role of administrative tribunals, that it would be presumed that they could apply both forms of remedies "unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction" (at para 81). In *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, [2003 SCC 54](#), the Court also

articulated a presumption that administrative tribunals that can decide questions of law should also have the power to consider the Constitution (at para 42). There have been cases where the legislature has clearly displaced both presumptions: see *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 1991 CanLII 12; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

As discussed in the extract by Kent Roach, immediately below, the Charter, with its extensive array of remedial possibilities, has focused attention on the large degree of judicial discretion involved in the choice of constitutional remedies. This has prompted discussion of a sort hitherto largely absent from our constitutional tradition about the factors that should influence that choice.

Kent Roach, Constitutional Remedies in Canada

2nd ed (Toronto: Thomson Reuters, 2013) at 3.10-3.70 (footnotes omitted)

3.10 The main purpose of constitutional remedies outlined in this chapter is to provide effective and meaningful remedies for individual claimants and for society. The legitimate purposes of constitutional remedies include compensation and correction of the harms that constitutional violations have caused to individuals, the vindication of the values of the Constitution, and ensuring compliance with the constitution in the future for the benefit of society. As Chief Justice McLachlin has recognized: "remedies make things better. They heal wounds. They put things right. Remedies allow us to mend our wounds and carry on—as individuals and as a society."

3.20 The main constraints on constitutional remedies are the need to respect the respective roles of the courts, the executive and the legislature when providing remedies, the need to be fair to all affected parties, and the need to recognize an open-ended category of compelling social interests that would be harmed by a particular remedy or an immediate or fully retroactive remedy.

3.30 The principles of proportionality are also relevant to remedial decision-making both with respect to whether less drastic remedies will adequately achieve remedial purposes and with respect to whether governments can justify limiting remedies because of countervailing and competing social interests.

3.40 All of the above purposes, constraints and principles find support in the jurisprudence, but it is still necessary for judges to choose which ones to stress in particular contexts. A particular constitutional remedy need not serve only one purpose or recognize one constraint. Remedial decision-making is inevitably contextual.

3.50 In some contexts, different purposes and constraints may be more relevant than others. When responding to a deficient minority language school system or a long-standing violation of equality rights for example, it may be impossible for a court fully to compensate for the past harmful effects of a violation or even to ensure immediate compliance with the Constitution. In such institutional contexts, declarations and injunctions may be issued in order to change governmental behaviour in the future while, at the same time, balancing the interests affected by the remedy and respecting limits on the role of the judiciary. A remedy such as a declaration may be appropriate when a lack of compliance with the Charter first emerges, but less appropriate if there has been long-standing non-compliance. Governments can fail to comply with the constitution for a variety of reasons including a simple lack of attention to the need to comply, incompetence or even intransigence. The particular reasons for non-compliance may influence the type of remedy required.

3.60 Disagreements about the appropriate role of the judiciary lie at the heart of debate about remedial purposes and constraints. The goal of compensating and correcting constitutional violations is associated with a classical model of adjudication in which judges provide remedies for those who have suffered violations and attempt to restore victims to the position they occupied before the violation. Under such an approach, judges are only justified and competent to order remedies to the extent that they repair harms caused by a government's violation. Judges should leave more robust remedial ambitions to "the legislative and administrative direction of the community as the pursuit of distributive justice." On the other hand, when a violation is proven, they should insist on full compensation for the harms of the violation without attempting either to balance the affected interests or change governmental behaviour in the future. If a court focuses on correcting harms caused by proven violations, it will not have to worry about infringing the role of other branches of government to pursue distributive justice.

3.70 Constitutional remedies that attempt to regulate governmental behaviour to ensure compliance with the constitution in the future are associated with a public law model of adjudication which stresses that remedial decision-making is a more instrumental and contingent process than determining violations of constitutional rights. Judges do not attempt to deduce remedies from the nature of the harms caused by the violation, but rather fashion remedies to achieve compliance with the Constitution in the future. Courts can invoke the breadth of their remedial powers at equity to justify ordering remedies that respond to harms and conditions that may not be causally connected to proven violations and also to balance all the interests affected by the remedy. Courts are concerned with implementing their decisions, and to this end, they can delay and supervise the remedial process. Courts may also engage in remedial dialogue by suspending declarations of invalidity or inviting the parties to submit remedial proposals before approving final remedies. Such approaches recognize limits on judicial competence, the special expertise of the executive, and the ability of legislatures to fashion more comprehensive remedies. Courts that fashion remedies instrumentally may also be prepared to limit remedies to recognizing competing interests such as the need not to impair effective government. In some cases, this may mean a departure from the remedial norm of full retroactive relief, especially in cases where governments have relied in good faith on prior law.

The material that follows will provide a more detailed examination, first, of the variants on the declaration of invalidity available under s 52(1) of the *Constitution Act, 1982* and, second, of the individual remedies that may be ordered under s 24(1) of the Charter. For further discussion of the remedial issues raised by the Charter, see Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021) ch 18; Kent Roach, "Charter Remedies" in Peter Oliver, Patrick Macklem & Natalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017); Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) ch 40; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2013). For a comparative approach, see Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge: Cambridge University Press, 2021).

II. REMEDIES UNDER SECTION 52(1) OF THE CONSTITUTION ACT, 1982

A. INTRODUCTION AND OVERVIEW

The focus of this section will be on the use of the declaration of invalidity under s 52 as a remedy for violations of rights under the Charter. A declaration that a law is invalid in its entirety may constitute an overly broad remedy in cases where only some parts of the law or some of its applications infringe the Charter. There are a variety of ways to structure more limited remedies that will save the permissible applications of the law and simply preclude those that are impermissible. Partial invalidation of laws may be accomplished through the techniques of *severance*, *reading down*, *reading in*, and *constitutional exemptions*.

A declaration of invalidity may also be a problematic remedy in the case of so-called underinclusive laws, where the problem with the law is that benefits being provided to some individuals are not being provided to others, creating a situation that violates the equality guarantees found in s 15 of the Charter. Striking down the law will have the result of depriving those who are currently entitled to benefits, as well as providing no benefit to the person challenging the law. In cases of underinclusive laws, the extension of benefits is a possible remedy that may be achieved either through severance of an explicit limitation on the operation of the law or by *reading in* an extension of benefits.

While these new remedial possibilities under the Charter have the advantage of preserving many socially useful laws and avoiding the creation of large legislative gaps, they also raise concerns about judicial usurpation of the legislative role. At what point do courts become subject to the charge that they are engaging in the rewriting or drafting of legislation, a task more appropriately left to the legislature?

Another remedial option, which avoids the legislative void created by the immediate nullification of a law and does not involve the judiciary in reshaping a new law that will meet the dictates of the Charter, is the *temporary suspension of a declaration of invalidity* for a period of time to allow Parliament or the provincial legislature to fill the void. Although attractive from the perspective of maintaining an appropriate judicial role, this remedy may fail to provide adequate redress for a violation of Charter rights because it allows a state of affairs that has been found to violate the Charter to persist for a period of time despite the violation. See Bruce Ryder, "Suspending the Charter" (2003) 21 SCLR (2d) 267; Grant Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity" (2011) 49 Alta L Rev 107; Robert Leckey, "Enforcing Laws That Infringe Rights" (2016) Public Law 206; Robert Leckey, *Common Law Bills of Rights* (Cambridge: Cambridge University Press, 2015); Carissima Mathen, "An Inconvenient Constitution? The Troubles with Suspended Declarations of Invalidity" (2021) 101 SCLR 345.

The first comprehensive treatment by the Supreme Court of Canada of the remedial issues raised by the Charter, and in particular of constitutionally underinclusive legislation and the use of suspended declarations of invalidity, is found in *Schachter v Canada*, immediately below. The Court has subsequently revised that part of *Schachter* that relates to suspended declarations of invalidity, but the case remains useful with respect to other s 52 remedies.

Schachter v Canada

[1992] 2 SCR 679, 1992 CanLII 74

[At the time this case was litigated, the *Unemployment Insurance Act* provided mothers who had given birth with 15 weeks of maternity benefits (s 30) and adoptive parents with 15 weeks of parenting leave, following the placement of their child with

them, the benefits to be shared between the two parents according to their wishes (s 32). A father, whose claim for "paternity benefits" following the birth of his child was dismissed as not falling within the provisions of the Act, challenged the decision as a violation of his rights to equality under s 15 of the Charter. At trial, Strayer J found a violation of s 15 of the Charter in that s 32 discriminated between natural parents and adoptive parents with respect to parental leave. (No s 1 argument was made.) With respect to the issue of the appropriate remedy, Strayer J granted declaratory relief under s 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s 32, without affecting a woman's right to maternity benefits. On appeal to the Federal Court of Appeal, the parties conceded a violation of s 15 of the Charter, and the only issue appealed was the jurisdiction of the trial judge to order the remedy granted. The Court of Appeal upheld Strayer J's decision. An appeal was taken to the Supreme Court of Canada.]

LAMER CJ (Sopinka, Gonthier, Cory, and McLachlin JJ concurring):

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I. Reading In as a Remedial Option Under Section 52

A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency." Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. ...

A. The Doctrine of Severance

The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or "reading down." Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared. ...

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... [A]s Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987) at pp. 250-52), it is logical to expect that severance would be a more prominent technique under the *Charter* than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is not so of violations of the *Charter* where the offending portion tends to be more limited.

Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those

that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (PC), at p. 518:

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

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B. Reading In as Akin to Severance

This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) [for example, "A benefits"] or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording) [for example, "Everyone benefits except B"]. It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. ...

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The first example would require the court to "read in" the words "and B," while the second example would require the court to "strike out" the words "except B." In each case, the result would be identical.

Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

There is nothing in s. 52 of the *Constitution Act, 1982* to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the words expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a *law* is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

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C. The Purposes of Reading In and Severance

(i) Respect for the Role of the Legislature

The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:

Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

(ii) Respect for the Purposes of the Charter

Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the *Charter*. The absolute unavailability of reading in would mean that the standards developed under the *Charter* would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the *Charter*. ... [E]ven in situations where the standards of the *Charter* allow for more than one remedial response, the purposes of the *Charter* may encourage one kind of response more strongly than another.

This is best illustrated by the case of *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (N.S.C.A.). In that case, a form of welfare benefit was available to single mothers but not single fathers. This was held to violate s. 15 of the *Charter* since benefits should be available to single mothers and single fathers equally. However, the court held that s. 15 merely required equal benefit, so that the *Charter* would be equally satisfied whether the benefit was available to both mothers and fathers or to neither. Given this and the court's conclusion that it could not extend benefits, the only available course was to nullify the benefits to single mothers. The irony of this result is obvious.

Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put (see [Evan H Caminker, "A Norm-Based Remedial Model for Underinclusive Statutes" (1986) 95 Yale LJ 1185], at p. 1186). Yet the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts to "equality with a vengeance," as LEAF [Women's Legal Action and Education Fund], one of the intervenors in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*.

Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

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Even where extension by way of reading in can be used to further the legislative objective through the very means the legislature has chosen, to do so may, in some cases, involve an intrusion into budgetary decisions which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.

Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money. ... In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

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(v) Conclusion

It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of the legislature and the purposes of the *Charter* are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

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Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. ... Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.

Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow the legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

I think it significant and worthy of mention that in this case Parliament did amend the impugned provision following the launching of this action, and that that amendment was not the one that reading in would have imposed. Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. The two groups now receive equal benefits

for ten weeks rather than the original fifteen. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

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Disposition

In the result, the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that s. 32 of the *Unemployment Insurance Act, 1971* ... be struck down pursuant to s. 52 and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of this matter given the November 1990 repeal and replacement of the impugned provision.

[Justice La Forest, with whom L'Heureux-Dubé J concurred, wrote a brief judgment warning against an overly mechanical approach.]

Appeal allowed.

B. SUSPENDED DECLARATIONS OF INVALIDITY AND EXEMPTIONS

Ontario (AG) v G

2020 SCC 38

[The Court revisited *Schachter* in affirming that a sex offender registry law that violated the s 15 rights of those found not criminally responsible of a sexual offence on account of mental disorder should be struck down subject to a 12-month suspended declaration and an exemption for the successful applicant, Mr G.]

KARAKATSANSIS J (Wagner CJ and Abella, Moldaver, Martin, and Kasirer JJ concurring):

[83] As I will explain, I conclude that suspensions of declarations of invalidity should be rare, granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect. And when declarations are suspended, granting individual exemptions pursuant to s. 24(1) of the Charter will often balance the interests of the litigant, the broader public, and the legislature in a manner that is "appropriate and just."

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[101] At the core of *Schachter* was its recognition that flexibility is necessary to arrive at appropriate remedies involving legislation, and its endorsement of remedies short of a full declaration of invalidity. Lamer C.J. made clear that "Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in" (p. 695).

[102] Different types of remedy can be granted because the circumstances may implicate general remedial principles in different ways. *Schachter* recognized the

"twin guiding principles" of "respect for the role of the legislature and the purposes of the *Charter*" (p. 715) that play a key role in determining the type of remedy that would be ordered.

[103] *Schachter* held that the first step in choosing the appropriate remedy is defining the extent of the inconsistency between the legislation and the *Charter*. The second step is determining the form of the declaration. Beyond the extent of the inconsistency, *Schachter* said that the form of a remedy would be influenced by courts' respect for the role of the legislature. The general rule is that tailored remedies should only be granted when a court can fairly conclude that the legislature would have enacted the law as it would be modified by the court (pp. 697 and 700).

[104] *Schachter* also endorsed the use of suspended declarations—declarations that legislation is unconstitutional, but whose effect is suspended for some period of time. Lamer C.J. reasoned that a delayed order could be justified based on the effect of an immediate declaration on the public and that, by contrast, the roles of courts and legislatures should not enter into the question of whether to suspend a declaration (p. 717).

[105] Finally, *Schachter* considered how s. 52(1) remedies could be combined with individual remedies for *Charter* violations. Lamer C.J. concluded that individual remedies under s. 24(1) of the *Charter* "will rarely be available in conjunction with" remedies involving legislation (p. 720).

[106] Much of *Schachter* remains good guidance three decades later. However, as I will explain, the jurisprudence on *Charter* remedies has built upon the foundation of *Schachter* and moved beyond it in some ways. While *Schachter* wisely advised courts to consider the principled basis for their remedial decisions, those remedial principles have since been further developed. In part, the guidelines *Schachter* endorsed for determining the extent of rights violations were tied to an articulation of the *Oakes* test that has since been overtaken. Aspects of its discussion of suspended declarations have been overlooked by courts and criticized in academic commentary for their failure to rely on coherent principles and encourage transparent application. Finally, its admonition against combining s. 52(1) and individual remedies has frequently not been followed.

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(3) The Form and Breadth of Section 52(1) Declarations

[108] As our jurisprudence demonstrates, and the language of s. 52(1) directs, the first step in crafting an appropriate s. 52(1) remedy in a given case is determining the extent of the legislation's inconsistency with the Constitution. Courts should bear in mind both "the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1" (*Schachter*, at p. 702) in crafting tailored remedies. (While this general guideline remains useful, courts should bear in mind that the *Oakes* test has evolved since *Schachter* was decided, such that it now focuses on justifying the infringing measure rather than the law as a whole (compare *Schachter*, at pp. 703-5 and *RJR-MacDonald*, at para. 144).) The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach.

[109] Defining the extent of the constitutional defect by reference to the substantive violation of the *Charter* safeguards the rights of all those directly affected by ensuring that the law is cured of all its constitutional defects. It also serves the broader public interest in having government act in accordance with the Constitution. These remedies reach beyond the claimant—and can even be granted when the claimant is not directly affected by the law—because "[n]o one should be subjected to an

unconstitutional law" (*Nur*, at para. 51; see also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313). This step of the analysis therefore reflects the *Charter's* rights-protecting purpose, the public's interest in constitutional compliance, and the text of s. 52(1)—the law is of no force or effect to the *full* extent of its inconsistency with the Constitution.

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[111] On the other hand, it also follows from s. 52(1) that to the extent they are not inconsistent with the Constitution, the public is entitled to the benefit of laws passed by the legislature. Tailored remedies that address the precise constitutional flaw can permit a court to both safeguard the constitutional rights of all those affected and preserve the constitutional aspects of the law. ...

[112] The second step is determining the form that a declaration should take. In doing so, *Schachter* explained that remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allows for them. Full statutory schemes or Acts are rarely struck down in their entirety—to my knowledge, this Court has only done so on eight occasions. To ensure the public has the benefit of enacted legislation, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149–50). Crucially, in Canada, the declaration issued cures the law's unconstitutionality. ...

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[114] ... [I]f granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. ... If it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice and would therefore undermine parliamentary sovereignty (*Schachter*, at pp. 705–6; *Hunter*, at p. 169). The significance of the remaining portion of the statute must be considered, and tailored remedies should not be granted when they would interfere with the legislative objective of the law as a whole (*Schachter*, at pp. 705–15) [here the Court cited *Vriend* discussed above]. ...

[115] Lamer C.J. was also conscious of the limitation of the judicial role, explaining in *Schachter* that tailored remedies should not be granted when they do not "flo[w] with sufficient precision from the requirements of the Constitution," because although courts are capable of determining what the Constitution requires, they are not well-suited to making "*ad hoc* choices from a variety of options" (p. 707).

[116] In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the *Charter* violation. ... This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible.

[117] There are times when an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law that violates *Charter* rights.

[118] In total, this Court has suspended declarations of invalidity in 23 out of approximately 90 decisions in which it declared legislation to be of no force or effect for violating the *Charter*. The approach to suspensions has varied over the last 35

years. Suspensions were initially recognized to be available when necessary to protect against serious threats to the rule of law. Then, in *Schachter*, this Court took an approach to granting suspensions based on determining whether cases fit into one of a list of categories—threats to the rule of law, threats to public safety, or underinclusive benefits—based on the public interest in the law's interim application. Since then, many cases have gone beyond the *Schachter* categories to grant suspensions for other reasons, including concerns related to the roles and capacities of courts and legislatures. The 12 declarations of invalidity for *Charter* violations after *Schachter* between 1992 and 1997—from *Zundel* to *Benner*—took immediate effect. By contrast, between 2003 and 2015—from *Trociuk* to *Carter*—13 out of 17 s. 52(1) declarations were suspended. Those more recent cases have been criticized for suspending declarations too frequently and without sufficient explanation. This case gives the Court an opportunity to recalibrate the remedial principles that guide the judicial discretion to delay the effect of a declaration of invalidity.

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[120] While ss. 52(1) does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts "may have regard to unwritten postulates which form the very foundation of the Constitution of Canada" (*Manitoba Language Rights*, at p. 752; see also *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 52).

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[122] The idea that the effect of a declaration could be suspended originally aimed to protect against a potential emergency. In 1985, in *Manitoba Language Rights*, nearly all of Manitoba's legislation was declared unconstitutional for being enacted in English alone. The Court issued a temporary declaration that the laws were valid in order to give the legislature the chance to re-enact them. The Court grounded this move in the constitutional principle of the rule of law ... [which] requires the creation and maintenance of an actual order of positive laws to govern society; a legal vacuum, along with the inevitable legal chaos, would have violated that principle (p. 753). The period of temporary validity ran from the date of judgment "to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing" (p. 767).

[123] The Court suspended the effect of a declaration of invalidity for the first time in a *Charter* case in *Swain*, in which automatic detention for those acquitted on what was then called the ground of "insanity" was found unconstitutional. Lamer C.J. suspended the declaration due to a concern that if the provision was immediately struck down, judges would have to free "those who may well be a danger to the public" (p. 1021).

[124] In *Schachter*, Lamer C.J. recognized three categories of cases in which suspensions could be granted: threats to the rule of law, threats to public safety, and underinclusive legislation (pp. 715-16). The first category flows directly from *Manitoba Language Rights*; the second corresponds with *Swain*; and the third category represents the circumstances of *Schachter* itself, in which immediate invalidity of the law would have deprived those entitled to financial benefits under the law without providing any remedy for those directly excluded from the benefits in question. All three categories reflect constitutionally grounded considerations, including recognizing the public's interest in legislation passed for its benefit. Suspending the effect of a declaration is one tool that allows courts to preserve the rights and entitlements that existing schemes extend to the public.

[125] *Schachter*'s categorical approach has resulted in uncertainty about when suspensions will be granted. Some decisions have gone beyond the *Schachter* categories. ... In other cases, failing to fit into a *Schachter* category has been given as

an explanation for declining to grant a suspension (*Boudreault*, at para. 98; *Hislop*, at para. 121). At times, the Court has provided no explanation for suspending the effect of its declaration (*Mounted Police Association*, at para. 158; *Saskatchewan Federation of Labour*, at para. 103). Academic commentators have noted the lack of transparent reasoning in some of this Court's decisions to grant suspensions (Roach (2004); Hoole, at pp. 118-23).

[126] A principled approach makes it possible to reconcile these cases on suspended declarations, and encourage consistency and transparency. As I will explain, the government bears the onus of demonstrating that a compelling public interest, like those included in *Schachter*, supports a suspension. These compelling interests cannot be reduced to a closed list of categories, but will be related to a remedial principle grounded in the Constitution—typically, the principle that the public is entitled to the benefit of legislation or that courts and legislatures play different institutional roles. The categorical approach in *Schachter* has been overtaken by the underlying remedial principles that animated those categories. ...

[127] As well, the relevance of some of the underlying principles has evolved in our jurisprudence. Lamer C.J. specifically noted in *Schachter* that “whether to delay the application of a declaration of [invalidity] should ... turn not on considerations of the role of the courts and the legislature, but rather on considerations ... relating to the effect of an immediate declaration on the public” (p. 717, emphasis added).

[128] Nonetheless, since the late 1990s, the general principle that courts and legislatures have different roles and competencies has informed how the Court exercises its jurisdiction to suspend the effect of its declarations for a period of time. ...

[129] ... In my view, *Schachter* and the cases that have come since are best reconciled by recognizing that allowing the legislature to fulfil its law making role can be a relevant consideration in whether to grant a suspension, but only when the government demonstrates that an immediately effective declaration would significantly impair the ability to legislate.

[130] In determining whether to exercise remedial discretion to suspend a declaration of invalidity, the Court should consider whether and to what extent the government has demonstrated that an immediately effective declaration would have a limiting effect on the legislature’s ability to set policy. In the vast majority of cases, as Bruce Ryder recognizes, “[a] suspended declaration neither enlarges nor diminishes the range of constitutional choices open to a legislature” (p. 285). For example, in *M. v. H.*, in which the Court found unconstitutional the definition of “spouse” denying benefits to same-sex spouses, the effect of a declaration of invalidity was suspended because “if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus ... the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion” (para. 147). However, an immediately effective declaration would not have prevented the legislature from addressing the issues more comprehensively in light of the Court’s decision. By contrast, there may be some cases where an immediate declaration could create legal rights that could narrow the range of constitutional policy choices available to the government or undermine the effectiveness of its policy choices. As I shall explain, this case offers an example of a situation in which the legal rights created by the declaration of invalidity could undermine the effectiveness of the legislature’s policy choices. Even so, avoiding such restrictions on the ability to legislate is but a relevant consideration, and may not be sufficient to justify a suspension of invalidity.

[131] The benefit achieved (or harm avoided) by the suspension must then be transparently weighed against countervailing fundamental remedial principles, namely the principles that *Charter* rights should be safeguarded through effective remedies

and that the public has an interest in constitutionally compliant legislation. This includes considering factors such as the significance of the rights infringement (*Bedford*, at para. 167)—for example, the weight given to ongoing rights infringement will be especially heavy when criminal jeopardy is at stake—and the potential that the suspension will create harm such as legal uncertainty (Leckey, at pp. 594–95). ...

[132] However, a balancing approach does not mean that suspensions will be easier to justify. A categorical approach may have been intended to provide narrow circumstances in which an unconstitutional law may continue to apply temporarily, but it has not had that effect. A balancing approach permits courts to engage with the underlying principles and ensure that a delayed declaration is not ordered unless there are compelling reasons to do so. The appropriate balance will result in suspensions only in rare circumstances. Given the imperative language of s. 52(1), and the importance of the fundamental remedial principles of constitutional compliance and of providing an effective remedy that safeguards the rights of those directly affected, there is a strong interest in declarations with immediate effect. Indeed, leaving unconstitutional laws on the books can lead to legal uncertainty and instability, especially if those laws are criminal prohibitions, which compel multiple actors (including police, Crown prosecutors, and the public) to conduct themselves in a certain way (Leckey, at pp. 594–95). Public confidence in the Constitution, the laws, and the justice system is undermined when an unconstitutional law continues to have legal effect without a compelling basis. And, of course, the violation of constitutional rights weighs heavily in favour of an immediate declaration of invalidity. A principled approach requires these countervailing factors to be weighed and does not allow for a suspension to be granted simply because the case engages, for example, public safety. In practice, therefore, a principled approach is disciplined and would be more stringent than a categorical approach, because any suspension must be specifically justified.

[133] Thus, I agree with the submissions of the Asper Centre that the government bears the onus of demonstrating that the importance of another compelling interest grounded in the Constitution outweighs the continued breach of constitutional rights. In each case, the specific interest, and the manner in which an immediate declaration would endanger that interest, must be identified and, where necessary, supported by evidence. Suspensions of declarations of invalidity will be rare. Indeed, this aligns with this Court's recent practice. This Court has not suspended the effect of a declaration of invalidity since its decision in *Carter* over five years ago, making 13 immediately effective declarations that legislation was of no force or effect for violating the *Charter* over that period.

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[135] In my view, the onus to demonstrate the appropriate length of time remains with the government and there is no “default” length of time such as 12 months. ... It is the government's responsibility to make a case for the length of the suspension it seeks.

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[139] In sum, the effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The court must consider the impact of such a suspension on rights holders and the public, as well as whether an immediate declaration of invalidity would significantly impair the legislature's democratic authority to set policy through legislation. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it has demonstrated it requires

to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time.

(5) Individual Remedies—Exemptions from Suspensions

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[144] This Court has said that to be “appropriate and just,” a s. 24(1) remedy should meaningfully vindicate the right of the claimant, conform to the separation of powers, invoke the powers and function of a court, be fair to the party against whom the remedy is ordered, and allow s. 24(1) to evolve to meet the challenges of each case (*Doucet-Boudreau*, at paras. 55-59). In particular, an effective remedy ... will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant’s experience and address the circumstances of the rights violation, and will not be “smothered” in procedural delays and difficulties (para. 55). The court’s approach to s. 24(1) remedies must stay flexible and responsive to the needs of a given case (para. 59).

[145] This Court’s jurisprudence makes clear that granting individual remedies while the effects of declarations of invalidity are suspended can be appropriate and just. The Court granted a worker disability benefits for chronic pain during the suspension of a declaration that provisions were invalid for excluding chronic pain from the workers’ compensation system (*Martin*, at paras. 121-22). The Court has acquitted individuals of criminal or quasi-criminal charges stemming from unconstitutional laws despite suspending the effects of the declarations of invalidity (*Guignard*, at para. 32; *Bain*, at pp. 105 and 165; see also *Corbiere*, at paras. 22-23).

[146] A rule that individual claimants cannot be exempted from suspensions of declarations of invalidity would improperly fetter the broad discretion afforded under s. 24(1) of the *Charter* for courts to grant remedies they “consider[re] appropriate and just in the circumstances.” Remedial discretion is a fundamental feature of the *Charter*. A bar on exempting individual claimants would often be unfair to the claimant, especially given that it is a court’s decision to grant a suspension that makes the individual remedy necessary. ...

[147] In my view, when the effect of a declaration is suspended, an individual remedy for the claimant will often be appropriate and just. The importance of safeguarding constitutional rights weighs heavily in favour of an individual remedy. The concern for vindicating individual rights with effective remedies reaches back to Blackstone and Dicey, and continues to have force in the present day (see K. Roach, “Dialogic remedies” (2019), 17 *I CON* 860, at pp. 862-65).

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[149] Like the decision of whether to suspend a declaration of invalidity despite the continued rights violation, there must be a compelling reason to deny the claimant an immediately effective remedy.

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[152] Ultimately, the public is well served by encouraging litigation that furthers the public interest by uncovering unconstitutional laws. Claimants, unlike others similarly situated, invest time and resources to pursue matters in the public interest—and those investments can pay dividends for others directly affected, especially those without the means to challenge the law themselves. Thus, if an exemption is otherwise appropriate and just, they should be exempted from suspensions in the absence of a compelling reason not to. Exemptions from suspensions will often be necessary to balance the interests of the litigant, the broader public, and the legislature.

(6) General Remedial Principles for Legislation That Violates the *Charter*

[153] As I have explained, running through this Court's remedial practice—from determining the form and breadth of remedies involving legislation, to suspending the effect of those remedies, to exempting litigants from suspensions—are recurring touchstones. These guide the principled discretion that this Court exercises when granting remedies for legislation that violates the *Charter*.

[154] Safeguarding rights lies at the core of that remedial approach. Section 52(1) calls for courts to invalidate any legislation to the extent it violates the *Charter*. ... The fundamental principle that courts should provide meaningful remedies for the violation of constitutional rights (*Doucet-Boudreau*, at para. 25) shapes the form and breadth of the declaration, acts as a strong counterweight against suspending the effect of such a declaration, and weighs in favour of granting an individual remedy in tandem with a suspension.

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[156] Another aspect of the rule of law, reflected in s. 52(1)'s caution that laws are of no force or effect only "to the extent of the inconsistency" with the Constitution, is the entitlement to a positive order of laws that organizes society and protects it from harm. The public has an interest in preserving legislation duly enacted by its democratically elected legislatures, to the extent it is not unconstitutional. This is why courts will tailor remedies to retain constitutional aspects of an unconstitutional law where possible and will temporarily suspend the effect of a declaration when an immediate order would undermine the public interest by depriving the public of laws passed for its benefit. In contrast, concerns about legal instability may weigh against suspension.

[157] Finally, running through this Court's remedial practice for unconstitutional legislation is respect for the role of the legislature coupled with an understanding of the duties of the judicial role. When determining the form and breadth of remedies, courts will preserve as much of the law as possible to respect the legislature's policy choices, following its discernible intention when doing so. But courts will not shrink from performing their duty to protect rights through s. 52(1) remedies, determining the full extent of inconsistencies with the Constitution and declaring legislation to be of no force or effect when necessary. Suspensions can be granted when the legislature's democratic role as policymaker would be so seriously undermined by an immediately effective declaration that it outweighs important countervailing principles. In such circumstances, if an exemption would undermine that role, it will weigh against an individual remedy.

[158] As I have explained, these constitutional considerations, drawn from our constitutional text and the broader architecture of our constitutional order and the rule of law, have repeatedly arisen in this Court's decisions on s. 52(1) remedies for *Charter* violations and give rise to four foundational principles:

- A. *Charter* rights should be safeguarded through effective remedies.
- B. The public has an interest in the constitutional compliance of legislation.
- C. The public is entitled to the benefit of legislation.
- D. Courts and legislatures play different institutional roles.

[159] In my view, these remedial principles provide the groundwork for meaningful remedies in different contexts. They provide guidance to courts and encourage them to transparently explain remedial results. They will not always lead to agreement on the correct outcome; their value is in transparency, helping those who disagree articulate their specific points of disagreement.

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[178] Here, there is an ongoing threat to public safety, although it is limited as the group of individuals whose information would no longer be tracked consists entirely of persons who the Review Board has deemed do not pose a significant threat to public safety. The legislature's ability to address that gap in public safety would, however, be appreciably restricted by an immediate declaration. This is a close call. But on balance, the combination of these two legitimate interests (public safety and preserving the legislature's latitude to respond to the finding of unconstitutionality) justifies temporarily depriving those affected of the immediate benefit of this judgment and allowing the violation to persist.

[179] The parties agree with the 12-month suspension ordered by the Court of Appeal. I see no basis to interfere with that determination. However, in future, courts will expect more detailed submissions on the length of time required.

[The Court found that a 12-month suspended declaration of invalidity was justified for public safety and because an immediate declaration could compromise "the legislature's role as a policy-maker." The Court also granted an exemption for Mr G on the basis of his "spotless record" in the 17 years since he was not a significant risk of committing a criminal offence.

Justice Rowe in a separate judgment would have maintained the Schachter categorical approach, and Coté and Brown JJ in their separate judgment would also have suspended the declaration of invalidity on public safety grounds which they related to concerns about preserving the rule of law. They stated:]

[225] As we see it, there are three principal reasons why only a threat to the rule of law should warrant a suspended declaration of invalidity. First, this was what the Court envisioned in assuming for the first time the power to issue a suspended declaration in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 ("Manitoba Reference"). Secondly, the Constitution commands such a result: the text contemplates immediate declarations as the norm, subject only to a rule of law concern. Thirdly, lessons learned in the wake of *Schachter* about the practical implications of suspended declarations reveal why a discretionary approach focused on "remedial principles" is undesirable, and why a constitutional tether to the rule of law is so essential.

[They also held ordering an exemption for Mr G in this case and in most cases would exceed the judicial role and warned at para 293: "Once suspended declarations are properly limited to the exceptional situations where the rule of law is imperilled, the concern for providing an immediate remedy to the claimant fades."]

NOTES AND QUESTIONS

1. There is no textual authorization for the use of suspended declarations of invalidity. In contrast, s 172(1) of the South African Constitution (1996) expressly provides for suspended declarations of invalidity:

- 172(1) When deciding a constitutional matter within its power, a court
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Like the Supreme Court of Canada, the South Africa Constitutional Court has frequently used this new remedial device but has generally been more willing to impose conditions on what happens during the 6 to 24 months it has suspended a declaration of invalidity and not rely on individual exemptions as contemplated in *Ontario v G*: see Robert Leckey, "Remedial Practice Beyond Constitutional Text" (2016) 64 Am J Comp L 1.

2. The entire Court in *Ontario v G* accepted the ability to exempt applicants from a suspended declaration of invalidity with Coté and Brown JJ concluding that exemptions should only rarely be ordered when necessary to prevent irreparable harm to Charter rights. This represents a change from *Carter v Canada (AG)*, [2016 SCC 4](#), where four judges in dissent opposed exemptions during a suspension on the basis that they "would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts" (*Carter v Canada (AG)*, [2015 SCC 5](#) at para 125) and that "[t]hese considerations, in our view, continue to be compelling" (*Carter* [2016] at para 12). See also *R v Albasir*, [2021 SCC 48](#), affirming the ability to order exemptions from a suspended declaration of invalidity where the exemption is required as an effective remedy and would not "undermine the purpose of suspending the s. 52(1) declaration" (at para 67).

Is the Court's increased receptiveness to individual exemptions during suspended declarations of invalidity a positive development? Or should the Court following South African practice give broader directions to the executive about how unconstitutional laws should and should not be enforced during a suspended declaration of invalidity?

C. UNDERINCLUSIVE LAWS AND READING IN

The two cases that follow, *Vriend v Alberta* and *M v H*, illustrate different remedial responses to underinclusive laws through application of the factors laid out in *Schachter*. Note that while these cases, like *Schachter*, both involved equality rights under s 15 of the Charter, issues of underinclusiveness may also arise in other contexts where the right in issue is understood as imposing positive obligations on government: see, for example, *Dunmore v Ontario (AG)*, [2001 SCC 94](#), excerpted in Chapter 21, Freedom of Association.

Vriend v Alberta

[\[1998\] 1 SCR 493, 1998 CanLII 816](#)

[In this case, also discussed in Chapter 18, Application, and Chapter 23, Equality Rights, the Supreme Court of Canada found that the omission of sexual orientation from the list of prohibited grounds of discrimination found in Alberta's human rights legislation—the *Individual's Rights Protection Act* [IRPA]—constituted an unjustifiable violation of s 15 of the Charter. The legislative history showed that the omission of sexual orientation was deliberate. The facts of the case, which are drawn on to some extent in the discussion of the appropriate remedy, involved a gay employee of a religious college who had been fired when his homosexuality was discovered. Unable to bring a complaint of discrimination under the IRPA because of the legislation's failure to protect against discrimination on the grounds of sexual orientation, he challenged the omission as a violation of s 15 of the Charter. From a remedial perspective, *Vriend* is significant as one of the few cases in which the Supreme Court has extended constitutionally underinclusive legislation by reading in rather than striking it down. As will be seen, however, the use of this remedy was not without controversy and dissent.]

IACOBucci J (Lamer CJ and Gonthier, Cory, McLachlin, and Bastarache JJ concurring):

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[129] Having found the exclusion of sexual orientation from the *IRPA* to be an unjustifiable violation of the appellants' equality rights, I now turn to the question of remedy under s. 52 of the *Constitution Act, 1982*. ...

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[145] Once the *Charter* inconsistency has been identified, the next step is to determine which remedy is appropriate. In *Schachter*, this Court noted that, depending upon the circumstances, there are several remedial options available to a court in dealing with a *Charter* violation that was not saved by s. 1. These include striking down the legislation, severance of the offending sections, striking down or severance with a temporary suspension of the declaration of invalidity, reading down, and reading provisions into the legislation.

[146] Because the *Charter* violation in the instant case stems from an omission, the remedy of reading down is simply not available. Further, I note that given the considerable number of sections at issue in this case and the important roles they play in the scheme of the *IRPA* as a whole, severance of these sections from the remainder of the Act would be akin to striking down the entire Act.

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[148] In *Schachter*, Lamer C.J. noted that when determining whether the remedy of reading in is appropriate, courts must have regard to the "twin guiding principles," namely, respect for the role of the legislature and respect for the purposes of the *Charter* Turning first to the role of the legislature, Lamer C.J. stated at p. 700 that reading in is an important tool in "avoiding undue intrusion into the legislative sphere. ... [T]he purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."

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[150] As I discussed above, the purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. It seems to me that the remedy of reading in would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the Legislature.

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[152] Turning to the second of the twin guiding principles, the respondents suggest that the facts of this case are illustrative of a conflict between two grounds, namely, religion and sexual orientation. If sexual orientation were simply read into the *IRPA*, the respondents contend that this would undermine the ability of the *IRPA* to provide protection against discrimination based on religion, one of the fundamental goals of that legislation. This result is alleged to be "inconsistent with the deeper social purposes of the *Charter*."

[153] I concluded above that the internal balancing mechanisms of the *IRPA* were an adequate means of disposing of any conflict that might arise between religion and sexual orientation. [The internal balancing mechanisms included a general defence that the discrimination was "reasonable and justifiable in the circumstances" (*IRPA*, s 11.1) and an exemption for *bona fide* occupational requirements.] Thus, I cannot accept the respondents' assertion that the reading in approach does not respect the purposes of the *Charter*. In fact, as I see the matter, reading sexual orientation into the *IRPA* as a further ground of prohibited discrimination can only enhance those purposes. The *Charter*, like the *IRPA*, is concerned with the promotion and protection of inherent dignity and inalienable rights. Thus, expanding the list of prohibited grounds of discrimination in the *IRPA* allows this Court to act in a

manner which, consistent with the purposes of the *Charter*, would augment the scope of the *IRPA*'s protections. In contrast, striking down or severing parts of the *IRPA* would deny all Albertans protection from marketplace discrimination. In my view, this result is clearly antithetical to the purposes of the *Charter*.

[154] In *Schachter, supra*, Lamer C.J. noted that the twin guiding principles can only be fulfilled if due consideration is given to several additional criteria which further inform the determination as to whether the remedy of reading in is appropriate. These include remedial precision, budgetary implications, effects on the thrust of the legislation, and interference with legislative objectives.

[155] As to the first of the above listed criteria, the court must be able to define with a "sufficient degree of precision" how the statute ought to be extended in order to comply with the Constitution. I do not believe that the present case is one in which this Court has been improperly called upon to fill in large gaps in the legislation. . . .

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[160] Turning to budgetary repercussions, in the circumstances of the present appeal, such considerations are not sufficiently significant to warrant avoiding the reading in approach. On this issue, the trial judge stated (at p. 18):

There will undoubtedly be some budgetary impact on the Human Rights Commission as a result of the addition of sexual orientation as a prohibited ground of discrimination. But, unlike *Schachter* [above], it would not be substantial enough to change the nature of the scheme of the legislation. . . .

[161] As to the effects on the thrust of the legislation, it is difficult to see any deleterious impact. All persons covered under the current scope of the *IRPA* would continue to benefit from the protection provided by the Act in the same manner as they had before the reading in of sexual orientation. Thus, I conclude that it is reasonable to assume that, if the Legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen. As the inclusion of sexual orientation in the *IRPA* does not alter the legislation to any significant degree, it is reasonable to assume that the Legislature would have enacted it in any event.

[162] In addition, in *Schachter, supra*, Lamer C.J. noted that, in cases where the issue is whether to extend benefits to a group excluded from the legislation, the question of the effects on the thrust of the legislation will sometimes focus on the size of the group to be added as compared to the group originally benefited. . . .

[163] Lamer C.J. went on to note that, "[w]here the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one" (p. 712). In the present case, gay men and lesbians are clearly a smaller group than those already benefited by the *IRPA*. Thus, in my view, reading in remains the less intrusive option.

[164] The final criterion to examine is interference with the legislative objective. In *Schachter*, Lamer C.J. commented upon this factor as follows (at pp. 707-8):

The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. . . . A second level of legislative intention may be manifest in the means chosen to pursue that objective.

[165] With regard to the first level of legislative intention, as I discussed above, it is clear that reading sexual orientation into the *IRPA* would not interfere with the objective of the legislation. Rather, in my view, it can only enhance that objective.

However, at first blush, it appears that reading in might interfere with the second level of legislative intention identified by Lamer C.J.

[166] As the Alberta Legislature has expressly chosen to exclude sexual orientation from the list of prohibited grounds of discrimination in the *IRPA*, the respondents argue that reading in would unduly interfere with the will of the Government. McClung J.A. shares this view. In his opinion, the remedy of reading in will never be appropriate where a legislative omission reflects a deliberate choice of the legislating body. He states that if a statute is unconstitutional, "the preferred consequence should be its return to the sponsoring legislature for representative, constitutional overhaul" (p. 35). However, as I see the matter, by definition, Charter scrutiny will always involve some interference with the legislative will.

[167] Where a statute has been found to be unconstitutional, whether the court chooses to read provisions into the legislation or to strike it down, legislative intent is necessarily interfered with to some extent. Therefore, the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional. As I see the matter, a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them.

[168] Indeed, as noted by the intervener Canadian Jewish Congress, if reading in is always deemed an inappropriate remedy where a government has expressly chosen a course of action, this amounts to the suggestion that whenever a government violates a Charter right, it ought to do so in a deliberate manner so as to avoid the remedy of reading in. In my view, this is a wholly unacceptable result.

[169] In the case at bar, the means chosen by the legislature, namely, the exclusion of sexual orientation from the *IRPA*, can hardly be described as integral to the scheme of that Act. Nor can I accept that this choice was of such centrality to the aims of the legislature that it would prefer to sacrifice the entire *IRPA* rather than include sexual orientation as a prohibited ground of discrimination, particularly for the reasons I will now discuss.

[170] As mentioned by my colleague Cory J., in 1993, the Alberta Legislature appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Alberta Human Rights Commission. The Panel issued a report making several recommendations including the inclusion of sexual orientation as a prohibited ground of discrimination in all areas covered by the Act. The Government responded to this recommendation by deferring the decision to the judiciary: "This recommendation will be dealt with through the current court case *Vriend* ...".

[171] In my opinion, this statement is a clear indication that, in light of the controversy surrounding the protection of gay men and lesbians under the *IRPA*, it was the intention of the Alberta Legislature to defer to the courts on this issue. Indeed, I interpret this statement to be an express invitation for the courts to read sexual orientation into the *IRPA* in the event that its exclusion from the legislation is found to violate the provisions of the Charter. Therefore, primarily because of this and contrary to the assertions of the respondents, I believe that, in these circumstances, the remedy of reading in is entirely consistent with the legislative intention.

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[174] With respect ... I do not accept that extending the legislation in this case is an undemocratic exercise of judicial power. ...

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[176] ... [T]he concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in [*R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46]. In my

view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly. ...

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[178] ... When a court remedies an unconstitutional statute by reading in provisions, no doubt this constrains the legislative process and therefore should not be done needlessly, but only after considered examination. However, in my view, the "parliamentary safeguards" remain. Governments are free to modify the amended legislation by passing exceptions and defences which they feel can be justified under s. 1 of the *Charter*. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response, as I outlined above (see also [Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislature" (1997) 35 Osgoode Hall LJ 75]). Moreover, the legislators can always turn to s. 33 of the *Charter*, the override provision, which in my view is the ultimate "parliamentary safeguard."

[179] On the basis of the foregoing analysis, I conclude that reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. The appellants suggest that this remedy should have immediate effect. I agree. There is no risk in the present case of harmful unintended consequences upon private parties or public funds. ... Further, the mechanisms to deal with complaints of discrimination on the basis of sexual orientation are already in place and require no significant adjustment. ...

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MAJOR J (dissenting in part on the issue of remedy):

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[195] In my opinion, *Schachter* did not contemplate the circumstances that pertain here, that is, where the Legislature's opposition to including sexual orientation as a prohibited ground of discrimination is abundantly clear on the record. Reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. That assumption cannot be made in this appeal.

[196] The issue may be that the Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination, or the issue may be how the legislation ought to be amended to bring it into conformity with the *Charter*. That determination is best left to the Legislature. ...

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[200] The only remaining issue is whether the declaration of invalidity ought to be temporarily suspended. In *Schachter*, Lamer C.J. stated that a declaration of invalidity may be temporarily suspended where the legislation is deemed unconstitutional because of underinclusiveness rather than overbreadth, and striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

[201] There is no intention to deprive individuals in Alberta of the protection afforded by the *IRPA*, but only to ensure that the legislation is brought into conformity with the *Charter* while simultaneously respecting the role of the legislature. I would therefore order that the declaration of invalidity be suspended for one year to allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.

M v H

[1999] 2 SCR 3, 1999 CanLII 686

[The Supreme Court of Canada found that the exclusion of same-sex couples from the definition of "spouse" in s 29 of Ontario's *Family Law Act*, RSO 1990, c F.3 [FLA]—the definition that governed the right to claim spousal support—was an unjustifiable infringement of s 15 of the Charter. Thus, like *Vriend*, *M v H* involved legislation that was constitutionally underinclusive because of the omission of gays and lesbians. However, on the issue of remedy, the Court distinguished *Vriend* and chose to strike down the underinclusive legislation, subject to a six-month delayed declaration of invalidity, instead of utilizing the technique of reading in to extend the definition of spouse to include same-sex couples.]

IACOBUCCI J (Lamer CJ and Cory and McLachlin JJ concurring):

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VI. Remedy

[136] Having found that the exclusion of same-sex couples from s. 29 of the *FLA* is unconstitutional and cannot be saved under s. 1 of the *Charter*, I must now consider the issue of remedy under s. 52 of the *Constitution Act, 1982*. In the court below, the words "a man and woman" were read out of the definition of "spouse" in s. 29 of the *FLA* and replaced with the words "two persons." The application of the order was suspended for a period of one year. With respect, I am not convinced that that is a suitable remedy in the circumstances of the present case.

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[139] In determining whether the reading in/reading down option is more appropriate than either striking down or severance, the Court must consider how precisely the remedy can be stated, budgetary implications, the effect the remedy would have on the remaining portion of the legislation, the significance or long-standing nature of the remaining portion and the extent to which a remedy would interfere with legislative objectives . . . As to the first of these criteria, the remedy of reading in is only available where the Court can direct with a sufficient degree of precision what is to be read in to comply with the Constitution. Remedial precision requires that the insertion of a handful of words will, without more, ensure the validity of the legislation and remedy the constitutional wrong . . .

[140] In the present case, the defect in the definition of "spouse" can be precisely traced to the use of the phrase "a man and woman," which has the effect of excluding same-sex partners from the spousal support scheme under the *FLA*. I recognize that there is remedial precision in so far as reading down this phrase and reading in the words "two persons" will, without more "remedy the constitutional wrong." However, I am not persuaded that reading in will also "ensure the validity of the legislation."

[141] If the remedy adopted by the court below is allowed to stand, s. 29 of the *FLA* will entitle members of same-sex couples who otherwise qualify under the definition of "spouse" to apply for spousal support. However, any attempt to opt out of this regime by means of a cohabitation agreement provided for in s. 53 or a separation agreement set out in s. 54 would not be recognized under the Act. Both ss. 53 and 54 extend to common-law cohabitants but apply only to agreements entered into between "a man and woman." Any extension of s. 29 of the Act would have no effect upon these Part IV domestic contract provisions of the *FLA*, which do not rely upon the Part III definition of "spouse." Thus, same-sex partners would find themselves in the anomalous position of having no means of opting out of the default system of

support rights. As this option is available to opposite-sex couples, and protects the ability of couples to choose to order their own affairs in a manner reflecting their own expectations, reading in would in effect remedy one constitutional wrong only to create another, and thereby fail to ensure the validity of the legislation.

[142] In addition, reading into the definition of "spouse" in s. 29 of the Act will have the effect of including same-sex couples in Part V of the *FLA* (Dependants' Claim for Damages), as that part of the Act relies upon the definition of "spouse" as it is defined in Part III. In my opinion, where reading in to one part of a statute will have significant repercussions for a separate and distinct scheme under that Act, it is not safe to assume that the legislature would have enacted the statute in its altered form. In such cases, reading in amounts to the making of *ad hoc* choices, which Lamer C.J. in *Schachter, supra*, at p. 707, warned is properly the task of the legislatures, not the courts.

[143] In cases where reading in is inappropriate, the court must choose between striking down the legislation in its entirety and severing only the offending portions of the statute. As noted by Lamer C.J. in *Schachter*, at p. 697, "[w]here the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized."

[144] In the case at bar, striking down the whole of the *FLA* would be excessive as only the definition of "spouse" in Part III of the Act has been found to violate the *Charter*. This is not a case where the parts of the legislative scheme which do offend the *Charter* are so inextricably bound up with the non-offending portions of the statute that what remains cannot independently survive. As a result, it would be safe to assume that the legislature would have passed the constitutionally sound parts of the statute without the unsound parts. See *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518; *Schachter, supra*, at p. 697.

[145] On the basis of the foregoing, I conclude that severing s. 29 of the Act such that it alone is declared of no force or effect is the most appropriate remedy in the present case. This remedy should be temporarily suspended for a period of six months. ...

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[147] In addition, I note that declaring s. 29 of the *FLA* to be of no force or effect may well affect numerous other statutes that rely upon a similar definition of the term "spouse." The legislature may wish to address the validity of these statutes in light of the unconstitutionality of s. 29 of the *FLA*. On this point, I agree with the majority of the Court of Appeal which noted that if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion.

NOTE AND QUESTIONS

Can the Court's remedial decisions in *Vriend* and *M v H* be adequately reconciled? In *M v H*, was the Court overly concerned about the kind of "remedial detail" that had not deterred it in *Vriend* from using the remedy of reading in? Is it possible that the remedial choice in *M v H* was influenced by a concern that, in the wake of the decision, many other statutes denying benefits to same-sex couples would be open to constitutional challenge and that legislatures could provide more comprehensive solutions than any judicial remedy of reading in? Within the six-month period contemplated in *M v H*, the Ontario legislature in fact introduced legislation amending over 60 pieces of legislation in response to *M v H*. The law had prospective

effect only and left the applicant without a remedy. The legislature used the separate category of "same-sex partners" (Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada decision in M v H*, SO 1999, c 6, s 25) rather than defining such people as spouses. It was subsequently unsuccessfully challenged under s 15. See *Vincent v Ontario (AG)*, [1999 CanLII 14912, 70 CRR \(2d\) 365 \(Ont Sup Ct J\)](#).

D. LIMITS ON RETROACTIVE RELIEF AND PROSPECTIVE RELIEF

The next case deals with the consequences of a remedy under s 52(1), in particular, whether departures from the remedial norm of retroactive relief can ever be justified.

As a result of the Court's decision in *M v H*, Parliament amended legislation to allow same-sex partners to receive survivor benefits under the self-funded *Canada Pension Plan*. Parliament, however, provided prospective relief only as of 2000, the date of the amendments. It did not provide fully retroactive benefits to 1985, the date at which the equality rights under s 15 of the Charter came into force. The appellants, representing a class of same-sex survivors, challenged s 72(1) of the *Canada Pension Plan*, RSC 1985, c C-8 (2nd Supp), which limited retroactive pension payments to 12 months after an application was received. The Supreme Court held that it was not necessary to decide whether this provision violated s 15 of the Charter because of its adverse effects on same-sex couples because the Court would not issue relief in the form of pension arrears retroactive to 1985.

Canada (AG) v Hislop

[2007 SCC 10](#)

LeBEL and ROTHSTEIN JJ (McLachlin CJ and Binnie, Deschamps, and Abella JJ concurring):

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[79] In substance, the position of the appellants is predicated on the traditional—often called Blackstonian—view that judges never make law, but merely discover it. In this perspective, the courts are said to apply the law as it really was or has been rediscovered. As a consequence of the declaration of nullity, the appellants claim that they are entitled to the full benefits of the law, in conformity with an understanding of the Constitution, which is deemed to have never changed.

[80] The supremacy clause, now enshrined at s. 52, is silent about the remedies which may flow from a declaration of nullity. Does it mean that such a declaration is always both prospective and retroactive? This does not appear to have been the position of our Court throughout the incremental development of the law of constitutional remedies after the adoption of the *Charter*. A body of jurisprudence now accepts the legitimacy of limiting the retroactive effect of a declaration of nullity and of fashioning prospective remedies in appropriate circumstances.

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[86] ... Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling: see S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205, at pp. 211 and 218. There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be

appropriate for the court to issue a prospective rather than retroactive remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies.

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[93] The determination of whether to limit the retroactive effect of a s. 52(1) remedy and grant a purely prospective remedy will be largely determined by whether the Court is operating inside or outside the Blackstonian paradigm. When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.

[94] The approach which our Court has adopted in respect of the crafting of constitutional remedies also flows from its understanding of the process of constitutional interpretation, which the "living tree" metaphor neatly describes. From the time Lord Sankey L.C. used these words to characterize the nature of the Canadian Constitution, courts have relied on this expression to emphasize the ability of the Constitution to develop with our country (*Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (P.C.), at p. 136). This Court has often stated that the Canadian Constitution should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which "accommodates and addresses the realities of modern life"

[95] It is true that the "living tree" doctrine is not wedded to a particular model of the judicial function. At times, its application may reflect the fact that, in a case, the Court is merely declaring the law of the country as it has stood and that a retroactive remedy is then generally appropriate. In other circumstances, its use recognizes that the law has changed, that the change must be acknowledged and that, from a given point in time, the new law or the new understanding of some legal principle will prevail.

[96] The question is no longer the legitimacy of prospective remedies, but rather when, why and how judges may rule prospectively or restrict the retroactive effect of their decisions in constitutional matters. The key question becomes the nature and effect of the legal change at issue in order to determine whether a prospective remedy is appropriate. The legitimacy of its use turns on the answer to this question.

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[99] Change in the law occurs in many ways. "Clear break with the past" catches some of its diversity. It can be best identified with those situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision. Such clear situations would justify recourse to prospective remedies in a proper context. But other forms of substantial change may be as relevant, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles or norms. The definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law. The right may have been there, but it finds an expression in a new or newly recognized technological or social environment. Such a legal response to these developments properly grounds the use of prospective remedies, when the appropriate circumstances are met. A substantial change in the law is necessary, not sufficient, to justify purely prospective remedies. Hence, we must now turn to what else must be considered once legal change has been established.

[100] Although the list of such factors should not be considered as closed, some of them appear more clearly compelling. They may include reasonable or in good faith reliance by governments ([*Miron v Trudel*, [1995] 2 SCR 418, 1995 CanLII 97], at para. 173; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002

SCC 13, at para. 78), or the fairness of the limitation of the retroactivity of the remedy to the litigants. Courts ought also consider whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources (*[Benner v Canada (Secretary of State)*, [1997] 1 SCR 358, 1997 CanLII 376], at para. 103; Schachter, at p. 710).

[101] A careful consideration of reliance interests is critical to this analytical process. Although legal mechanisms, such as the *de facto* doctrine, *res judicata* or the law of limitations, may mitigate the consequences of declaratory rulings in certain circumstances, they do not address every situation. Fully retroactive remedies might prove highly disruptive in respect of government action, which, on the basis of settled or broadly held views of the law as it stood, framed budgets or attempted to design social programs. Persons and public authorities could then become liable under a new legal norm. Neither governments nor citizens could be reasonably assured of the legal consequences of their actions at the time they are taken.

[102] The strict declaratory approach also hardly appears reconcilable with the well established doctrine of qualified immunity in respect of the adoption of unconstitutional statutes which our Court applied, for example, in cases such as *Mackin* and *Guimond v. Québec (Attorney General)*, [1996] 3 S.C.R. 347. Where legislation is found to be invalid as a result of a judicial shift in the law, it will not generally be appropriate to impose liability on the government. As Gonthier J. wrote in *Mackin*, it is a general rule of public law that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" (para. 78). The rationale for this qualified immunity, which applies equally to actions for damages based on the general law of civil liability and to claims for damages under s. 24(1) of the *Charter*, was aptly expressed by Gonthier J.:

Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded . . . [para. 79]

The same principles will apply in respect of claims for retroactive benefits under s. 15 of the *Charter*. Whether framed as a remedy under s. 52 or s. 24(1), it may be tantamount to a claim for compensatory damages flowing from the underinclusiveness of the legislation.

[103] People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the

law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.

[104] Having regard to the above-mentioned criteria, it is possible to distinguish this case from some cases where fully retroactive remedies were granted. *Miron* provides an example of when it would not be appropriate for courts to limit the retroactive effect of a s. 52(1) remedy. In *Miron*, the appellant was injured while a passenger in a vehicle driven by an uninsured driver. He made a claim for accident benefits against the insurance policy of his unmarried partner but his claim was denied on the basis that the policy covered only legally married spouses. Writing for the majority, McLachlin J. (as she then was) held that the distinction based on marital status was discriminatory under s. 15(1) of the *Charter*. She concluded that retroactive reading up of the legislation was an appropriate remedy, which entitled the appellant to the retroactive benefit of his partner's insurance policy.

[105] In *Miron*, it would not have been appropriate for the Court to limit the retroactive effect of the remedy and grant a purely prospective remedy. First, the government did not meet the threshold factor of showing a substantial change from the existing law. As early as 1980, the Ontario Legislature was able to agree on a formula to extend death benefits to certain unmarried persons. And in 1981, in the context of the Ontario *Human Rights Code*, the Legislature agreed on a definition of "spouse" as the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage. In other words, Ontario's vehicle insurance legislation was out of step with the evolving understanding of "spouse" as it existed in other Ontario statutes. Therefore, the Court's holding in *Miron*—that the vehicle insurance legislation's definition of spouse violated s. 15—was not a substantial change from the existing law. To the contrary, it reflected an understanding of s. 15 of the *Charter* that was already understood by the Ontario Legislature in the context of the Ontario *Human Rights Code* and other provincial legislation. Because the finding of a s. 15 infringement in *Miron* did not represent a substantial change in the law, it would have been inappropriate to limit the retroactive effect of its decision.

[106] However, even if the government had succeeded in meeting the substantial change requirement, other factors militated against limiting the retroactive effect of the remedy. In reaching her conclusion, McLachlin J. drew support from three observations. First, she observed that the legislature had, since the accident occurred, amended the applicable legislation to include unmarried partners, thus allaying any concerns about interfering unduly with legislative objectives. The amended legislation provided "the best possible evidence of what the Legislature would have done had it been forced to face the problem the appellants raise[d]" (para. 180). Second, considerations of fairness to the successful litigant also weighed in favour of retroactivity, as providing a retroactive remedy in this case was the only means of "curl[ing] an injustice which might otherwise go unremedied": *ibid*. Third, McLachlin J. noted that the distinction based on marital status was unreasonable, even at the time the impugned legislation was enacted (para. 173). Because the Legislature ought to have known that the vehicle insurance legislation was out of step with a modern understanding of "spouse," it could not reasonably exclude common law spouses from insurance coverage.

[107] It should be noted that, in *Miron*, all of the factors discussed above—good faith reliance by governments, fairness to the litigants and the need to respect the constitutional role of legislatures—favoured a retroactive remedy. In a number of cases, however, these factors may pull in different directions, with some factors favouring a retroactive remedy and others favouring a purely prospective remedy. In such cases, once the "substantial change" threshold criterion is met, it may be appropriate to limit the retroactive effect of the remedy based on a balancing of these other factors. This balance must be struck on a case-by-case basis.

[108] A second situation that must be distinguished was considered by this Court in its recent judgment in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1, wherein it held that taxes collected pursuant to an *ultra vires* regulation are recoverable by the taxpayer. The difference between the result in *Kingstreet* and the type of situation in the present case may be understood in terms of a basic distinction between cases involving moneys collected by the government and benefits cases. Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the s. 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter*. In benefits cases, a range of options is open to government. The excluded group could simply be included in the existing benefit scheme as was the result in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. It could also be included in a modified benefit scheme, adopted by legislative amendments, as occurred in *Schachter*. Also, in *Schachter*, the Court alluded to the possibility of an elimination of the benefit (p. 702). In our political system, choosing between those options remains the domain of governments. This principle points towards limiting the retroactive effect of remedies in s. 15 benefits cases in which the other above-mentioned criteria are met.

(2) The Appropriate Remedy in This Case

(a) Limits on the Retroactive Effect of the Remedy in the Context of This Case

[109] Same-sex equality jurisprudence since 1985 is illustrative of the sort of legal shift that gives rise to new law and justifies consideration of prospective remedies. The factors mentioned above also weigh in favour of limiting the retroactive effect of the remedy in the context of this case.

(i) The Substantial Change in the Law

[110] This Court's decision in *M. v. H.* [[1999] 2 SCR 3, 1999 CanLII 686] marked a departure from pre-existing jurisprudence on same-sex equality rights. In 1995, a majority of this Court upheld the exclusion of same-sex partners from old age security legislation in [*Egan v Canada*, [1995] 2 SCR 513, 1995 CanLII 98], with four judges finding no s. 15(1) violation, and one judge concluding that the scheme was contrary to s. 15(1) but that it could be justified under s. 1. Four years later in *M. v. H.*, eight members of this Court held that the exclusion of same-sex partners from the spousal support provisions under the *Family Law Act* was contrary to s. 15(1) and could not be saved under s. 1. *M. v. H.* thus marks a clear shift in the jurisprudence of the Court, where it moved away from the plurality's holding in *Egan* and came to a new understanding of the scope of equality rights.

[111] Bastarache J. disagrees with our conclusion on the nature of the change brought about by *M. v. H.* He cites lower court decisions rendered prior to *Egan* and before *M. v. H.* to show that the law on same-sex equality rights remained unsettled until *M. v. H.* However, in our system, the Supreme Court has the final word on the interpretation of the Constitution: *Manitoba Language Rights Reference*, at p. 745. A majority of the Court in *Egan* rejected the appellants' claim for equal benefits under the law. It was a fact that this Court held in *Egan* that the Constitution did not require equal benefits for same-sex couples. This fact changed only after *M. v. H.* when this Court held that it was unconstitutional to exclude same-sex couples from the definition of spouse in the *Family Law Act*. The threshold requirement for limiting the retroactive effect of the remedy has been satisfied. The Court must now consider

other relevant factors. In this case, reliance interests, fairness concerns, the government's good faith, and the need to respect Parliament's legislative role all weigh in favour of limiting retroactive relief.

(ii) Reasonable Reliance

[112] Given the state of the jurisprudence prior to *M. v. H.*, the exclusion of same-sex partners from the former CPP was based on a reasonable understanding of the state of s. 15(1) jurisprudence as it existed after *Egan* and before *M. v. H.* Admittedly, the Court in *Egan* was divided over whether to extend old age security benefits to same-sex couples, with four judges dissenting. After *M. v. H.*, it became apparent that the *Egan* dissent had prevailed. However, the benefit of hindsight does not undermine the government's reasonableness in relying on *Egan*.

[113] In holding that the government reasonably relied on the pre-*M. v. H.* jurisprudence, we do not seek to justify the slowness of legislatures and courts alike in recognizing Charter rights. Rather, we acknowledge the fact that although the Constitution embodies the supreme law and the enduring values of this country, it is up to the courts to interpret and apply those provisions. In *Manitoba Language Rights Reference*, this Court held:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails. [p. 745]

[114] The text of the Constitution establishes the broad confines of the supreme law, but it is up to the courts to interpret and apply the Constitution in any given context. The inviolability of the Constitution ensures that our nation's most cherished values are preserved, while the role of the courts in applying the Constitution ensures that the law is sufficiently flexible to change over time to reflect advances in human understanding. But it also means that the Constitution, at any snapshot in time, is only as robust as the court interpreting it. If the judiciary errs or is slow to recognize that previous interpretations of the Constitution no longer correspond to social realities, it must change the law. However, in breaking with the past, the Court does not create an automatic right to redress for the Court's prior ruling. Where the government's reliance on the unconstitutional law was reasonable because it was relying on this Court's jurisprudence, it will be less likely that a right to retroactive relief will flow from a subsequent declaration of invalidity of the unconstitutional law.

(iii) Good Faith

[115] Our comments above indicate that the government did not act in bad faith in failing to extend survivors' benefits to same-sex couples prior to *M. v. H.* It is significant that the survivors' benefit scheme under the former CPP was never struck down by a court of competent jurisdiction. Rather, recognizing the likely implications of this Court's ruling in *M. v. H.* for that scheme, Parliament endeavoured to pre-emptively correct the constitutional deficiencies therein by enacting remedial legislation. Because the government acted in good faith by attempting pre-emptively to correct a constitutional infirmity soon after it was discovered, it would be inappropriate to reach back further in time and impose a retroactive remedy.

(iv) *Fairness to Litigants*

[116] In seeking payment of arrears back as far as 1985, the Hislop class effectively asks this Court to overlook the evolution in the jurisprudence of same-sex equality rights that has taken place and to declare that the understanding to which we have come over that period of time was in fact the law in 1985. This position cannot be sustained. Although *M. v. H.* declares what the Constitution requires, it does not give rise to an automatic right to every government benefit that might have been paid out had the Court always interpreted the Constitution in accordance with its present-day understanding of it. *M. v. H.* was not a case like *Miron* where limiting the retroactive effect of the s. 52(1) remedy would have granted the "successful" claimant a hollow victory. In contrast, a *purely prospective remedy* in *M. v. H.* was not meaningless. *M. v. H.* resulted in wide scale amendments to federal and provincial legislation across the country to extend government benefits to same-sex couples. Equally important, *M. v. H.* helped usher in a new era of understanding of the equal human dignity of same-sex couples. One could not say that *M. v. H.* granted those litigants only a Pyrrhic victory.

(v) *Respecting Parliament's Role*

[117] Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class' claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former *CPP*. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

(vi) *Conclusion*

[118] For the foregoing reasons, the retroactive relief sought by the Hislop class is unavailable under the law applicable to constitutional remedies. It is not therefore necessary to carry out a s. 15(1) analysis in respect of s. 72(1).

NOTE AND QUESTIONS

Justice Bastarache wrote separate concurring reasons that stressed that the denial of retroactive relief should depend on a general balance of interests and not on whether there was a substantial change in the law. He also indicated that, in his view, the Court's decision in *M v H* did not constitute a substantial change in the law. Do you agree with the majority that a substantial change in the law can justify a departure from retroactive relief? If so, is the Court's distinction between the recognition of same-sex spousal rights in *M v H* as a substantial change in the law and the recognition of common law spousal rights in *Miron* as not a substantial change in the law persuasive? Should courts refuse, as in *Hislop*, to decide whether rights were violated because the remedy of retroactive relief is not available? What does this tell us about the relationship between rights and remedies?

E. SEVERANCE AND READING DOWN

As noted in *Schachter*, severance is a remedy familiar from federalism cases and one that involves partial invalidation of the law: see, for example, *Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1, 1948 CanLII 2 [Margarine Reference], excerpted in Chapter 11, Criminal Law and Procedure. The Supreme Court has indicated that severance can be used to fulfill the purposes of the Charter while preserving those parts of the legislation that do not violate the Charter. It was used in *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 1991 CanLII 12, in which, after finding a violation of s 15, the Court deleted the age 65 bar to unemployment insurance benefits. Is there any difference between this form of judicial amendment of laws, involving deletion of language, and reading in as discussed in *Schachter* and used in *Vriend*?

Reading down is also a remedy that has been used in federalism cases to avoid declaring a law to be of no force or effect. Reading down permits courts to save from invalidity a law that would be unconstitutional if given its broadest interpretation by giving the law a narrower interpretation that would preclude unconstitutional applications. For an example of reading down in the federalism context, see *McKay v The Queen*, [1965] SCR 798, 1965 CanLII 3. In *McKay*, a municipal by-law prohibiting the placement of signs on residential properties was interpreted so as not to apply to federal election signs. The Court concluded that such an application would have been *ultra vires*.

Reading down need not only be thought of as a remedy for invalidity; it also functions as a technique of interpretation to avoid invalidity. As such, the doctrine of reading down is rooted in notions of legislative intent: the narrowing interpretation is placed on the law because of a presumption that the legislature intended to act within the bounds of the Constitution. For an example of reading down as a technique of interpretation, see *R v Butler*, [1992] 1 SCR 452, 1992 CanLII 124, excerpted in Chapter 20, Freedom of Expression. In *Butler*, the Court chose to place a narrow constitutional reading on the obscenity provisions of the *Criminal Code*, thereby avoiding any finding of a Charter violation. Reading down was thus used in its traditional form as a preliminary interpretive device to keep the law within constitutional bounds rather than as an explicit remedy after a finding of a constitutional violation.

Stronger forms of reading down can also be used as a remedy for possible invalidity and can involve reading limitations into legislation. The Supreme Court of Canada was originally reluctant to save legislation through strong forms of reading in. In *Hunter v Southam Inc*, [1984] 2 SCR 145, 1984 CanLII 33, after finding that the broad search and seizure powers under the *Combines Investigation Act* violated s 8 of the Charter (freedom from unreasonable search and seizure), Dickson J, writing for a unanimous Court, rejected the federal government's request that the procedures required by s 8 of the Charter be read into the legislation, stating (at 169):

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

In *R v Sharpe*, 2001 SCC 2, also discussed in Chapter 20, the Supreme Court of Canada used an explicit and strong remedy of reading in to save potentially overbroad legislation prohibiting the possession of child pornography. Certain exemptions were read into the law to narrow its scope and cure the potential overbreadth. Chief Justice McLachlin stated:

[111] Confronted with a law that is substantially constitutional and peripherally problematic, the Court may consider a number of alternatives. One is to strike out the entire law. This was the choice of the trial judge and the majority of the British Columbia Court of Appeal. The difficulty with this remedy is that it nullifies a law that is valid in most of its applications. Until Parliament can pass another law, the evil targeted goes unremedied. Why, one might well ask, should a law that is substantially constitutional be struck down simply because the

accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?

[112] Another alternative might be to hold that the law as it applies to the case at bar is valid, declining to find it unconstitutional on the basis of a hypothetical scenario that has not yet arisen. In the United States, courts have frequently declined to strike out laws on the basis of hypothetical situations not before the court, although less so in First Amendment (free expression) cases. While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are "reasonable."

[113] Yet another alternative might be to uphold the law on the basis that it is constitutionally valid in the vast majority of its applications and stipulate that if and when unconstitutional applications arise, the accused may seek a constitutional exemption. ...

[114] I find it unnecessary to canvas any of these suggestions further because in my view the appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1, following *Schachter v. Canada*, [1992] 2 S.C.R. 679. *Schachter* suggests that the problem of peripheral unconstitutional provisions or applications of a law may be addressed by striking down the legislation, severing of the offending sections (with or without a temporary suspension of invalidity), reading down, or reading in. The Court decides on the appropriate remedy on the basis of "twin guiding principles": respect for the role of Parliament, and respect for the purposes of the *Charter* (p. 715). Applying these principles, I conclude that in the circumstances of the case reading in an exclusion is the appropriate remedy.

[115] To assess the appropriateness of reading in as a remedy, we must identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance. In this case, s. 163.1 might be read as incorporating an exception for the possession of:

1. *Self-created expressive material*: i.e., any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and
2. *Private recordings of lawful sexual activity*: i.e., any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. ...

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[121] *Schachter, supra*, holds that reading in will be appropriate only where (1) the legislative objective is obvious and reading in would further that objective or constitute a lesser interference with that objective than would striking down the legislation; (2) the choice of means used by the legislature to further the legislation's objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and (3) reading in would not require an intrusion into legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise. The third requirement is not of concern here. The first two inquiries—conformity with legislative objective and avoidance of unacceptable law-making—require more discussion.

[122] The first question is whether the legislative objective of s. 163.1(4) is evident. In my view it is. The purpose of the legislation is to protect children from exploitation and abuse by prohibiting possession of material that presents a reasoned risk of harm to children. This question leads to a second: whether reading in will further that objective. In other words, will precluding the offending applications of the law better conform to Parliament's objective than striking down the whole law? Again the answer is clearly yes. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exception will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are

not so great that their exclusion amounts to impermissible redrafting The new exceptions resemble those that Parliament has already created and are consistent with its overall approach of catching mainstream child pornography reasonably linked to harm while excluding peripheral material that engages free speech values. Moreover, since the problematic applications lie on the periphery of the material targeted by Parliament, carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. This suggests that excluding the offending applications of the law will not subvert Parliament's object. On the other hand, striking down the statute altogether would assuredly undermine Parliament's object, making it impossible to combat the lawfully targeted harms until it can pass new legislation.

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[124] The second prong of *Schachter, supra*, is directed to the possibility that reading in, though recognizing the objective of the legislation, may nonetheless undermine legislative intent by substituting one means of effecting that intent with another. As we noted in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the relevant question is "what the legislature would ... have done if it had known that its chosen measures would be found unconstitutional" (para. 167). If it is not clear that the legislature would have enacted the legislation without the problematic provisions or aspects, then reading in a term may not provide the appropriate remedy. This concern has more relevance where the legislature has made a "deliberate choice of means" by which to reach its objective. Even in such a case, however, "a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them": *Vriend, supra*, at para. 167.

[125] In the present case it cannot be said that the legislature has made a deliberate choice of means in the sense that phrase was used in *Vriend, supra*. ... I see no evidence ... that Parliament saw the statute's application to the two problematic categories of materials (i.e., self-created expressive materials and private recordings that do not depict unlawful sexual activity) as an integral part of the legislative scheme. On the contrary, given that the risk to children posed by materials falling within these two categories is relatively remote, it seems reasonable to conclude that such materials are caught incidentally, not deliberately, and that Parliament would have excluded these two categories from the purview of the law had it been seized of the difficulty raised by their inclusion.

F. CONSTITUTIONAL EXEMPTIONS

When a constitutional exemption is granted, the law remains in force, but it is declared inapplicable, on a case-by-case basis, to individuals or groups whose Charter rights are infringed by its effects. In *R v Ferguson*, [2008 SCC 6](#), the Supreme Court of Canada expressed serious reservations about its use as a remedy for unconstitutional laws.

Ferguson involved an RCMP officer who was convicted of manslaughter. He argued that the mandatory minimum four-year sentence provided for the offence constituted, on the facts of his case, cruel and unusual punishment contrary to s 12 of the Charter. The trial judge ruled in his favour, relying on s 24(1) of the Charter to grant Ferguson a constitutional exemption from the mandatory minimum sentence and to impose a lesser sentence. The Supreme Court of Canada found that there was no basis for concluding that the mandatory minimum sentence constituted cruel and unusual punishment on the facts of the case. Nonetheless, the Court went on to discuss whether, if a violation of s 12 had been established, a constitutional exemption under s 24(1) would have been the appropriate remedy, or whether the only remedy should have been a declaration that the law was of no force and effect under s 52 of the *Constitution Act, 1982*.

The Court recognized the arguments in favour of utilizing constitutional exemptions:

[38] The argument in favour of recognizing constitutional exemptions is simply put. ... [W]here a mandatory minimum sentence that is constitutional in most of its applications generates an unconstitutional result in a small number of cases, it is better to grant a constitutional exemption in these cases than to strike down the law as a whole. The s. 52(1) remedy of declaring invalid a law that produces a result inconsistent with the *Charter* is a blunt tool. A law that may be constitutional in many of its applications—and indeed ruled constitutional on a reasonable hypotheticals analysis—is struck down because in one particular case, or in a few cases, it produces an unconstitutional result. Would it not be better, the argument goes, to allow the law to stand, while providing an individual remedy in those cases—arguably rare—where its application offends the *Charter*?

[39] ... More generally, granting constitutional exemptions for unconstitutional effects of mandatory minimum sentence laws fits well with the Court's practices of severance, reading in and reading out in order to preserve the law to the maximum extent possible: see *Schachter v. Canada*, [1992] 2 S.C.R. 679.

The Court went on, however, to conclude that these arguments were outweighed by "counter-considerations" (at para 40) and that it would be inappropriate to fashion a constitutional exemption under s 24(1) from a mandatory sentence under the *Criminal Code*. One such consideration was the remedial scheme under the *Charter*, with the Court ruling that any exemption from the application of a *law* could only be formulated as a remedy under s 52(1) of the *Constitution Act, 1982* and not under s 24(1) of the *Charter*. Chief Justice McLachlin, writing for the Court, stated:

[64] The highly discretionary language in s. 24(1), "such remedy as the court considers appropriate and just in the circumstances," is appropriate for control of unconstitutional acts. By contrast, s. 52(1) targets the unconstitutionality of laws in a direct non-discretionary way: laws are of no force or effect to the extent that they are unconstitutional.

A central consideration weighing against the use of a constitutional exemption on the facts of the case was a concern to avoid intruding on the role of Parliament:

[56] ... To allow constitutional exemptions for mandatory minimum sentences is, in effect, to read in a discretion to a provision where Parliament clearly intended to exclude discretion. ... It cannot be assumed that Parliament would have enacted the mandatory minimum sentencing scheme with the discretion that allowing constitutional exemptions would create. For the Court to introduce such a discretion would thus represent an inappropriate intrusion into the legislative sphere.

However, the Court also raised concerns related to the rule of law:

[69] Constitutional exemptions for mandatory minimum sentence laws raise concerns related to the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability.

[70] ... [A] constitutional exemption under s. 24(1) is a personal remedy ... [and] is thus distinct from a s. 52 remedy that reads in an exception for a well-defined class of situations—as, for instance, the remedy in *Sharpe*. When a constitutional exemption is granted, the successful claimant receives a personal remedy under s. 24(1), but the law remains on the books, intact. ... The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.

[71] Constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable It is up to judges on a case-by-case basis to decide when to

strike down a minimum sentence that is inconsistent with the *Charter*, and when to grant an individual exemption under s. 24(1). But the *Charter* is silent on how a judge should make this decision . . . In theory, all violations could be remedied under s. 24(1), leaving no role for s. 52(1). . . Constitutional exemptions, it is suggested, should be confined to laws that usually operate constitutionally and only occasionally result in constitutional violations. But how is the judge to decide whether the case before her is rare? The bright line required for constitutional certainty is elusive.

[72] The divergence between the law on the books and the law as applied—and the uncertainty and unpredictability that result—exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly—a fundamental tenet of the rule of law. Second, it risks over-application of the law; . . . the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.

[73] A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances . . . Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.

How can the restrictive approach to constitutional exemptions adopted in *Ferguson* be reconciled with the Court's willingness to consider using exemptions from suspended declarations of invalidity in *Ontario v G*? Is there as clear a line as the Court suggests between case-by-case exemptions from a law under s 24(1) of the *Charter* and reading down a law under s 52 of the *Constitution Act, 1982* by reading in exemptions? Should different principles apply to remedial decision-making under s 52(1) and s 24(1) because the former is addressed at unconstitutional laws and the latter is directed at unconstitutional acts? Note that restrictions on combining s 24(1) remedies such as damages and s 52 declarations of invalidity will be discussed below.

III. REMEDIES UNDER SECTION 24(1) OF THE CHARTER

A. DECLARATIONS

In *Little Sisters Book and Art Emporium v Canada*, excerpted immediately below, a majority of the Supreme Court of Canada issued a declaration, under s 24(1) of the *Charter*, that the applicants' *Charter* rights had been violated because of the unconstitutional application of the challenged law, rather than the remedy requested—namely, striking down the law in its entirety under s 52 of the *Constitution Act, 1982*. As the minority reasons show, however, the majority's remedial choice was not uncontroversial.

The case, which is discussed in Chapter 20, involved a challenge, on the basis of ss 2(b) and 15 of the *Charter*, to provisions in the federal customs legislation that prohibited the

importation of obscene publications and empowered customs officials to make the necessary determination of obscenity. The challenge was brought by a bookstore, Little Sisters, which alleged a customs practice of targeting material destined for gay and lesbian bookstores. Little Sisters had sought not only a recognition that its own rights had been violated because of the way in which the law had been applied to them but also a declaration of the law's invalidity on the ground, *inter alia*, that the procedure for determining obscenity was so cumbersome and procedurally defective that it could not be administered in a way that respected Charter rights. With the exception of a reverse-onus clause, a majority of the Court, in a judgment written by Binnie J, found no constitutional flaw in the legislation itself. Any problems were found to lie in the administration of the law, the appropriate remedy for which was a declaration under s 24(1) of the Charter. The majority also refused Little Sisters' request for an injunction restraining customs from applying the law so long as any risk of unconstitutional administration existed.

Little Sisters Book and Art Emporium v Canada

2000 SCC 69

BINNIE J (McLachlin CJ and L'Heureux-Dubé, Gonthier, Major, and Bastarache JJ concurring):

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[154] In my view, the appellants have established that:

1. Section 152(3) of the *Customs Act* should not be construed and applied so as to place the onus on an importer to establish that goods are not obscene within the meaning of s. 163(8) of the *Criminal Code*. The burden of proving obscenity rests on the Crown or other person who alleges it.
2. The rights of the appellants under s. 2(b) and s. 15(1) of the *Charter* have been infringed in the following respects:
 - (a) They have been targeted as importers of obscene materials despite the absence of any evidence to suggest that gay and lesbian erotica is more likely to be obscene than heterosexual erotica, or that the appellants are likely offenders in this regard;
 - (b) In consequence of the targeting, the appellants have suffered excessive and unnecessary prejudice in terms of delays, cost and other losses in having their goods cleared (if at all) through Canada Customs;
 - (c) The reasons for this excessive and unnecessary prejudice include:
 - (i) failure by Customs to devote a sufficient number of officials to carry out the review of the appellants' publications in a timely way;
 - (ii) the inadequate training of the officials assigned to the task;
 - (iii) the failure to place at the disposal of these officials proper guides and manuals, failure to update Memorandum D9-1-1 and its accompanying illustrative manual in a timely way, and the failure to develop workable procedures to deal with books consisting mostly or wholly of written text;
 - (iv) failure to establish internal deadlines and related criteria for the expeditious review of expressive materials;
 - (v) failure to incorporate into departmental guides and manuals relevant advice received from time to time from the Department of Justice;

- (vi) failure to provide the appellants in a timely way with notice of the basis for detention of publications, the opportunity to make meaningful submissions on a re-determination, and reasonable access to the disputed materials for that purpose; and
- (vii) failure to extend to the appellants the equal benefit of fair and expeditious treatment of their imported goods without discrimination based on sexual orientation.

[155] It is apparent that this catalogue particularizes in greater detail the declaration issued by the trial judge, namely:

THIS COURT DECLARIES that Tariff Code 9956(a) of Schedule VII and s. 114 of the *Customs Tariff*, S.C. 1987, c. 41 (3rd Supplement) and ss. 58 and 71 of the *Customs Act*, S.C. 1986, c. 1 (2nd Supplement) have at times been construed and applied in a manner contrary to s. 2(b) and s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

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[157] Having rejected that s. 52 argument, except as to the reverse onus provision, the remaining question is whether the Court should attempt to fashion a more structured s. 24(1) remedy. I conclude, with some hesitation, that it is not practicable to do so. The trial concluded on December 20, 1994. We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to endorse my colleague's conclusion that these measures are "not sufficient" (para. 262) and have offered "little comfort" (para. 265). Equally, however, we have not been informed by the appellants of the specific measures (short of declaring the legislation invalid or inoperative) that in the appellants' view would remedy any continuing problems.

[158] The most detailed suggestion the appellants have made in the way of a s. 24(1) remedy is the following request:

... in the final alternative an injunction restraining Customs from applying and administering the *Customs Tariff*, S.C. 1987, c. 41 (3rd Supplement) s. 114, Schedule VII, Code 9956(a) and the *Customs Act*, S.C. 1986 (2nd Supp.), s. 58 and s. 71, as amended, permanently or until such time as there is no risk that the unconstitutional administration will continue.

The first branch of the proposed injunction ("permanently") amounts to a s. 52 declaration of inoperability, which I do not consider justified. The second branch ("until such time") sets an unrealistic standard ("no risk"). If diluted to a call for constitutional behaviour, the result would add little to the general duty that falls on any government official to act in accordance with the Constitution, injunction or no injunction, and would scarcely advance the objectives of either clarity or enforceability. A more structured s. 24(1) remedy might well be helpful but it would serve the interests of none of the parties for this Court to issue a formal declaratory order based on six-year-old evidence supplemented by conflicting oral submissions and speculation on the current state of affairs. The views of the Court on the merits of the appellants' complaints as the situation stood at the end of 1994 are recorded in these reasons and those of my colleague Iacobucci J. These findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary.

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IACOBUCCI J (Arbour and LeBel JJ concurring) (dissenting in part):

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[253] Given Smith J.'s finding that there were "grave systemic problems" in the administration of the law—a conclusion with which I wholeheartedly agree—the primarily declaratory remedy relied on by Binnie J. is simply inadequate. Systemic problems call for systemic solutions. I believe that Customs' history of improper censorship, coupled with its inadequate response to the declarations of the courts below, confirms that only striking down the legislation in question will guarantee vindication of the appellants' constitutional rights. Having concluded that the law must fall, I will offer some broad guidelines for future reform.

(i) Legislation Must Ensure Constitutional Application

[254] ... In this case, it is true that nothing in the Customs legislation itself forces Customs to ignore evidence of literary and artistic merit; to make decisions without even allowing written submissions from the parties affected; and to discriminate against gay and lesbian materials. However, the legislation does call for prior restraint by an investigatory rather than adjudicatory body, and does not provide for any meaningful safeguards aimed at preventing the inevitable flaws that result from such a system.

[255] Effectively, the respondents call on this Court to trust them. Indeed, when questioned at oral arguments about what guarantee we have that the mistakes of the past will not continue, counsel for the respondent Canada replied, "what may have occurred then, I trust will not occur now." ...

[256] In fact, the respondents' approach would mean that every unconstitutional law requires no more than a declaratory remedy; after all, Parliament is fully capable of amending a law to bring it into compliance with the Constitution at any time. I therefore disagree with Binnie J.'s conclusion that, with the exception of s. 152(3) of the *Customs Act*, a declaratory remedy is sufficient in this case. While the government is free to delegate powers, it must do so in a way that ensures—or at the very least attempts to ensure—that *Charter* rights will be respected.

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(ii) Declaratory Relief Is Insufficient

[258] The need to strike down the Customs legislation as it applies to expressive materials is reinforced by comparison with the alternate remedy adopted by both the courts below, and by Binnie J. in this Court. Declarations are, in many cases, an appropriate constitutional remedy. As Kent Roach has summarized in his *Constitutional Remedies in Canada* (loose-leaf ed.), at para. 12.30, declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government. However, declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance: see *ibid.*, at para. 12.320.

[259] *Mahe v. Alberta*, [1990] 1 S.C.R. 342, illustrates the appropriate role of declaratory relief. In that case the Court held that Edmonton's school system violated s. 23 of the *Charter* because it did not grant sufficient "management and control" over French-language education to the linguistic minority. In determining the appropriate remedy, Dickson C.J. recognized, at pp. 391-92, that the impugned provisions of the *School Act* were "'permissive' provisions, that is, they do not prevent authorities from acting in accordance with the *Charter*, but neither do they guarantee that such compliance will occur." The Chief Justice declined to strike down the legislation, instead choosing to issue a declaration. He feared that "the result of a declaration of

invalidity would be to create a legislative vacuum" (p. 392), which would potentially leave the appellants worse off. The Court therefore simply issued "a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s. 23" (p. 392). Similarly, in [*Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 1997 CanLII 327] the Court simply declared that services must be provided to the deaf instead of striking down the entire legislative scheme.

[260] The rationale behind the remedial choice in those cases does not apply to the present appeal. Striking down the applicability of the Customs legislation to expressive materials will not make the appellants worse off; it will fully vindicate their rights. While the appellants are admittedly not entitled to any particular legislative scheme, they are entitled to a remedy that will prevent further systematic and consistent violations of their constitutional rights. Only invalidating the impugned Customs legislation will achieve that goal.

[261] A final reason that declaratory relief is inappropriate in this case is the difficulties the appellants face in enforcing it. This case has been a massive undertaking for the appellants. Proving the constitutional violations recognized by Smith J. required the production of an enormous record. Unfortunately, if the appellants are unsatisfied with the government's compliance with the declaration affirmed by this Court, they have little choice but to try to assemble a similar record documenting the enforcement of the Customs regime since the declaration was made. This is obviously a heavy burden, and indeed unfair. A stronger remedy is necessary to vindicate the appellants' rights. ...

[262] In my respectful opinion, declaratory relief has already proven ineffective. As Roach, *supra*, at para. 13.884 has noted, "declaratory relief does not facilitate continued judicial supervision and may not be effective where governments do not take prompt and good faith steps to comply with the declaration." While obviously we lack evidence of the enforcement of the Customs regime since Smith J.'s declaration, I believe that the reforms thus far are not sufficient.

[Justice Iacobucci then reviewed the reforms, concluding: "With respect, I am not satisfied that these measures will remedy the 'grave systemic problems' found by Smith J. They are largely hortatory or permissive" (at para 265). Justice Iacobucci made several recommendations for reform, including the enactment of new legislation with appropriate safeguards for timely decisions and freedom of expression, the creation of a specialized administrative tribunal, and reliance on criminal prosecutions for obscenity.]

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[281] No doubt there are many other steps that could be taken to improve the current system. I put these suggestions forward to show that there is a variety of approaches available to Parliament to underscore the importance of ensuring Canadians have access to as many expressive materials as possible while realizing the practical constraints that are involved. Because the present regime essentially treats books like any other commodity, I hope that Parliament will review and revise the current Customs legislation to reflect the seminal importance of freedom of expression in our Canadian democracy.

[282] ... In my opinion, the record in this appeal amply bears out Smith J.'s conclusion that there are "grave systemic" flaws in the enforcement of the Customs legislation. But I cannot agree that the remedy is simply to issue a declaration and take it on faith that Canada Customs—an agency which, it bears repeating, has a long and ignominious record of excessive censorship throughout this century—will reform its ways.

[283] I would therefore allow the appeal, set aside the judgment of the British Columbia Court of Appeal and declare, pursuant to s. 52 of the *Constitution Act, 1982*, that Schedule VII, Tariff Code 9956(a) (now Tariff Item 9989.00.00) is of no force and effect. I would suspend this declaration of invalidity for a period of 18 months to allow the government time to choose the preferred remedial option described in these reasons, and to take the related steps necessary to make the implementation of the chosen option effective.

NOTES AND QUESTIONS

1. Does the majority's judgment suggest that the Court might be inclined to sanction the use of structural injunctions (discussed below) in appropriate cases? What does the majority's judgment suggest about how such injunctions should be constructed and when they will be appropriate?
2. Is the minority's judgment an example of a court approving a structural injunction; or is it a case of recognizing the limitations of declarations as a remedy and inviting Parliament, as opposed to a court, to engage in structural reform? Note that Little Sisters continued to have problems with customs. The small bookstore started new litigation against customs but abandoned it when the Supreme Court held that it would not grant it advance costs on the basis that the appeal was not in the broader public interest. *Little Sisters Book Store v Canada (Commissioner of Customs and Revenue)*, [2007 SCC 2](#).

3. In *Canada (Prime Minister) v Khadr*, [2010 SCC 3](#), the Supreme Court reversed a mandatory order that Canada request Omar Khadr's repatriation from the United States. (Khadr was detained at the US detention camp in Cuba, Guantanamo Bay.) The Court instead entered a declaration that Canada had violated Khadr's rights when it had sent officials to Guantanamo Bay to interrogate him in 2003 and 2004. The Court stated:

[39] Our first concern is that the remedy ordered below [the mandatory order] gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*.

The Court also justified its use of a declaration as opposed to a mandatory order by expressing concerns about the adequacy of the record:

[44] ... The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

After the Court's declaration that Khadr's rights had been violated, Canada issued a diplomatic note requesting that the United States not use the fruits of interrogation by Canadian

officials in Omar Khadr's subsequent military commission proceedings. The United States declined to honour this request.

In subsequent litigation, a trial judge found that Khadr had still not received an effective remedy and that Canada had breached the common law duty of procedural fairness and the doctrine of fair expectations by not consulting Khadr and his lawyers before issuing the diplomatic note. This part of the decision is innovative and potentially requires that governments conform to common law obligations when responding to declarations. The trial judge in this case also retained jurisdiction and required Canada to propose another remedy, the adequacy of which Khadr would then be allowed to comment on: *Khadr v Canada (Prime Minister)*, [2010 FC 715](#). The federal government was able to have this judgment stayed pending appeal, with Blais CJ expressing doubts about whether courts could require the government to make diplomatic representations as a remedy under s 24(1) or retain jurisdiction in such a context: *Canada (Prime Minister) v Khadr*, [2010 FCA 199](#). The appeal was subsequently declared moot in the light of Khadr's guilty plea in a military commission held at Guantanamo: *Canada v Khadr*, [2011 FCA 92](#). For further discussion of this case, see Amir Attaran & Jon Khan, "Solving the 'Khadr Problem': Retention of Jurisdiction" (2015) 34:2 NJCL 145; Kent Roach, "The Supreme Court at the Bar of Politics" (2010) 28 NJCL 115.

4. The Supreme Court's preference for declarations over mandatory orders as constitutional remedies is not, however, absolute. In *Canada (AG) v PHS Community Services Society*, [2011 SCC 44](#) (better known as the "Insite" case), excerpted in Chapter 22, The Right to Life, Liberty, and Security of the Person, the Court made a mandatory order—what is called "an order in the nature of mandamus" (at para 150)—requiring the federal minister of health to issue an exemption under the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA] to allow the continued operation of Insite, a safe injection site in downtown Vancouver. The Court concluded that the Minister's refusal to grant the exemption violated s 7 of the Charter because it was arbitrary and grossly disproportionate to the purposes of the Act, which were to protect public safety and health—the trial judge had found that the safe injection site had prevented the transmission of disease by the use of dirty needles and had not increased crime in the neighbourhood. The Court justified the choice of a mandatory order in the form of a mandamus over a declaration as follows:

[146] One option would be to issue a declaration that the Minister erred in refusing to grant a further exemption to Insite in May 2008, and return the matter to the Minister to reconsider the matter and make a decision that respects the claimants' *Charter* rights.

[147] However, this remedy would be inadequate.

[148] The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. These claimants would be cast back into the application process they have tried and failed at, and made to await the Minister's decision based on a reconsideration of the same facts. Litigation might break out anew. A bare declaration is not an acceptable remedy in this case.

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[150] In the special circumstances of this case, an order in the nature of mandamus is warranted. I would therefore order the Minister to grant an exemption to Insite under s. 56 of the CDSA forthwith. (This of course would not affect the Minister's power to withdraw the exemption should the operation of Insite change such that the exemption would no longer be appropriate.) On the trial judge's findings of fact, the only constitutional response to the application for a s. 56 exemption was to grant it. The Minister is bound to exercise his discretion under s. 56 in accordance with the *Charter*. On the facts as found here, there can be only one response: to grant the exemption. There is therefore nothing to be gained (and much to be risked) in sending the matter back to the Minister for reconsideration.

What, if anything, justifies the decision to rely on a declaration in the *Khadr* case, but to use a more intrusive mandatory order in the *Insite* case? Can the difference be adequately explained by the Court's deference to the state's foreign affairs duties in *Khadr*? Do differences in the adequacy of the record in the cases also help explain the different remedial choices?

B. STRUCTURAL INJUNCTIONS

In drafting remedies for constitutional violations, US courts have made extensive use of complex supervisory orders called "structural injunctions" or "civil rights injunctions," the goal of which is to restructure institutions that have operated unconstitutionally in the past, resulting in systemic violations of rights. Such orders have resulted in US courts redrawing electoral boundaries, desegregating school systems by redrawing school boundaries and ordering the busing of children, and running prisons and mental hospitals. The civil rights injunction is a controversial remedy and has been criticized for allowing judges to exercise legislative and administrative powers: see Robert J Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall LJ 474, for the argument that, although institutional advantages clearly favour legislators and administrators in the task of designing structural changes in institutions to meet the demands of the Charter, if they fail to respond positively, the courts will be required to act. The majority of requests for structural remedies under the Charter thus far have arisen in the context of the minority language education rights guaranteed by s 23 of the Charter, which are discussed in Chapter 24, Language Rights. For further discussion of the structural injunction under the Charter, see, in addition to Sharpe's article, Nora Gillespie, "Charter Remedies: The Structural Injunction" (1990) 11 Adv Q 190; Ghislain Otis, "La Charte et la modification des programmes gouvernementaux [The Charter and the Modification of Governmental Programs]" (1991) 36 McGill LJ 1348; Christopher Manfredi, "Appropriate and Just in the Circumstances" (1994) 27 Can J Poli Sci 435; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2013) ch 13.

The next case concerns whether a trial judge was justified in retaining jurisdiction over a case and requiring the government to report back to the Court and the parties on its progress in making minority language schools available after the judge had issued a declaration that the s 23 minority language educational rights of francophones in Nova Scotia had been violated.

Doucet-Boudreau v Nova Scotia (Minister of Education)

2003 SCC 62

IACOBUCCI and ARBOUR JJ (McLachlin CJ and Gonthier and Bastarache JJ concurring):

[41] Section 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms. The respondent makes various arguments suggesting that LeBlanc J. exceeded his jurisdiction by violating constitutional norms, statutory provisions, and common law rules. We will first deal with the extent of the remedial jurisdiction in s. 24(1) and the constitutional limits to that jurisdiction proposed by the respondent. Later we will discuss how statutes and common law rules might be relevant to the choice of remedy under s. 24(1) . . .

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[51] The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory

provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances."

(3) The Meaning of "Appropriate and Just in the Circumstances"

[52] What, then, is meant in s. 24(1) by the words "appropriate and just in the circumstances"? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just. Deciding on an appropriate and just remedy in particular circumstances calls on the judge to exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. Once again, we emphasize McIntyre J.'s words in [*Mills v The Queen*, [1986] 1 SCR 863, 1986 CanLII 17], at p. 965:

It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

[53] With respect, the approach to s. 24 reflected in the reasons of LeBel and Deschamps JJ. would tend to pre-empt and reduce this wide discretion. Their approach would also, in this case, pre-empt and devalue the constitutional promise respecting language rights in s. 23. In our view, judicial restraint and metaphors such as "dialogue" must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated. The same may be said of common law procedural principles such as *functus officio* which may to some extent be incorporated in statutes. Rather, as LeBel and Deschamps JJ. appear to recognize at paras. 135 and following, there are situations in which our Constitution requires special remedies to secure the very order it envisages.

[54] While it would be unwise at this point to attempt to define, in detail, the words "appropriate and just" or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

[55] First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties," is not a meaningful vindication of the right and therefore not appropriate and just

[56] Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. . . [A] court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

[57] Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

[58] Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

[59] Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24 because of its broad language and the myriad of roles it may play in cases should be allowed to evolve to meet the challenges and circumstances of those cases. ...

(4) Application to This Case: The Remedy Ordered by the Trial Judge Was Appropriate and Just in the Circumstances

(a) The Reporting Order Effectively Vindicated the Rights of the Parents

[60] LeBlanc J. exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education in Kingston (Greenwood, Chéticamp, Île Madame-Arichat (Petit de Grat), Argyle, and Clare). The facts as found by LeBlanc J. disclosed that continued delay could imperil the already vulnerable s. 23 rights, their exercise depending as it does on the numbers of potential students. As Freeman J.A. noted in dissent in the Court of Appeal, the reporting hearings were aimed at identifying difficulties with the timely implementation of the trial judge's order as they arose, instead of requiring fresh applications by the appellants every time it appeared that a party was not using its best efforts to comply with the judge's order.

[61] In the absence of reporting hearings, the appellant parents would have been forced to respond to any new delay by amassing a factual record by traditional means disclosing whether the parties were nonetheless using their best efforts. A new proceeding would be required and this might be heard by another judge less familiar with the case than LeBlanc J. All of this would have taken significant time and resources from parents who had already waited too long and dedicated much energy to the cause of realizing their s. 23 rights. ...

[62] In assessing the extent to which LeBlanc J.'s remedy was appropriate and just in the circumstances, it is useful to examine the options before the trial judge. In doing so we are not intending to usurp the role and discretion of the trial judge but only to gain a fuller understanding of the situation he faced. LeBlanc J. could have limited the remedy to a declaration of the rights of the parties, as the Court considered prudent in [Mahe v Alberta, [1990] 1 SCR 342, 1990 CanLII 133], at pp. 392-93. In Mahe, however, the primary issues before the Court concerned the scope and content of s. 23 of the *Charter* . . . After clarifying the content and scope of the s. 23 rights at issue, the Court chose the remedy of ordering a declaration of those rights. It did so to allow the government the greatest flexibility to fashion a response suited to the circumstances (p. 393). The assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully.

[63] . . . The general content of s. 23 in many cases is now largely settled . . . In the present case, for example, it was clear to and accepted by the parties from the start

that the government was required to provide the homogeneous French-language facilities at issue. The entitled parents sought the assistance of the court in enforcing the *full and prompt* vindication of their rights after a lengthy history of government inaction.

[64] Our colleagues LeBel and Deschamps JJ. state at para. 140 of their reasons that the trial judge was not faced with a government which had understood its obligations but refused to comply with them. Our colleagues suggest that there was some issue as to what s. 23 demanded in the situation. With respect, this portrayal is directly at odds with the findings of fact made by the trial judge. At para. 198 of his reasons, the trial judge wrote:

It is apparent that the real issue between the parties is the date on which these programs and facilities are to be implemented. The Department, in its submissions, does not challenge the applicants' right and entitlement to these programs and facilities but point [sic] to a number of factors which ought to satisfy the applicants. The Conseil opposes the applicants' claim for an earlier implementation of the transition plan but supports the applicants in its [sic] demand for declaration that the Department ought to be directed to provide homogeneous facilities.

[65] ... According to the trial judge, the government did not deny the existence or content of the s. 23 rights of the parents but rather failed to prioritize those rights and delayed fulfilling its obligations. The government "did not give sufficient priority to the serious rate of assimilation occurring among Acadians and Francophones in Nova Scotia and the fact that rights established in s. 23 are individual rights" (para. 204) despite clear reports showing that assimilation was "reaching critical levels" (para. 215). ... These findings are not on appeal and it is not open for appellate judges to reverse these findings without proper justification. ...

[66] LeBlanc J. obviously considered that, given the Province's failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy. ... Where governments have failed to comply with their well understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined. ... LeBlanc J. was entitled to conclude that he was not limited to declaring the appellant parents' rights and could take into consideration that the case before him was different from those in which declarations had been considered appropriate and just.

[67] Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay.

(b) The Reporting Order Respected the Framework of Our Constitutional Democracy

[68] The remedy granted by LeBlanc J. took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy.

LeBlanc J. considered the government's progress toward providing the required schools and services (see, e.g., paras. 233-34). Some flexibility was built into the "best efforts" order to allow for unforeseen difficulties. It was appropriate for LeBlanc J. to preserve and reinforce the Department of Education's role in providing school facilities as mandated by s. 88 of the *Education Act*, as this could be done without compromising the entitled parents' rights to the prompt provision of school facilities.

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[70] Our colleagues LeBel and Deschamps JJ. appear to consider that the issuance of an injunction against the government under s. 24(1) is constitutionally suspect and represents a departure from a consensus about *Charter* remedies (see para. 134 of the dissent). With respect, it is clear that a court may issue an injunction under s. 24(1) of the *Charter*. The power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared. ... In this case, it was open to the trial judge in all the circumstances to choose the injunctive remedy on the terms and conditions that he prescribed.

(c) The Reporting Order Called on the Function and Powers of a Court

[71] Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes. For example, prejudgment remedies [such as *Mareva* injunctions and *Anton Piller* orders, developed by the courts] involve the court in the preservation of evidence and the management of parties' assets prior to trial. In bankruptcy and receivership matters, courts may be called on to supervise fairly complex and ongoing commercial transactions relating to debtors' assets. Court-appointed receivers may report to and seek guidance from the courts and in some cases must seek the permission of the courts before disposing of property Similarly, the courts' jurisdiction in respect of trusts and estates may sometimes entail detailed and continuing supervision and support of their administration Courts may also retain an ongoing jurisdiction in family law cases to order alterations in maintenance payments or parenting arrangements as circumstances change. Finally, this Court has in the past remained seized of a matter so as to facilitate the implementation of constitutional language rights

[72] The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies

[73] As academic commentators have pointed out, the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts The change announced by s. 24 of the *Charter* is that the flexibility inherent in an equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights.

[74] The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.

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(d) The Reporting Order Vindicated the Right by Means That Were Fair

[83] ... The respondent argues that it was subject to an overly vague remedy. In our opinion, the reporting order was not vaguely worded so as to render it invalid. While, in retrospect, it would certainly have been advisable for LeBlanc J. to provide more guidance to the parties as to what they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. In our view, the "reporting" element of LeBlanc J. remedy was not unclear in a way that would render it invalid.

[84] ... LeBlanc J.'s written order is satisfactory and clearly communicates that the obligation on government was simply to report. The fact that this was the subject of questions later in the process suggests that future orders of this type could be more explicit and detailed with respect to the jurisdiction retained and the procedure at reporting hearings.

[85] It should be remembered that LeBlanc J. was crafting a fairly original remedy in order to provide flexibility to the executive while vindicating the s. 23 right. It may be expected that in future cases judges will be in a better position to ensure that the contents of their orders are clearer. ... It may be more helpful in some cases for the trial judge to seek submissions on whether to specify a timetable with a right of the government to seek variation where just and appropriate to do so.

[86] Once again, we emphasize that s. 24(1) gives a court the discretion to fashion the remedy that *it considers* just and appropriate in the circumstances. The trial judge is not required to identify the single best remedy, even if that were possible. In our view, the trial judge's remedy was clearly appropriate and just in the circumstances.

(5) Conclusion

[87] Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

[88] The remedy crafted by LeBlanc J. meaningfully vindicated the rights of the appellant parents by encouraging the Province's prompt construction of school facilities, without drawing the court outside its proper role. The Court of Appeal erred in wrongfully interfering with and striking down the portion of LeBlanc J.'s order in which he retained jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates. ...

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LeBEL and DESCHAMPS JJ (Major and Binnie JJ concurring) (dissenting):

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[91] The devil is in the details. Awareness of the critical importance of effectively enforcing constitutional rights should not lead to forgetfulness about the need to draft pleadings, orders and judgments in a sound manner, consonant with the basic rules of legal writing, and with an understanding of the proper role of courts and of the organizing principles of the legal and political order of our country. Court orders should be written in such a way that parties are put on notice of what is expected of them. Courts should not unduly encroach on areas which should remain the responsibility of public administration and should avoid turning themselves into managers of the public service. Judicial interventions should end when and where the case of which a judge is seized is brought to a close.

[92] In our respectful view, without putting in any doubt the desire of the trial judge to fashion an effective remedy to address the consequences of a long history of neglect of the rights of the Francophone minority in Nova Scotia, the drafting of his so-called reporting order was seriously flawed. It gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized, thereby breaching the constitutional principle of separation of powers. The order did so by reason of the way it was framed and the manner in which it was implemented. In our opinion, the reporting order was void, as the Court of Appeal of Nova Scotia found, and the appeal should be dismissed.

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[97] The drafting of applications asking for injunctive relief, or of orders granting such remedies, can be a serious challenge for counsel and judges. The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided

[98] Unfortunately, the drafting of the present reporting order was anything but clear. Its brevity and apparent simplicity belie its actual complexity and the state of confusion and uncertainty in which it left not only all of the parties, but the trial judge himself at times. This order was final, not interim, and it was tied to the "best efforts order," which was not couched in terms liable to shed much light on the nature of the obligations of the respondents. Given that this part of the order was not challenged on appeal, we will not discuss it at length, but instead, will focus exclusively on the reporting order which is the object of this appeal.

[99] At first, when judgment was rendered, the reporting order read, at para. 245:

The applicants have requested that I should maintain jurisdiction. I agree to do so. I am scheduling a further appearance for Thursday, July 27, 2000 at 1:30 p.m., and at that time the respondents will report on the status of their efforts. I am requesting the respondents to utilize their best efforts to comply with this decision.

This drafting was slightly modified in the final order, dated December 14, 2000:

The Court shall retain jurisdiction to hear reports from the respondents respecting the respondents' compliance with this Order. The respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

[100] As Flinn J.A. observed in his reasons in the Court of Appeal ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104), nobody knew the exact nature of these reports. Their

form and content were undefined. There was no indication as to whether they should be delivered orally or in writing or both nor as to how detailed they should be and what kind of supporting documents, if any, would be needed. The order also provided for hearings, but again, it left the parties in the dark as to the procedure, purpose or nature of these sessions of the court. The parties learned only shortly before these hearings that affidavits needed to be filed and deponents made available for cross-examination. Further, there seemed to be little direction, if any at all, as to what sort of evidence was required to be included for the purpose of the hearings. The nature of these hearings, as the process developed, appeared to become a cross between a mini-trial, an informal meeting with the judge and some kind of mediation session, for the purpose of monitoring the execution of the school-building program for Francophone students.

[101] The trial judge himself seemed unsure about the nature of the hearings he had ordered and of the process he had initiated. At first, he appeared to lean towards the view that those hearings were regular sessions of the court, that he had not issued a final order and that additional relief could be requested. For example, in the July 27, 2000 hearing, the trial judge stated that in the hearings, he "would have the opportunity to determine if the Respondents were indeed making every or best efforts to comply" (appellants' record, at p. 762). This a reiteration of a claim made earlier in that hearing (appellants' record, at p. 720). Similarly, in the August 9, 2000 hearing, the trial judge stated: "the amount of room I have with respect to a decision or direction or comment is very limited" (appellants' record, at pp. 997-98); this statement implies that the trial judge had the power, albeit limited, to make orders. However, after the setting down of his formal order, at the last hearing in March 2001, he commented that he could not grant further relief, that he had fully disposed of the matter in his order and accompanying reasons, which were released the previous summer. He added that the sessions had a solely informational purpose.

[102] In the meantime, schools were built or renovated and made available to Francophone students. It is difficult to determine whether those sessions accomplished anything in this respect. What these sessions certainly did was sow confusion, doubt and uncertainty about the obligations of the respondents and about the nature of a process that went on over several months. The trial judge appeared to view this process as open ended and indeterminate, with more sessions being scheduled as he wished. Nobody really knew when it all would come to an end.

[103] The uncertainty engendered by the reporting order was not merely inconvenient for the parties. In our view it amounted to a breach of the parties' interest in procedural fairness. One essential feature of a fair procedural rule is that its contents are clearly defined, and known in advance by the parties subject to it . . .

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IV. The Appropriate Role of the Judiciary

[105] While superior courts' powers to craft Charter remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice, as we have shown above, and by constitutional boundaries, as we shall see below. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels. First, by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle. Second, by acting after exhausting its

jurisdiction, it will breach the *functus officio* doctrine. We will look at each of these breaches in turn.

1. The Separation of Powers

[106] Courts are called upon to play a fundamental role in the Canadian constitutional regime. When needed, they must be assertive in enforcing constitutional rights. At times, they have to grant such relief as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment. Despite—or, perhaps, because of—the critical importance of their functions, courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada. In essence, this role is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities. Beyond these functions, an attitude of restraint remains all the more justified, given that, as the majority reasons acknowledge, Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.

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[110] ... Aside from their duties to supervise administrative tribunals created by the executive and to act as vigilant guardians of constitutional rights and the rule of law, courts should, as a general rule, avoid interfering in the management of public administration.

[111] More specifically, once they have rendered judgment, courts should resist the temptation to directly oversee or supervise the administration of their orders. They should generally operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. Once they have declared what the law is, issued their orders and granted such relief as they think is warranted by circumstances and relevant legal rules, courts should take care not to unnecessarily invade the province of public administration. To do otherwise could upset the balance that has been struck between our three branches of government.

[112] This is what occurred in the present case. When the trial judge attempted to oversee the implementation of his order, he not only assumed jurisdiction over a sphere traditionally outside the province of the judiciary, but also acted beyond the jurisdiction with which he was legitimately charged as a trial judge. In other words, he was *functus officio* and breached an important principle which reflects the nature and function of the judiciary in the Canadian constitutional order

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[115] If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding

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[117] In addition to this concern with finality, the question of whether a court is clothed with the requisite authority to act raises concerns related to the separation of powers, a principle that transcends procedural and common law rules. In our view, if a court intervenes, as here, in matters of administration properly entrusted to the executive, it exceeds its proper sphere and thereby breaches the separation of powers. By crossing the boundary between judicial acts and administrative oversight, it acts illegitimately and without jurisdiction. Such a crossing of the boundary cannot be characterized as relief that is “appropriate and just in the circumstances” within the meaning of s. 24(1) of the *Charter*.

V. Application of the Relevant Principles to the Present Case

[118] When the above principles are applied to the present facts, it is evident that McIntyre J.'s admonition in *Mills v. The Queen*, [1986] 1 S.C.R. 863, that s. 24(1) "was not intended to turn the Canadian legal system upside down" is à propos (p. 953). In our view, the trial judge's remedy undermined the proper role of the judiciary within our constitutional order, and unnecessarily upset the balance between the three branches of government. As a result, the trial judge in the present circumstances acted inappropriately, and contrary to s. 24(1).

[119] As we noted above, the trial judge equivocated on the question of whether his purported retention of jurisdiction empowered him to make further orders. Regardless of which position is taken, the separation of powers was still breached. On the one hand, if he did purport to be able to make further orders, based on the evidence presented at the reporting hearings, he was *functus officio*. We find it difficult to imagine how any subsequent order would not have resulted in a change to the original final order. This necessarily falls outside the narrow exceptions provided by *functus officio*, and breaches that rule.

[120] Such a breach would also have resulted in a violation of the separation of powers principle. By purporting to be able to make subsequent orders, the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts. The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor the resources to undertake public administration. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96, it was held that in light of the "myriad options" available to the government to rectify the unconstitutionality of the impugned system, it was "not this Court's role to dictate how this is to be accomplished."

[121] In addition, if he purported to adopt a managerial role, the trial judge undermined the norm of co-operation and mutual respect that not only describes the relationship between the various actors in the constitutional order, but defines its particularly Canadian nature, and invests each branch with legitimacy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, Iacobucci J. noted that "respect by the courts for the legislature and the executive role is as important as ensuring that the other branches respect each others' role and the role of the courts" (para. 136). He discussed the wording of provisions of the Charter that expressed this norm of mutual respect (para. 137), and remarked that this norm has "the effect of enhancing the democratic process" (para. 139).

[122] Similarly, McLachlin J. (as she then was) in the 1990 Weir Memorial Lecture reviewed the elements of our legal culture—including our political climate, our tradition of judicial restraint, and the system of references—that have contributed to a spirit of co-operation, rather than confrontation among the branches of government (B. M. McLachlin, "The Charter: A New Role for the Judiciary?" (1991), 29 Alta. L Rev. 540, at pp. 554-56). Moreover, referring to her reasons in *Dixon v. British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.), she spoke to the importance of considerations of institutional legitimacy for a court crafting a remedy (at p. 557):

It was not for me, I felt, to dictate to the Legislature what sort of law they should enact; that was the responsibility of the elected representatives. But, again following a time-honoured judicial tradition, I offered advice on what limits on the principle of one person-one vote, might be acceptable.

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[124] Therefore, just as the legislature should, after a judicial finding of a *Charter* breach retain independence in writing its legislative response, the executive should after a judicial finding of a breach, retain autonomy in administering government policy that conforms with the *Charter*. In our constitutional order, the legislature and the executive are intimately interrelated and are the principal loci of democratic will. Judicial respect for that will should extend to both branches.

[125] Thus, if the trial judge's initial suggestion that he could continue to make orders, and thereby effectively engage in administrative supervision and decision making accurately characterizes the nature of the reporting sessions, the order for reporting sessions breached the constitutional principle of separation of powers. Since no part of the Constitution can be interpreted to conflict with another, that order cannot be considered appropriate and just in the circumstances, under s. 24(1). The trial judge's order for reporting sessions should also be considered inappropriate because it put into question the Canadian tradition of mutual respect between the judiciary and the institutions that are the repository of democratic will.

[126] If, however, the trial judge's statement in the last session that he could not make further orders correctly characterized his remedial order, then he breached the separation of powers in another way. When considered in light of this constitutional principle and applied to the present facts, McLachlin C.J.'s proposition that "s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise" (*R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*"), at para. 22) leads to the conclusion that the trial judge's remedy was not appropriate and just in the circumstances.

[127] The appellants argued that the trial judge retained jurisdiction *only* to hear reports, and that these hearings had purely "suasive" value. They also argued that the hearings were designed to hold "the Province's feet to the fire" (SCC hearing transcripts). They further suggested that the threat of having to report to the trial judge functioned as an incentive for the government to comply with the best efforts order. In the words of the appellants:

Is it a coincidence that, after a nine month delay (October 1999 to July 2000) the Province called for tenders eight days before the reporting hearing and "fast tracked" the school? The Province knew it would have to report on July 27. The Province ensured that a call for tenders and a construction schedule were in place for July 27.

[128] If this characterization of the trial judge's activity is accurate, then the order for reporting sessions did not result in the exercise of adjudicative, or any other, functions that traditionally define the ambit of a court's proper sphere. Moreover, it resulted in activity that can be characterized as political. According to the appellants' characterization, a primary purpose of the hearings was to put public pressure on the government to act. This kind of pressure is paradigmatically associated with political actors. Indeed, the practice of publicly questioning a government on its performance, without having any legal power to compel it to alter its behaviour, is precisely that undertaken by an opposition party in the legislature during question period.

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[133] We would reiterate, at this point, the importance of clarity and certainty in the provisions of a court order. If the trial judge had precisely defined the terms of the remedy, *in advance*, then the ensuing confusion surrounding his role may not have occurred. Moreover, by complying with this essential element of fair procedure, he may have been able to avoid the constitutional breach of the separation of powers that followed.

VI. Neither a Breach of Procedural Fairness Nor of the Separation of Powers Was Appropriate

[134] ... [T]he trial judge's decision to provide injunctive relief already represented a departure from the cooperative norm that defines and shapes the relationships among the branches of the Canadian constitutional order. We do not deny that in the appropriate factual circumstances, injunctive relief may become necessary. However, the trial judge's order for reporting sessions then purported to go even further, and breached both a fundamental principle of procedural fairness and the constitutional principle of separation of powers.

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[139] ... The facts here do not require us to decide whether previous government non-compliance can ever justify remedial orders that breach principles of procedural fairness and the separation of powers. The Government of Nova Scotia did not refuse to comply with either a prior remedial order or a declaration with respect to its particular obligations in the fact-situation at hand. No such order was made Therefore, it cannot be asserted that the trial judge's order has succeeded where less intrusive remedial measures failed.

[140] Moreover, what was required by the Government of Nova Scotia to comply with its obligations pursuant to s. 23 was not self-evident at trial. The present order, therefore, did not overcome governmental recalcitrance in the face of a clear understanding of what s. 23 required in the circumstances of the case. Remedies must be chosen in light of the nature and structure of the Canadian constitutional order, an important feature of which is the presumption of co-operation between the branches of government. Therefore, unless it is established that this constitutional balance has been upset by the executive's clear defiance of a directly applicable judicial order, increased judicial intervention in public administration will rarely be appropriate.

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[143] In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized Charter remedy, as such an order is entirely idiosyncratic. More importantly, refusing superior courts this power would not deprive claimants of access to that which they are guaranteed by s. 23, namely, the timely provision of minority language instruction facilities. Indeed, if the appellants' characterization of the reporting hearings' purpose is correct, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. ...

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VII. Conclusion

[145] In the result, the trial judge breached both a principle of procedural fairness and the constitutional principle of separation of powers, and it is not clear that alternative, less-intrusive remedial measures, would not have achieved the ends sought. While a trial judge's decisions with respect to remedies are owed deference, we believe that this must be tempered when fundamental legal principles are threatened. In light of these principles, and in the presence of untested alternative remedies, we would find that the present trial judge's retention of jurisdiction was not appropriate and just under s. 24(1). The Court of Appeal was correct in declaring that the order to retain jurisdiction for the purposes of reporting sessions was of no force and effect.

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Appeal allowed.

NOTES AND QUESTIONS

1. Do you agree with the majority that the trial judge's order was fair and within his power? Or do you agree with the minority that it was unfair and exceeded the trial judge's powers?

2. The majority stressed the particular context of the history of denial of minority language education rights in Nova Scotia. To what extent is the remedial approach taken in this case based on the particular nature of rights to minority language schools? Could a similar approach ever be justified, as has been done in other countries, in relation to conditions of confinement in custodial institutions or with respect to health care rights? For a comparison of *Doucet-Boudreau* with a leading case from the South African Constitutional Court on structural interdicts to require governments to supply drugs to prevent mother-to-child HIV transmission, see Kent Roach & Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just, and Equitable?" (2005) 122 SALJ 325.

3. Although the Court disagreed about the particular remedy devised in this case, it agreed that s 24(1) of the Charter provides a basis for an injunction against the government. Would this have changed the remedy in *Little Sisters*? If a judge is prepared to issue injunctive relief under s 24(1), what considerations should guide their exercise of remedial discretion? What will be the likely effect of the stress that the minority places on the clarity of the order and its enforceability? Should contempt powers ever be used to enforce a constitutional remedy? For commentary on this case, see Debra M MacAlister, "Case Comment: Doucet-Boudreau and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation" (2004) 16 NJCL 153; Kent Roach, "Principled Remedial Decision Making Under the Charter" (2004) 25 SCLR (2d) 101; Paul S Rouleau, Subrata Bhattacharjee & Nicolas Rouleau, "Revisiting Doucet-Boudreau: Perspectives on Remedies in Section 23 Cases" (2006) 32 SCLR (2d) 301.

4. The majority in *Doucet-Boudreau* suggested that the trial judge's order could have been improved by greater specificity. Is this a good thing? Will judges be in a position to make more specific orders? Would more specific orders increase concerns about the judiciary invading governmental functions? The importance of clear and enforceable orders was emphasized in *Thibodeau v Air Canada*, 2014 SCC 67, where the Supreme Court reversed a trial judge's decision to retain jurisdiction to ensure that Air Canada developed a "proper monitoring system and procedures to quickly identify, document and quantify potential violations of its" statutory bilingualism requirements within six months (at para 121). Justice Cromwell stated for the Court:

[126] Structural orders play an important, but limited, role in the enforcement of rights through the courts: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 56. Orders of this nature are treated with special care because of two potential and related problems: first, insufficient clarity, which in turn may result in the second, namely the need for ongoing judicial supervision—ongoing supervision being something that courts only exceptionally undertake.

Does the Court's unanimous decision in *Thibodeau* resolve the differences between the majority and the minority in *Doucet-Boudreau*? If so, has the Court moved closer toward the majority or the minority position in *Doucet-Boudreau*? Will the emphasis on clear and enforceable orders make judges more or less willing to issue structural injunctions? For arguments that *Thibodeau* marks the ascendancy of the minority's approach, and that this inappropriately treats governmental defendants as if they were private defendants and will make structural injunctions even rarer in Canada after 2021, Roach argued what is required is a "declaration plus" where courts retain jurisdiction without ordering specific injunctions that can be enforced through contempt of court resulting in fines or even imprisonment. See Kent Roach, "Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response" (2016) 66 UTLJ 3; Kent Roach, *Remedies for Human Rights Violations* (Cambridge: Cambridge University Press, 2021) ch 7.

C. DAMAGES

Vancouver (City) v Ward

2010 SCC 27

McLACHLIN CJ (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, and Cromwell JJ concurring):

I. Introduction

[1] The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the *Constitution Act, 1982*. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1)—the provision at issue in this case—under which the court is authorized to grant such remedies to individuals for infringement of *Charter* rights as it “considers appropriate and just in the circumstances.”

[2] The respondent Ward’s *Charter* rights were violated by Vancouver and British Columbia officials who detained him, strip searched his person and seized his car without cause. The trial judge awarded Mr. Ward damages for the *Charter* breaches, and the majority of the Court of Appeal of British Columbia upheld that award.

[3] This appeal raises the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. Although the *Charter* is 28 years old, authority on this question is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

[4] I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[5] I conclude that damages were properly awarded for the strip search of Mr. Ward, but not justified for the seizure of his car. I would therefore allow the appeal in part.

II. Facts

[6] On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver’s Chinatown. During the ceremony, the Vancouver Police Department (“VPD”) received information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5’9”, with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

[7] Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. On the day, Mr. Ward, a white male, had grey, collar-length hair, was in his mid-40s and was wearing a grey T-shirt with some red on it. Based on his appearance, Mr. Ward

was identified—mistakenly—as the would-be pie-thrower. When the VPD officers noticed him, Mr. Ward was running and appeared to be avoiding interception. The officers chased Mr. Ward down and handcuffed him. Mr. Ward loudly protested his detention and created a disturbance, drawing the attention of a local television camera crew. The television broadcast showed that Mr. Ward had a “very agitated look on his face,” “appeared to be yelling for the benefit of the onlookers” and was “holding back” as he was being escorted down the street.

[8] Mr. Ward was arrested for breach of the peace and taken to the police lockup in Vancouver, which was under the partial management of provincial corrections officers. Upon his arrival, the corrections officers instructed Mr. Ward to remove all his clothes in preparation for a strip search. Mr. Ward complied in part but refused to take off his underwear. The officers did not insist on complete removal and Mr. Ward was never touched during the search. After the search was completed, Mr. Ward was placed in a small cell where he spent several hours before being released.

[9] While Mr. Ward was at the lockup, VPD officers impounded his car for the purpose of searching it once a search warrant had been obtained. VPD detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge Mr. Ward for attempted assault. Mr. Ward was released from the lockup approximately 4.5 hours after he was arrested and several hours after the Prime Minister had left Chinatown following the ceremony.

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VI. Analysis

A. When Are Damages Under Section 24(1) Available?

(1) The Language of Section 24(1) and the Nature of Charter Damages

[16] Section 24(1) empowers courts of competent jurisdiction to grant “appropriate and just” remedies for *Charter* breaches. This language invites a number of observations.

[17] First, the language of the grant is broad. As McIntyre J. observed, “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”: *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. The judge of “competent jurisdiction” has broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case.

[18] Second, it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions. To quote McIntyre J. in *Mills* once more, “[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion”: *Mills*, at p. 965.

[19] Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be “appropriate and just” to award damages. The phrase “appropriate and just” limits what remedies are available. The court’s discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.

[20] The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the

right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

[21] Damages for breach of a claimant's *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other s. 24(1) remedies will be more responsive to the breach.

[22] The term "damages" conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand's *Bill of Rights Act 1990*, an action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable." In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages—including constitutional damages—lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a Charter Breach

[23] Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

(3) Step Two: Functional Justification of Damages

[24] A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. ...

[25] I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

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[30] In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude

damages where the objectives of vindication or deterrence clearly call for an award. Indeed, the view that constitutional damages are available only for pecuniary or physical loss has been widely rejected in other constitutional democracies

[31] In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.

(4) Step Three: Countervailing Factors

[32] As discussed, the basic requirement for the award of damages to be "appropriate and just" is that the award must be functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.

[33] However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

[34] A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just." The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

[35] The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.

[36] The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation: *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667 (C.A.), at p. 678.

[37] Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. ...

[38] Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages

will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.

[39] In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power": para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.

[40] The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:

The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]

[41] The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong," bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle—that duly enacted laws should be enforced until declared invalid—applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

[42] State conduct pursuant to a valid statute may not be the only situation in which the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance, although no others have been established in this case. It may be that in the future other situations may be recognized where the appropriateness of s. 24(1) damages could be negated on grounds of effective governance.

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[45] If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s. 24(1) damages, and the state fails to negate that the

award is "appropriate and just," the final step is to determine the appropriate amount of the damages.

(5) Step Four: Quantum of Section 24(1) Damages

[46] The watchword of s. 24(1) is that the remedy must be "appropriate and just." This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy.

[47] As discussed earlier, damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant's personal injury resulting from the violation of his *Charter* rights. However, as discussed earlier, cases may arise where vindication or deterrence play a major and even exclusive role.

[48] Where the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed, as discussed above. As in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.

[49] In some cases, the *Charter* breach may cause the claimant pecuniary loss. Injuries, physical and psychological, may require medical treatment, with attendant costs. Prolonged detention may result in loss of earnings. *Restitutio in integrum* requires compensation for such financial losses.

[50] In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures

[51] When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

[52] A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

[53] Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair—or "appropriate and just"—to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments

from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

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[55] In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s. 24(1) should not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

[56] A final word on exemplary or punitive damages. In *Mackin*, Justice Gonthier speculated that “[i]n theory, a plaintiff could seek compensatory and punitive damages by way of ‘appropriate and just’ remedy under s. 24(1) of the *Charter*”: para. 79. The reality is that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect. Nevertheless, it is worth noting a general reluctance in the international community to award purely punitive damages

[57] To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

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B. Application to the Facts

[60] At trial, Justice Tysoe held that the provincial correction officers' strip search and the Vancouver Police Department's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. There are thus two distinct claims to consider.

(1) Damages for the Strip Search

[61] The first question is whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages. This requires him to show: (1) a breach of his *Charter* rights; and (2) that an award of damages would serve a functional purpose in the circumstances, having regard to the objects of s. 24(1) damages. If these are established, the burden shifts to the state (step 3) to show why, having regard to countervailing factors, an award of damages under s. 24(1) of the *Charter* would be inappropriate. If the state fails to negate s. 24(1) damages, the inquiry moves to the final step, assessment of the appropriate amount of the damages.

[62] Here the first step is met. Justice Tysoe found that the strip search violated Mr. Ward's personal rights under s. 8 of the *Charter*. This finding is not challenged on this appeal. Nor is it suggested that the British Columbia Supreme Court is not an appropriate forum for the action.

[63] The second question is whether damages would serve a functional purpose by serving one or more of the objects of s. 24(1) damages—compensation, vindication and deterrence.

[64] In this case, the need for compensation bulks large. Mr. Ward's injury was serious. He had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion. Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 90.

[65] The corrections officers' conduct which caused the breach of Mr. Ward's *Charter* rights was also serious. Minimum sensitivity to *Charter* concerns within the

context of the particular situation would have shown the search to be unnecessary and violative. Mr. Ward did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did. In these circumstances, a reasonable person would understand that the indignity resulting from the search was disproportionate to any benefit which the search could have provided. In addition, without asking officers to be conversant with the details of court rulings, it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others

[66] In sum, the *Charter* breach significantly impacted on Mr. Ward's person and rights and the police conduct was serious. The impingement on Mr. Ward calls for compensation. Combined with the police conduct, it also engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages.

[67] The next question is whether the state has established countervailing factors that would render s. 24(1) damages inappropriate or unjust.

[68] The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward's only recourse is a claim for damages under s. 24(1) of the *Charter*. Nor has the state established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.

[69] I conclude that damages for the strip search of Mr. Ward are required in this case to functionally fulfill the objects of public law damages, and therefore are *prima facie* "appropriate and just." The state has not negated this. It follows that damages should be awarded for this breach of Mr. Ward's *Charter* rights.

[70] This brings us to the issue of quantum. As discussed earlier, the amount of damages must reflect what is required to functionally fulfill the relevant objects of s. 24(1) compensation, while remaining fair to both the claimant and the state.

[71] The object of compensation focuses primarily on the claimant's personal loss: physical, psychological, pecuniary, and harm to intangible interests. The claimant should, in so far as possible, be placed in the same position as if his *Charter* rights had not been infringed. Strip searches are inherently humiliating and thus constitute a significant injury to an individual's intangible interests regardless of the manner in which they are carried out. That said, the present search was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward's underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward's injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.

[72] The objects of vindication and deterrence engage the seriousness of the state conduct. The corrections officers' conduct was serious and reflected a lack of

sensitivity to *Charter* concerns. That said, the officers' action was not intentional, in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.

[73] Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's \$5,000 damage award was appropriate.

(2) Damages for the Car Seizure

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[77] The object of compensation is not engaged by the seizure of the car. The trial judge found that Mr. Ward did not suffer any injury as a result of the seizure. His car was never searched and, upon his release from lockup, Mr. Ward was driven to the police compound to pick up the vehicle. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but rather arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for pickup.

[78] I conclude that a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

VII. Disposition

[79] The appeal is allowed in part. The award against the City in the amount of \$100 is set aside, substituted by a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The award of damages against the Province in the sum of \$5,000 for breach of Mr. Ward's s. 8 *Charter* rights is confirmed.

Appeal allowed in part.

NOTES AND QUESTIONS

1. The clear four-part structure in *Ward* for awarding damages under s 24(1) of the *Charter* is not applied in all cases. If harm is caused by legislation that is found to be unconstitutional, damages will be awarded under s 24(1) only if, in addition to a *Charter* violation and a functional justification for the award of damages, the state has "acted negligently, in bad faith or by abusing its powers": *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, [2002 SCC 13](#) at para 82. This additional fault requirement is related to the Court's reluctance to combine a s 24(1) remedy (damages) with a declaration of invalidity under s 52(1) of the *Constitution Act, 1982*. It is also related to a sense that, when legislating, the state should benefit from both a presumption that its laws are constitutional and a qualified immunity. Some state actors may benefit from a qualified immunity, even in cases where legislation does not specifically authorize actions that violate the *Charter*. In *Henry v British Columbia (AG)*, [2015 SCC 24](#), a majority of the Court imposed a fault requirement just short of malice when an applicant sought damages under s 24(1) for the prosecutor's failure to disclose material. Justice Moldaver stressed that such a fault requirement was necessary, in addition to a *Charter* violation, to ensure that prosecutorial conduct was not chilled. The Chief Justice

dissented and, as in *Ward*, would not have required fault in addition to the Charter violation. Note that fault requirements or qualified immunities as contemplated by the Court in both *Mackin* and *Henry* do not provide absolute immunity. A trial judge subsequently held that prosecutors had failed to make disclosure with the sufficient level of fault and awarded Henry, who had been wrongfully convicted and imprisoned for 23 years, \$7.5 million in damages under s 24(1) in order to vindicate his Charter rights and deter similar violations in the future: *Henry v British Columbia*, [2016 BCSC 1038](#).

2. In *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, [2020 SCC 13](#), the Supreme Court refused to extend the *Mackin* qualified immunity that protects governments from having to pay damages imposed by unconstitutional laws unless they act with fault such as an abuse of power or bad faith to all governmental policies that authorized violations of Charter rights. Chief Justice Wagner stated for the majority:

[166] The trial judge awarded damages to the CSF as a remedy for the infringement of s. 23 resulting from the inadequate funding of school transportation. The Court of Appeal, relying on *Ward* and *Mackin*, reversed the trial judge's decision and cited the government's limited immunity in this regard. It held that concerns for good governance justify affording governments immunity for decisions made in accordance with any type of government policy that is subsequently found to constitute an infringement. In my view, this was an error. There is no government immunity for decisions made in accordance with government policies.

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[172] An overly broad application of the limited government immunity could in fact have undesirable effects. It would permit a government to avoid liability for damages simply by showing that its unlawful actions are authorized by its policies.

[173] This concern is accentuated by the fact that government policies do not usually result from a public process and that the "government policy" concept has not been defined. Does it concern any form of directives or guidelines issued by the government? If so, the immunity the Court is being asked to recognize would be very broad. In contrast, a law is an easily identifiable instrument. It is the product of a vote taken by a legislative body. The preparation of a law is a transparent public process that is central to the democratic process. It is therefore appropriate to give the government, in respect of a well-defined instrument such as a law, an immunity that it is nonetheless inadvisable to give it for undefined instruments with unclear limits, such as government policies. The latter approach would reduce the chances of obtaining access to justice and an appropriate and just remedy for individuals whose rights have been infringed. The effect of expanding the scope of the government immunity like this is that bringing an action for damages in response to a Charter infringement would become illusory.

Justices Brown and Rowe would have extended the *Mackin* qualified immunity to violations authorized by governmental policies with the exception of s 23 of the Charter because that right explicitly mandates positive action. They argued:

[285] Before this Court, the appellants have argued that *Mackin* immunity applies only to legislation—not to policies. The Chief Justice shares this view. We respectfully disagree. We say that the immunity generally applies to policies. Indeed, while our colleague sees this issue as never before having been considered (at para. 169), this Court's jurisprudence has consistently framed this principle in broad terms that encompass policies. Moreover, the same rationale is engaged regardless of the vehicle for governmental action. We say respectfully that this jurisprudence should be viewed as dispositive of the broad issue of whether *Mackin* applies to policies. As we will discuss, however, an exception is warranted for s. 23.

[286] In *Mackin* itself, the Court formulated the immunity in undeniably broad terms:

According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the *mere enactment or application of a law* that is subsequently declared to be unconstitutional ... In other words "*i]nvalidity of governmental action*, without more, clearly should not be a basis for liability for harm caused by the action" ... In the legal sense, therefore, *both public officials and legislative bodies* enjoy limited immunity against actions in civil liability based on the fact that a *legislative instrument* is invalid. [Emphasis added; emphasis in original deleted; citations omitted; para. 78.]

Do you agree that *Mackin* settled the issue and that qualified immunity applies when a Charter violation was authorized by policies developed by the executive and not just on the basis of violations authorized by legislation? Should it? Is any qualified immunity that requires a Charter applicant to establish governmental fault in addition to a Charter violation and a need for damages to compensate, vindicate or deter Charter violations even necessary given the third countervailing factor stage of the analysis in *Ward*? Note that qualified immunity often prevents the award of damages for violations of rights in the American *Bill of Rights*. The *George Floyd Justice in Policing Act* (HR 1280—117th Congress (2021–22), not enacted by both houses of Congress) passed by the House of Representatives but not the Senate would repeal qualified immunity.

3. Constitutional damage awards in the United States are driven by a concern about over-deterring individual governmental officials in the exercise of their duties. Are these concerns compelling under *Ward*, where damages were awarded not against individual officials but against the state directly? For arguments that the system of awarding damages against governments is superior because it allows the government to take steps to minimize the costs of violations, see Peter H Shuck, *Suing Government* (New Haven, Conn: Yale University Press, 1983).

4. To what extent does the third part of the *Ward* analysis, which allows the government to demonstrate that damages are not appropriate because of good governance concerns and the availability of alternative remedies, resemble the analysis under s 1 of the Charter? Can proportionality principles taken from s 1 help guide and make more transparent the exercise of remedial discretion? On this, see Kent Roach, "A Late Spring: Charter Damages After *Ward v Vancouver*" (2011) 29 NJCL 145.

5. One issue with respect to damages is how courts should value violation of Charter rights. In particular, concerns have been expressed that the quantum of \$5,000 damages awarded in *Ward* was too low in light of the serious violation caused by the unconstitutional strip search as well as the economics of litigation, especially in cases where the government, if successful, could claim costs from the unsuccessful plaintiff. Should higher damages be awarded? Would this raise concerns about impinging on good governance? Note that because of the generally low quantum of Charter damage awards that such claims are increasingly aggregated in the form of class actions.

6. For a fuller discussion of Charter damages, see Kenneth D Cooper-Stephenson, *Charter Damage Claims* (Calgary: Carswell, 1990); Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2013); Kenneth D Cooper-Stephenson, *Constitutional Damages Worldwide* (Toronto: Carswell, 2013).

CHAPTER TWENTY-SIX

AMENDING THE CONSTITUTION

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I. NEGOTIATING A CONSTITUTIONAL AMENDMENT PROCEDURE

The year is 1864. You are a legal advisor to one of the delegates at the Charlottetown Conference, a key meeting that would lead to Confederation in 1867. Delegates at this conference have agreed to discuss the terms of union, including the rules that would ultimately appear in what we identify today as the *Constitution Act, 1867*. In the briefing materials you prepare for the delegate for whom you work, do you offer advice on how to design a procedure that will allow Canadians in the future to make alterations to the *Constitution Act, 1867* after it later

becomes law? If yes, why is it important to specify such a procedure in advance? If no, what do you gain and lose by keeping the *Constitution Act, 1867* silent on how it can be revised?

Assume you have prepared advice on how to design a procedure to alter what would become the *Constitution Act, 1867*. What is the content of your advice? Do you include specific details about who may initiate the change, who may ratify the change, and who may promulgate the change? Do you include limitations on what in the initial text can later be changed? And what about the possibility of changing the *Constitution Act, 1867* during periods of emergency: does your advice make it easier or harder to make changes at a time of stress, trauma, and presumably of great need in the country?

Class activity: Assemble yourselves into separate groups, each representing a different set of delegates at the Charlottetown Conference. Try to negotiate an agreement on whether to include such a procedure in the *Constitution Act, 1867*, and also on the finer points of the procedure. Did you succeed? What challenges did you encounter? What opportunities did you identify for common ground? In preparation for your negotiations, you may find it useful to read this overview of constitutional amendment: Markus Böckenförde, *Constitutional Amendment Procedures: International IDEA Constitution-Building Primer 10*, 2nd ed (Stockholm, Sweden: IDEA, 2017), online (pdf): <<https://www.idea.int/sites/default/files/publications/constitutional-amendment-procedures-primer.pdf>>.

As you read the materials in this chapter, keep in mind your early intuitions and expectations about whether, why, and how to create a procedure to update the *Constitution Act, 1867* and other constitutional laws that form part of the Constitution of Canada. Does the way Canadians amend the Constitution align with your first intuitions and expectations?

Our objective for this chapter is to introduce you to the design, history, and operation of constitutional amendment in Canada, with specific attention to how the relevant case law and academic analysis evaluates how the Constitution of Canada manages to balance enough flexibility to allow for change when it is needed but rigid enough to protect the fundamental commitments of the Constitution from easy repeal or replacement.

II. INTRODUCTION: WHY AMEND?

A constitution and procedures for its amendment are like hockey and pucks—one can hardly work as it is supposed to without the other. It is no surprise, then, that only a few of the world's constitutions—by one count fewer than 4 percent—do not codify amendment procedures authorizing alterations to their text: see Francesco Giovannoni, "Amendment Rules in Constitutions" (2003) 115 *Public Choice* 37 at 37. Why do almost all constitutional designers choose to write amendment procedures into their constitutional texts? There is certainly some soft pressure to conform to what appears to be a global norm of entrenching rules of constitutional amendment. But "other constitutions have them, so ours should too" just does not seem like a good enough reason to justify including anything in a constitution, especially because the process of constitution-making ordinarily involves fiercely competing interests, finite time and resources, and high costs in the event of failure.

The main purpose of amendment is evident in the word itself. The verb "to amend" derives from the Latin *emendare*, meaning "to free from fault": see Walter W Skeat, *A Concise Etymological Dictionary of the English Language* (Oxford: Clarendon Press, 1885) at 133. Where a political community identifies something in need of updating in its codified constitution or discovers an outright error in its text, the actors authorized to amend the constitution can initiate the process of constitutional amendment to free their constitution from the observed fault without having to write an altogether new constitution. This orderly process of piece-meal and peaceful constitutional change has many advantages over its alternatives. Would anyone prefer to live with a faulty constitution unsuited to the times or to risk outright revolutionary change accompanied perhaps by violence and the need to start from scratch?

Not all constitutional amendments are adopted in an orderly process, nor are they all done in piecemeal fashion. Here in Canada, as we show in Section III of this chapter, the successful patriation of the Constitution in 1982 and the failed Meech Lake and Charlottetown accords were far from orderly, and they were all efforts at wholesale constitutional transformation. These exceptions to how constitutional amendment has typically unfolded in Canada reinforce the rule that the procedures for constitutional amendment are designed to provide a clear and actionable roadmap for the amending actors to respond to the changing political, social, and economic needs of the country. At their best, amendment procedures in constitutional democracies aggregate and translate popular preferences into constitutional rules while balancing these preferences against the larger backdrop of a commitment to constitutionalism, human rights, and the rule of law.

Still, as Peter Hogg has quite rightly observed, “[i]t is always difficult to amend a country’s constitution”: see Peter W Hogg, “The Difficulty of Amending the Constitution of Canada” (1993) 31 Osgoode Hall LJ 41 at 60. Yet whether the process of amendment is ever successfully used, it is still important for a constitution to include amendment procedures. Perhaps the most basic motivation is to distinguish the constitutional text from ordinary law. Constitutions are generally altered only with recourse to procedures that are more demanding than the simple majority votes required to change or repeal an ordinary statute. Constitutions can confer fundamental rights and freedoms, create and constrain public institutions, and establish rules for the exercise of democracy. It is commonly asserted that the content of constitutions ought to be insulated from change by the variable whims of electoral majorities. Do you agree?

III. CONSTITUTIONAL AMENDMENT IN CANADA BEFORE 1982

The power of constitutional amendment is an important marker of sovereignty. As the materials that follow show, until 1982, this power was not fully exercisable by Canadian actors.

A. CONSTITUTIONAL AMENDMENT AT CONFEDERATION

The *British North America Act, 1867* (BNA Act; since renamed the *Constitution Act, 1867*) did not include a procedure for its own amendment in Canada by Canadian actors. The Act instead remained amendable by the same body that had written it to begin with—the Parliament of the United Kingdom. There were a few exceptions. First, s 92(1) of the 1867 Act (since repealed) authorized a provincial legislature to amend its own constitution as to the matters falling within its jurisdiction. And s 101 of the Act authorized the Parliament of Canada to make amendments concerning courts:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

When compared with the otherwise plenary amendment power of the Parliament of the United Kingdom, these narrow domestic powers were a reminder that the BNA Act was essentially a colonial statute. The British *Statute of Westminster* later began to transform the Act from a colonial statute to a quasi-constitution. As discussed in Chapter 1, Introduction, the *Statute of Westminster* provided that no subsequent British statute would apply to Canada unless it had been enacted at the request and with the consent of Canada. Canadian legislative bodies were also authorized to repeal or amend imperial statutes applicable to Canada, with one major exception: the BNA Act. The result was that the Parliament of the United Kingdom retained its power over constitutional amendments to the most significant parts of

the Constitution of Canada. But this exception was softened by a practice, adopted at the 1930 imperial conference, that the Parliament of the United Kingdom would amend the Constitution of Canada only at the request and with the consent of Canada. See William Livingston, "The Amending Power of the Canadian Parliament" (1951) 45 Am Polit Sci Rev 437 at 437, 438, 441.

In 1949, the Parliament of the United Kingdom passed the *British North America (No 2) Act, 1949*, which conferred on the Parliament of Canada the power to amend, by simple majority, a limited category of matters concerning the "Constitution of Canada." The amendment was inserted into the *British North America Act, 1867*, as s 91(1):

91. ... [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(1) The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

Some critics feared that the amendment would allow the Parliament of Canada to amend the Constitution in respect of matters of importance to provinces without their consent. FR Scott explored the basis for this concern in an important article published the year after the amendment was adopted:

It is clear that the refusal of the Canadian government to consult with the provinces before the adoption of the amendment, as urged by the Conservative party and by several provincial premiers, indicates its rejection of the compact theory of Confederation. Mr. St. Laurent in effect admitted this ... though he stressed that his proposal involved no change except a change of the venue where the amendments can be made, since only matters "within the exclusive concern of the federal authorities" were being dealt with. As no one knows, however, just what such matters may be, and as the provinces might take a different view from that of the Canadian government, or even of the Supreme Court were the question referred to it, we must consider this unilateral action by the federal Parliament as further evidence against the claims of those who would treat the constitution as a compact, either in law or in political theory.

As already noted, the federal amending power is an all-inclusive power, the "amendment from time to time of the Constitution of Canada," subject to certain exceptions. The phrase "the Constitution of Canada" includes the provincial constitutions. There is no separate "federal" constitution; the constitution is a single body of law setting up and apportioning authority to different organs of the state, some federal and some provincial. If the section had stopped there, it would have crystallized into law the present practice by which, through the joint address, Ottawa can secure any amendment it desires from the Parliament of the United Kingdom. But the section goes on to [stipulate] that the federal power of amendment shall not extend over [a number of subjects]

In thus limiting its amending powers the federal Parliament has indicated its willingness to give a protection to provincial and minority rights which did not formerly exist. Formerly, only convention restrained Parliament from requesting any amendment—even one affecting so fundamental a right as the right to the two official languages in section 133 of the British

North America Act. Now Parliament has withdrawn certain defined classes of matters from its competence, leaving them to be amended by a process to be agreed upon at the Dominion–provincial conference. ... However, should there be a failure to achieve agreement on the amending procedure for matters falling within any of the excepted classes ... , then presumably the former conventional method of amendment in London after a joint address from Ottawa will continue. This would indeed create an anomalous situation, since Ottawa would then possess both processes of amendment itself—one, over exclusively federal matters, by its own legislation, and the other, over all other matters, by joint address that Westminster cannot refuse to implement. In either case a mere majority vote in both Houses is sufficient for the adoption of the amendment. There may be political wisdom in consulting with the provinces before adopting a joint address requesting an amendment affecting provincial rights, but there is certainly no legal necessity for so doing.

See FR Scott, "The British North America (No 2) Act, 1949" (1950) 8 UTLJ 201 at 201, 202, 203-4. As Scott notes, the Parliament of Canada did not consult the provinces about the 1949 amendment. Should it have? On the one hand, the amendment did not affect the powers or prerogatives of the provinces, so on what basis could the provinces object? On the other hand, the amendment conferred a power that, as Scott suggests, Parliament could conceivably deploy to amend the Constitution in respect of provincial matters. Had you been a legal adviser to Prime Minister St Laurent at the time, would you have advised him to consult with the provinces? What information would assist you in making such a determination?

B. TOWARD A DOMESTIC AMENDMENT PROCEDURE

The 1949 amendment did not withdraw from the Parliament of the United Kingdom the power to formalize constitutional amendments to the Constitution of Canada. But by then, the power of constitutional amendment in Canada was divided—Canada would approve the amendment before officially requesting its entrenchment by the Parliament of the United Kingdom, and the United Kingdom, no longer able to exercise the discretion to deny Canada's request, would thereafter formalize the constitutional amendment by passing a parliamentary statute.

There remained the question how Canada might forward an amendment concerning matters of federal–provincial concern. It was clear that the Parliament of Canada had the legal authority to make the request unilaterally. But only a multilateral process of federal–provincial consultation and approval could clothe it with the necessary political authority. By 1965, four general principles could be identified from a historical study of the procedures that had been used since Confederation to make amendments to the BNA Act:

The first general principle ... is that [n]o Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.

The second general principle is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle ... has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address to the Canadian House of Commons and Senate to the Crown.

The third general principle is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province.

The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal–provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

There have been five instances—in 1907, 1940, 1951, 1960 and 1964—of federal consultation with all provinces on matters of direct concern to all of them. There has been only one instance up to the present time in which an amendment was sought after consultation with only those provinces directly affected by it. This was the amendment of 1930, which transferred to the Western provinces natural resources that had been under the control of the federal government since their admission to Confederation. There have been ten instances [in 1871, 1875, 1886, 1895, 1915, 1916, 1943, 1946, and twice in 1949] of amendments to the Constitution without prior consultation with the provinces on matters that the federal government considered were of exclusive federal concern. In the last four of these, one or two provinces protested that federal–provincial consultations should have taken place prior to action by Parliament.

See Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965) at 15–16. As we will see below, in Section IV, Constitutional Amendment After 1982, the fourth general principle would feature prominently in the Supreme Court of Canada's reasons in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25 [Patriation Reference].

Whether the practice of prior provincial consultation had matured into a convention was critical to designing a fully domestic amendment procedure for Canada. If it had, there would be a political requirement to entrench the convention into the amendment process. But had the practice been a mere practice all along—not a convention—there would be less pressure as a political matter, and certainly none rooted in constitutional law, to translate the practice into a constitutionally entrenched rule requiring provincial consultation for constitutional amendments involving matters of federal–provincial relations.

Serious efforts to design a domestic process of constitutional amendment had begun even before the coming into force of the *Statute of Westminster*. There were nearly 15 failed attempts to negotiate a constitutional amendment procedure. Spurred by the Balfour Report in 1926, the prime minister and the premiers of the provinces gathered the next year at an intergovernmental conference to begin the work of “patriating” the Constitution.

The search for an amending formula became known as the patriation debate.

Agreement on amending procedures would allow Canadians to “patriate” the Constitution. The words “patriate” and “patriation” were devised by Canadians (as an alternative to “repatriate” or “repatriation”) to acknowledge the legal reality that the British North America Act, 1867, although largely developed by British North Americans in British North America, had never been legally domiciled in Canada and subsequently sent abroad. Hence, legally, the Constitution could not be repatriated or brought back home again after an absence. This legal distinction did not affect French language usage in Canada, which consistently employed the word “rapatriement.”

The patriation debate, launched by the Balfour Report in 1926, would be marked by many attempts to resolve the issue and would last 56 years. Canada would become, with the adoption of the Statute of Westminster in 1931, an independent state in all respects except that the British Parliament would retain legislative authority over the British North America Act and its amendments, until the patriation issue was concluded in 1982.

See James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 25. For a detailed account of the many steps toward Canada's adoption of its new process of constitutional amendment, see Hurley at 25–67.

Canadian actors tried and tried again until they finally succeeded, almost six decades later, in bringing the Constitution home. Their efforts culminated with the adoption of the *Constitution Act, 1982*, which included in its text a complicated escalating structure of constitutional amendment, reviewed in Section IV, which follows.

Class activity: Hurley details over one dozen failed efforts to negotiate a homegrown plan for patriation. See Hurley, *Amending Canada's Constitution* at 25-67, online (pdf): <http://publications.gc.ca/collections/collection_2014/priv/CP32-63-1995-eng.pdf>. Pick one of those failed attempts and conduct additional research about it. Why was that specific plan inadequate to rally the agreement of all actors? What could have been done to reach an agreement on your chosen proposal? Was it missing something essential, or did it include something disqualifying?

IV. CONSTITUTIONAL AMENDMENT AFTER 1982

A. DESIGN ISSUES

If you participated in the class activity on the 1864 Charlottetown negotiations (see Section I, above), you would have recognized the many difficult issues that arise in designing an amending formula.

In the Canadian context, two have predominated. The first is the locus of sovereignty—that is, what or who should be vested with the power of constitutional amendment. Should the power be directly vested with citizens, or with the governments that are accountable to them? If the former, should an elected constituent assembly deliberate on constitutional amendments in advance of voting on them, or would ratification by a popular referendum with universal suffrage suffice? If the latter, are legislative assemblies the appropriate governmental institutions, and if so, given the federal nature of our polity, should some combination of legislative assemblies (both provincial and federal) be necessary to achieve constitutional change? Should certain groups, such as Indigenous peoples in Canada, be required to consent to amendments affecting their rights? As these questions make clear, identifying the locus of sovereignty for constitutional change is parasitic on an underlying conception of the nature of the political community whose terms of association are found in that constitutional document. And to the extent that there is a lack of an agreement on that conception—as is arguably the case in Canada—the process for constitutional amendment becomes a forum through which competing conceptions of the Canadian political community come into conflict.

Closely related to the first issue is a second: the correct balance to be struck between stability and flexibility. On the one hand, a constitution is meant to provide a framework within which the ordinary politics of political communities take place. If this framework were easily subject to change, it would be more difficult for it to provide a set of background rules for political decision-making. Moreover, since a constitution often addresses controversial issues, making constitutional change difficult arguably protects political decision-making because it reduces the capacity for constitutional politics to crowd out ordinary politics—that is, the politics of non-constitutional issues. On the other hand, a constitution that is too difficult to change may be incapable of responding to the changing nature of the political community or to fundamental challenges to the constitutional order itself. An overly rigid constitution risks becoming illegitimate, a “suicide pact,” rather than the foundation for the ongoing existence and functioning of a political order. The balance between stability and flexibility plays out in the level of support required for constitutional change. For example, should there be a super-majority requirement within legislative assemblies? Is a simple majority sufficient for referenda?

B. THE LAW AND CONVENTION OF PROVINCIAL CONSENT

The process for amending the Canadian Constitution—often referred to as the amending formula—has been a source of ongoing controversy. This exploded in 1980 when, in the face of failure to secure the agreement of the provinces on what would become the *Constitution*

Act, 1982, the federal government announced its intention to secure the necessary constitutional amendment without provincial consent.

The federal move prompted a series of constitutional references before several provincial courts of appeal that were heard together by the Supreme Court in the 1981 *Patriation Reference*, excerpted below. The provinces argued that Canadian constitutional practice had crystallized into a *legal* requirement for provincial consent to constitutional changes affecting provincial interests. The federal government took the position that no such consent was required. Moreover, the provinces made the additional argument that a constitutional *convention* existed for provincial consent, a position that the federal government rejected as well. A majority of the Court held, in a 7–2 ruling, that there was no *legal* requirement of provincial consent. But a slightly smaller six-person majority also held that a constitutional *convention* had been established requiring a “substantial degree” of provincial consent to amendments affecting the provinces’ interests.

Re: Resolution to amend the Constitution

[1981] 1 SCR 753, 1981 CanLII 25

[Reproduced first are the majority reasons on the issue of whether there was a *legal* requirement for provincial consent.]

LASKIN CJ and DICKSON, BEETZ, ESTEY, McINTYRE, CHOUINARD, and LAMER JJ:

The References in question here were prompted by the opposition of six provinces, later joined by two others, to a proposed Resolution which was published on October 2, 1980 and intended for submission to the House of Commons and as well to the Senate of Canada. It contained an address to be presented to Her Majesty the Queen in right of the United Kingdom respecting what may generally be referred to as the Constitution of Canada. The address laid before the House of Commons on October 6, 1980, was in these terms:

... An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1981* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.
2. No Act of Parliament of the United Kingdom passed after the *Constitution Act, 1981* comes into force shall extend to Canada as part of its law.
3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.
4. This Act may be cited as the *Canada Act*.

... The proposed Resolution, as the terms of the address indicate, includes a statute which, in turn, has appended to it another statute providing for the patriation of the *British North America Act* (and a consequent change of name), with an amending procedure, and a *Charter of Rights and Freedoms* including a range of provisions (to be entrenched against legislative invasion) which it is unnecessary to enumerate. ... Although there was general agreement on the desirability of patriation with an amending procedure, agreement could not be reached at conferences preceding the introduction of the proposed Resolution into the House of Commons, either on the constituents of such a procedure or on the formula to be embodied therein, or on the inclusion of a *Charter of Rights*.

• • •

There are two broad aspects to the matter under discussion which divide into a number of separate issues: (1) the authority of the two federal Houses to proceed by resolution where provincial powers and federal–provincial relationships are thereby affected and (2) the role or authority of the Parliament of the United Kingdom to act on the Resolution. The first point concerns the need of legal power to initiate the process in Canada; the second concerns legal power or want of it in the Parliament of the United Kingdom to act on the Resolution when it does not carry the consent of the provinces.

The submission of the eight provinces which invites this Court to consider the position of the British Parliament is based on the *Statute of Westminster, 1931* in its application to Canada. The submission is that the effect of the Statute is to qualify the authority of the British Parliament to act on the federal Resolution without previous provincial consent where provincial powers and interests are thereby affected, as they plainly are here. This issue will be examined later in these reasons.

• • •

The proposition was advanced on behalf of the Attorney General of Manitoba that a convention may crystallize into law and that the requirement of provincial consent to the kind of resolution that we have here, although in origin political, has become a rule of law. (No firm position was taken on whether the consent must be that of the governments or that of the legislatures.)

In our view, this is not so. No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of a convention, as political in inception and as depending on a consistent course of political recognition ... is inconsistent with its legal enforcement.

• • •

Turning now to the authority or power of the two federal Houses to proceed by resolution to forward the address and appended draft statutes to Her Majesty the Queen for enactment by the Parliament of the United Kingdom. There is no limit anywhere in law, either in Canada or in the United Kingdom (having regard to s. 18 of the *British North America Act*, as enacted by 1875 (U.K.), c. 38, which ties the privileges, immunities and powers of the federal Houses to those of the British House of Commons) to the power of the Houses to pass resolutions. Under s. 18 aforesaid, the federal Parliament may by statute define those privileges, immunities and powers, so long as they do not exceed those held and enjoyed by the British House of Commons at the time of the passing of the federal statute.

• • •

It is said, however, that where the resolution touches provincial powers, as the one in question here does, there is a limitation on federal authority to pass it on to Her Majesty the Queen unless there is provincial consent. If there is such a limitation, it arises not from any limitation on the power to adopt resolutions but from an external limitation based on other considerations which will shortly be considered.

• • •

For the moment, it is relevant to point out that even in those cases where an amendment to the *British North America Act* was founded on a resolution of the federal Houses after having received provincial consent, there is no instance, save in the *British North America Act, 1930* where such consent was recited in the resolution. The matter remained, in short, a conventional one within Canada, without effect on the validity of the resolution in respect of United Kingdom action. ...

• • •

This Court is being asked, in effect, to enshrine as a legal imperative a principle of unanimity for constitutional amendment to overcome the anomaly—more of an anomaly today than it was in 1867—that the *British North America Act* contained no provision for effecting amendments by Canadian action alone. ...

The effect of those [provincial] views, if they are correct . . . , [is] to leave at least the formal amending authority in the United Kingdom Parliament. Reference will be made later to the ingredients of the arguments on legality. The effect of the present Resolution is to terminate any need to resort to the United Kingdom Parliament in the future. ...

• • •

The provincial contentions asserted a legal incapacity in the federal Houses to proceed with the Resolution which is the subject of the References and of the appeals here. Joined to this assertion was a claim that the United Kingdom Parliament had, in effect, relinquished its legal power to act on a resolution such as the one before this Court, and that it could only act in relation to Canada if a request was made by "the proper authorities." ... It is not that the provinces must be joined in the federal address to Her Majesty the Queen; that was not argued. Rather their consent (or, as in the Saskatchewan submission, substantial provincial compliance or approval) was required as a condition of the validity of the process by address and resolution and, equally, as a condition of valid action thereon by the United Kingdom Parliament.

• • •

The Court was invited to regard the Balfour Declaration of 1926 as embracing the provinces of Canada (and, presumably, the states of the sister dominion, Australia) in its reference to "autonomous communities." That well-known statement of principle ... is as follows:

They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

It is impossible to seek nourishment for the provincial position in these appeals in this Declaration. The provinces did not come into the picture in the march to the *Statute of Westminster, 1931* until after the 1929 Conference on the Operation of Dominion Legislation, although to a degree before the Imperial Conference of 1930. ...

Although the Balfour Declaration cannot, of itself, support the assertion of provincial autonomy in the wide sense contended for, it seems to have been regarded as retroactively having that effect by reason of the ultimate enactment of the *Statute of Westminster, 1931* ... [which stated *inter alia*]:

• • •

2(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of

Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion. ...

7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces,

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

• • •

The *Colonial Laws Validity Act* was intended to be a liberating statute, releasing colonial legislatures from subservience to British common law (subject to Privy Council authority) and from subservience to British statute law unless such statute law applied expressly or by necessary implication to the colony. ... Following the Imperial Conference of 1930 and as a result of the Dominion–Provincial Conference of 1931, the provinces obtained an assurance that they too would benefit by the repeal of the *Colonial Laws Validity Act* and by being empowered to repeal any British legislation made applicable to them. This was achieved by s. 7(2) of the Statute of Westminster, 1931. There did not appear to be any need to include them in s. 4.

The most important issue was, however, the position of the Dominion vis-à-vis the *British North America Act*. What s. 7(1), reinforced by s. 7(3), appeared to do was to maintain the *status quo ante*; that is, to leave any changes in the *British North America Act* (that is, such changes which, under its terms, could not be carried out by legislation of the provinces or of the Dominion) to the prevailing situation, namely, with the legislative authority of the United Kingdom Parliament being left untouched. ...

• • •

It was also urged upon this Court that s. 7(1), which in terms ("Nothing in this Act shall be deemed to apply to ... the British North America Acts, 1867 to 1930") removes the *British North America Act* (at least as it then stood) from the application of any terms of the Statute of Westminster, 1931 was addressed to ss. 2 and 3 and not to s. 4. The argument goes that s. 7(1) does not exclude the application of s. 4; that s. 4 must be read in its preclusive effect on a dominion as having the provinces in view; that the "request and consent" which must be declared in a British statute to make it applicable to Canada, is the request and consent of the Dominion and the provinces if the statute is one affecting provincial interests or powers. ...

Nothing in the language of the Statute of Westminster, 1931 supports the provincial position yet it is on this interpretation that it is contended that the Parliament of the United Kingdom has relinquished or yielded its previous omnipotent legal authority in relation to the *British North America Act*, one of its own statutes. ...

• • •

At least with regard to the amending formula the process in question here concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution.

We are involved here with a finishing operation Were it otherwise, there would be no need to resort to the Resolution procedure invoked here, a procedure which takes account of the intergovernmental and international link between Canada and Great Britain. There is no comparable link that engages the provinces with Great Britain. Moreover, it is to confuse the issue of process, which is the basic question

here, with the legal competence of the British Parliament The legal competence of that Parliament, for the reasons already given, remains unimpaired, and it is for it alone to determine if and how it will act.

• • •

Support for a legal requirement of provincial ... is, finally, asserted to lie in the preamble of the *British North America Act* itself, and ... the nature of Canadian federalism. ...

What is stressed is the desire of the named provinces "to be federally united ... with a Constitution similar in Principle to that of the United Kingdom." The preamble speaks also of union into "One Dominion" and of the establishment of the Union "by Authority of Parliament," that is the United Kingdom Parliament. What, then, is to be drawn from the preamble as a matter of law? A preamble, needless to say, has no enacting force but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears. ...

There is not and cannot be any standardized federal system from which particular conclusions must necessarily be drawn. ... Allocations of legislative power differ as do the institutional arrangements through which power is exercised. This Court is being asked by the provinces which object to the so-called federal "package" to say that the internal distribution of legislative power must be projected externally, as a matter of law, although there is no legal warrant for this assertion and, indeed, what legal authority exists (as in s. 3 of the *Statute of Westminster, 1931*) denies this provincial position.

At bottom, it is this distribution, it is the allocation of legislative power as between the central Parliament and the provincial legislatures, that the provinces rely on as precluding unilateral federal action The Attorney General of Canada was pushed to the extreme by being forced to answer affirmatively the theoretical question whether in law the federal government could procure an amendment to the *British North America Act* that would turn Canada into a unitary state. That is not what the present Resolution envisages because the essential federal character of the country is preserved under the enactments proposed by the Resolution.

... There is here, however, an unprecedented situation in which the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it. The law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power.

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What is central here is the untrammelled authority at law of the two federal Houses to proceed as they wish in the management of their own procedures and hence to adopt the Resolution which is intended for submission to Her Majesty for action thereon by the United Kingdom Parliament. The *British North America Act* does not, either in terms or by implication, control this authority or require that it be subordinated to provincial assent. Nor does the *Statute of Westminster, 1931* interpose any requirement of such assent. ...

[The next excerpt is from the majority reasons on the issue of a constitutional convention requiring substantial provincial consent.]

MARTLAND, RITCHIE, DICKSON, BEETZ, CHOUINARD, and LAMER JJ:

... The issue raised by the question is essentially whether there is a constitutional convention that the House of Commons and Senate of Canada will not proceed alone. The thrust of the question is accordingly on whether or not there is a conventional requirement for provincial agreement, not on whether the agreement should be unanimous assuming that it is required. ...

• • •

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period

Being based on custom and precedent, constitutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of statutes such as the *Statute of Westminster, 1931*, or in the proceedings and documents of federal–provincial conferences. They are often referred to and recognized in statements made by members of governments.

The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.

Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules.

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It was submitted by counsel for Canada, Ontario and New Brunswick that there is no constitutional convention

It was submitted by counsel for Manitoba, Newfoundland, Quebec, Nova Scotia, British Columbia, Prince Edward Island and Alberta that the convention does exist, [and] that it requires the agreement of all the provinces and that the second question in the Manitoba

Counsel for Saskatchewan agreed that the question be answered in the affirmative but on a different basis. He submitted that the convention does exist and requires a measure of provincial agreement. Counsel for Saskatchewan further submitted that the Resolution before the Court has not received a sufficient measure of provincial consent.

We wish to indicate at the outset that we find ourselves in agreement with the submissions made on this issue by counsel for Saskatchewan.

• • •

... We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

[Here, the majority discussed the Favreau White Paper, mentioned above, and the various amendments made to the Constitution. They noted that five of twenty-two amendments "directly affected federal–provincial relationships in the sense of changing provincial legislative powers" (at 891), each of which "was agreed upon by each province whose legislative authority was affected" (at 893). The majority continued:]

In negative terms, no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld.

There are no exceptions.

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In 1965, the White Paper had stated that

The nature and the degree of provincial participation in the amending process ... have not lent themselves to easy definition.

Nothing has occurred since then which would permit us to conclude in a more precise manner.

Nor can it be said that this lack of precision is such as to prevent the principle from acquiring the constitutional status of a conventional rule. If a consensus had emerged on the measure of provincial agreement, an amending formula would quickly have been enacted and we would no longer be in the realm of conventions. ...

Furthermore, the Government of Canada and the governments of the provinces have attempted to reach a consensus on a constitutional amending formula in the course of ten federal-provincial conferences held in 1927, 1931, 1935, 1950, 1960, 1964, 1971, 1978, 1979 and 1980 (see Gérald A. Beaudoin ... [*Le partage des pouvoirs* (Laval, Quebec: Laval University, 1980)], at p. 346). A major issue at these conferences was the quantification of provincial consent. No consensus was reached on this issue. But the discussion of this very issue for more than fifty years postulates a clear recognition by all the governments concerned of the principle that a substantial degree of provincial consent is required.

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.

It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments whereas the eight other provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement. Nothing more should be said about this.

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The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements. ...

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. ...

• • •

It was contended by counsel for Canada, Ontario and New Brunswick that the proposed amendments would not offend the federal principle and that, if they became law, Canada would remain a federation. The federal principle would even be re-inforced, it was said, since the provinces would as a matter of law be given an important role in the amending formula.

It is true that Canada would remain a federation if the proposed amendments became law. But it would be a different federation made different at the instance of

a majority in the Houses of the federal Parliament acting alone. It is this process itself which offends the federal principle.

• • •

We have reached the conclusion that the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.

NOTES AND QUESTIONS

1. *Catalytic effect*. This decision has been credited with forcing the federal government and the provinces back to the negotiating table because although the Court acknowledged the legality of a unilateral federal move, it effectively declared such a move illegitimate. The negotiations culminated in an agreement between the federal government and the nine provinces other than Quebec. In a later case raising the issue of whether Quebec's agreement to constitutional change was required for the requirement of substantial consent, the Court concluded that there was no convention of a Quebec veto—that is, Quebec need not grant consent for amendments to be valid: *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793, 1982 CanLII 219.

2. *Unanimous or substantial agreement?* The Court relied on the Jennings test to evaluate whether a convention of provincial consent to amendments involving provincial legislative powers existed. Andrew Heard has observed that the Supreme Court

appeared to assume that there must be a consistent and unanimous voice across the actors in order for a convention to exist. Such an assumption is not found in Jennings's writings on the subject or in subsequent academic discussions on the matter . . . Had the members of the Supreme Court looked at the broader literature from the 1960s and 1970s about constitutional amendment, they would have found a widespread belief that unanimity was considered necessary to any broad constitutional package being negotiated.

See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 2014) at 176-77.

3. *The precedents*. The Court determined that only five of all previous amendments in Canada were relevant to determining whether, and if so, how much, provincial consent was required to make an amendment affecting federal–provincial relations. But there had been a total of 22 amendments to the BNA Act by the time the Court heard the *Patriation Reference* (reviewed in detail by the Court at 888-91). Should only 5 of these 22 previous amendments have been relevant to the Court's determination? Should all of them be examined to arrive at an answer? More than five? Fewer than five? Were some more relevant than others?

4. *Conventions in courts*. In the common law tradition, courts do not enforce conventions, but they do recognize them, as the Court did in the *Patriation Reference*. The Court (at 880-81) explained the basis for this distinction between enforcement and recognition (see above).

But does it really matter that the Court does not enforce a convention if it recognizes it as valid? Recognition may be an equally effective, albeit indirect, way of enforcing a convention, provided the Court is perceived by political actors and the public as authoritative on the matter.

And what is the difference between the authoritative recognition of the existence of a convention and its enforcement? Perhaps very little, as Farrah Ahmed, Richard Albert, and Adam Perry argue:

A rule may be enforced simply by drawing a person's attention, and if necessary the attention of the community, to her violation or would-be violation. Once a light is shone on her

conduct in this way, the person may take it upon herself to either correct her behavior or to make amends. This is a mild response compared to other forms of enforcement. What nonetheless makes this a kind of enforcement is that the person has not been allowed to violate the rule without consequence.

If it seems strange to define declaration as a kind of enforcement, consider an example from England and Wales. A standard administrative law remedy is a declaration that an administrative act is unlawful. The declaration does not invalidate the act, nor does it lead to damages or the like, nor even does it impose any ongoing obligation. Even so, declarations ... are considered "one of the most important remedies in review proceedings." The reason is that the government almost invariably responds to a declaration by taking steps to avoid or correct for the illegality. Declarations enforce administrative law standards because the government is committed to acting lawfully, and because the government treats the court as an authority regarding its legal obligations

Conventions can likewise be enforced by judges through declarations. Suppose there is a general legal duty to comply with conventions. If a constitutional actor breaks a convention, then (provided any conditions regarding standing, justiciability, and the like were satisfied) a complainant could obtain a declaration of illegality. The declaration would be a form of legal enforcement, because it would be an exercise of legal authority.

Conventions can also be enforced through declarations as a form of non-legal enforcement. The scenario we have in mind parallels the legal case: the would-be convention-violator is committed to complying with her conventional obligations, and the person or body making the declaration is regarded as an authority on what the convention requires. The authority need not be a court. In the United Kingdom, for example, the Ministerial Code contains most of the important conventions applicable to ministers. The arbiter of what the Code requires is the prime minister, and her decisions are treated by ministers as conclusive. When the prime minister declares that some act would contravene the Code, other actors treat the matter as settled, and act accordingly. In this way, the prime minister enforces the Code. But of course, a court could also be treated as an authority on conventions. In such a case, a court's declaration that an act is not convention-compliant would be a form of non-legal enforcement. Yet it would be a formal type of judicial enforcement.

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[I]n the Patriation Reference, the Supreme Court stopped short of what it considered to be enforcing a convention. The Court believed that it could not enforce conventions because "they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules." The Court specified that "unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce." And so, concluded the Court, "to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach." ...

The Court's declaration followed from a threatened violation of the convention. The declaration prevented the convention from being violated with impunity, given the political pressure the declaration placed on political actors, who ultimately tailored their conduct to the convention. The analysis of enforcement we offered in Section 2 of this article suggests that the Court's declaration in the Patriation Reference amounted to enforcement.

See Farrah Ahmed, Richard Albert & Adam Perry, "Judging Constitutional Conventions" (2019) 17 Int'l J Const L 787.

Indeed, as William Lederman has argued, judicial recognition of a convention may induce voluntary compliance:

I suggest that the non-enforceability of conventions by the Court is of only marginal importance, at least in nearly all situations. In nearly all cases, the power authoritatively to ... declare the terms of established constitutional conventions will be enough to attract voluntary compliance from the political actors. At the end of the day, if the prestige of the Supreme Court of Canada and the legitimacy of its power of judicial review in our federal system are widely accepted by the official political actors and by the people at large, the judicial declaration will induce willing compliance. If there is no such official and general acceptance of the role of the Court, what effective enforcement measures would be possible anyway? Fortunately, it appears that we do have this kind of acceptance in Canada.

See William Lederman, Comment: "The Supreme Court of Canada and Basic Constitutional Amendment: An Assessment of Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)" (1982) 27 McGill LJ 527 at 537-38.

The Court's choice to recognize a constitutional convention may not have been without consequence. According to Adam Dodek, the Supreme Court has "unnecessarily invited future controversy and conflict between the courts and the executive." Dodek actually suggests that what the Court did amounted to "declaration," something more than mere "recognition"—the Court has opened itself to the possibility that it would inaccurately articulate the relevant constitutional convention and thereby "set the stage for confusion, conflict and potential crisis": see Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" (2011) 54 SCLR (2d) 117 at 131, 138, 141.

5. *The case for unilateralism.* The Court held hearings on April 28-30 and again on May 1 and 4, 1981, and issued its reasons on September 28 of the same year. This four-month period may have offered then Prime Minister Pierre Trudeau an opportunity to go it alone. This route was suggested by Bruce Ackerman and Robert Charney:

[W]hy didn't Trudeau call an extraordinary national referendum on the proposed Liberal constitution: Charter of Rights, patriation, amending procedure, the works? The Supreme Court had already made it impossible to repatriate by Canada's 114th Dominion Day on the sheer assertion of parliamentary sovereignty. Why waste the summer in the way it was wasted—for, as you will recall, constitutional discussion did in fact tend to peter out as Canadians turned their attention to the problems of energy pricing and a bank rate that was rising to record heights. ...

So far as we can tell, moreover, Trudeau might well have won such a referendum in a big way Indeed, such a referendum would have given Trudeau that wide electoral support from all regions of the country that his Liberal Party so evidently lacked in a normal parliamentary election. To make the mystery more complete, . . . the prime minister was perfectly aware of the legitimating power of a national referendum. His own proposal for replacing the constitution's interim amending procedure contemplated a special referendum if seven premiers, representing 80 per cent of the Canadian population, could agree on a counter-proposal to Trudeau's own general amending procedure. . . .

Why, then, did Trudeau not break the impasse caused by provincial opposition and judicial delay by calling the Canadian People to the polls to speak on the legitimacy of the Liberal constitution? . . . Wouldn't a landslide victory have vastly enhanced the perceived legitimacy of the liberal nationalist effort at repatriation?

See Bruce Ackerman & Robert Charney, "Canada at the Constitutional Crossroads" (1984) 34 UTLJ 117 at 128-30.

6. *Autochthony.* The view advanced by Ackerman and Charney appears to have been rooted in the concept of autochthony. As Peter Hogg explains:

[A]utochthony requires that a constitution be indigenous, deriving its authority solely from events within Canada. . . . The legal force of the *Canada Act 1982* and the *Constitution Act*,

1982, like other United Kingdom statutes extending to Canada, depends upon the power over Canada of the United Kingdom Parliament. These instruments have an external rather than a local root. If patriation means the securing of constitutional autochthony, I conclude that it has not been achieved.

See Peter Hogg, "Patriation of the Canadian Constitution: Has It Been Achieved?" (1983) 8 Queen's LJ 123 at 125-26. Hogg did not believe that patriation made the Constitution of Canada autochthonous. Would a national referendum as suggested by Ackerman and Charney have done the trick? Is the Canadian Constitution autochthonous today? Does it matter if it is not?

7. *Indigenous peoples.* Can we consider patriation to have been "autochthonous" in the sense of deriving its authority from an inclusive process that gave voice to all persons? For Indigenous peoples, one scholar argues that patriation was both a "monumental achievement" and a "monumental defeat":

For Indigenous people, the *Constitution Act, 1982* represents a contradiction or a constitutional paradox. It is both an instrument of colonization and an instrument of decolonization. Despite all of the efforts to place their issues on the constitutional table and protect Indigenous rights (ultimately through the inclusion of section 25 and 35 of the *Constitution Act, 1982*), most Aboriginal organizations viewed the amended constitution as a major defeat. All of the national and all but one provincial Indigenous organization (the Métis Association of Alberta) walked away from the constitutional table or rejected the amended constitution because it failed to offer sufficient protection to Indigenous peoples, or to enunciate an appropriate and detailed understanding of what sections 25 and 35 recognized, affirmed, and protected.

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Although easily construed as a monumental defeat, patriation also represented a monumental victory for Indigenous peoples. ... With the entrenchment of section 35, Aboriginal and treaty rights were recognized and affirmed, arguably as *sui generis* rights originating within Indigenous nations or the agreements between Indigenous nations and settler society. Moreover, section 25 affords these rights further protection from the *Canadian Charter of Rights and Freedoms*.

See Kiera Ladner, "An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat" in Lois Harder & Steve Patten, *Patriation and its Consequences* (Vancouver: UBC Press, 2015) 267 at 270-71.

C. THE CONSTITUTION'S AMENDING FORMULA

If we define sovereignty as the power to make the final choice about how to structure the institutions of government, how to allocate powers, and how to reflect this in a Constitution, then patriation formalized Canada's sovereignty by transferring that power to Canadian political institutions. But, as it turns out, there is not one single-decision rule for amending the Canadian Constitution. Rather, there are five rules—five rules that make up the amending formula, as it is called—contained in part V of the *Constitution Act, 1982*, each of which purports to apply to different types or categories of amendments:

1. The "general amending formula," or the "7/50 formula," found in s 38(1), requires the consent of the Parliament of Canada and the legislative assemblies of two-thirds of the provinces having at least 50 percent of the population of all the provinces. This general amending formula gives no province alone a veto on amendment, which has been a source of dissatisfaction in Quebec. This procedure is the only one in the Constitution subject to time limits: an amendment cannot be proclaimed until one year after the initiation of the amendment process unless every province has indicated assent or dissent (s 39(1)), and an amendment dies unless it has received the

appropriate degree of support within three years of the start of the process (s 39(2)). Section 38(3) permits a province to opt out of an amendment derogating from its legislative powers, proprietary rights, or other rights and privileges. If the amendment transfers legislative powers from the provinces in relation to education or cultural matters, the province opting out is also entitled to reasonable compensation (s 40). Section 38 is the default formula for constitutional amendments—that is, it applies to amendments that do not fall under the other amending formulas. Moreover, s 42 specifically assigns some amendments to s 38—for example, “the principle of proportionate representation of the provinces in the House of Commons” (s 42(1)(a)) (the amendments specified by s 42 cannot be the subject of opting out).

2. The “unanimity procedure,” found in s 41, requires that consent be provided by Parliament and the legislative assemblies of all the provinces in relation to amendments to the office of the Queen, the governor general, and the lieutenant governor of a province; the minimum number of members to which a province is entitled in the House of Commons as of 1982 (because of the “Senate floor rule” found in s 51A of the *Constitution Act, 1867*); the general use of the English and French languages; the composition of the Supreme Court of Canada; and any amendment to the amending formula.
3. The “bilateral procedure,” found in s 43, deals with provisions of the Constitution affecting only some provinces. Where an amendment is in relation to a provision affecting one or more but not all provinces, only the legislative assemblies of the provinces affected and Parliament need consent to the amendment.
4. The “federal unilateral procedure,” in s 44, allows Parliament alone to make amendments to the federal executive or the House of Commons or Senate (provided amendments to the Houses of Parliament do not affect their powers or their method of selection in ways protected by other parts of the amending formula). Section 44 replaces the old s 91(1) of the *Constitution Act, 1867*, which was similarly worded.
5. The “provincial unilateral procedure” in s 45 replaces the old s 92(1) of the *Constitution Act, 1867* and permits the province to amend its constitution, provided that the amendment does not affect matters governed by other parts of the amending formula, such as the office of the lieutenant governor.

In addition to part V, s 35.1 provides that amendments affecting Aboriginal rights or changes to s 91(24) of the *Constitution Act, 1867* will be preceded by a constitutional conference of first ministers and representatives of Indigenous peoples. However, s 35.1 does not impose a duty to obtain the consent of Indigenous peoples.

NOTES AND QUESTIONS

1. *Using part V.* The amending formula in part V of the *Constitution Act, 1982* has been used successfully on 11 occasions since 1982. The “7/50” formula has been used only once to pass the *Constitutional Amendment Proclamation, 1983*. Most notably, this amendment altered the Aboriginal rights provisions in ss 25 and 35 of the *Constitution Act, 1982*; added ss 35(3), 35(4), 35.1; and amended s 25(b). Section 44 has been relied on by Parliament three times. The *Constitution Act, 1985* (Representation) repealed and replaced s 51 of the *Constitution Act, 1867* (which had been amended many times since 1867) to lay down new rules governing representation in the House of Commons; the *Constitution Act, 1999* (Nunavut) amended the relevant provisions of the *Constitution Act, 1867* to provide for the representation of Nunavut in the House of Commons and the Senate; and the *Fair Representation Act* (2011) replaced s 51(1) of the *Constitution Act, 1867* to readjust the number of members of the House of Commons and provincial representation in it.

The remaining seven amendments have been made through s 43, and have all involved the federal government and one other province. For example, s 43 was used in 1993 to extend

language rights in New Brunswick by adding s 16.1 to the *Constitution Act, 1982*. The most controversial amendments involving s 43 have concerned denominational school rights in Newfoundland (three amendments) and Quebec (one amendment). The Newfoundland amendments all involved changes to term 17 of the Newfoundland Terms of Union (which were constitutionalized by the *Newfoundland Act*, 12 & 13 Geo VI, c 22 (UK)). Term 17 replaced s 93 of the *Constitution Act, 1867* with respect to Newfoundland, and entrenched a set of denominational school rights. In 1987, term 17 was amended to extend those rights to Pentecostal schools (Constitution Amendment, 1987). However, in 1997 (Constitution Amendment, 1997 (*Newfoundland Act*)), and again in 1998 (Constitution Amendment, 1998 (*Newfoundland Act*)), term 17 was amended first to dilute and then to remove the constitutional protection accorded to denominational schools. Both these amendments were made after province-wide referenda in which a majority of Newfoundlanders voted in favour of the amendments.

During the parliamentary debate surrounding the first amendment, religious groups argued (unsuccessfully) that Parliament should approve the proposed amendment because of the impact on minority rights. Is there a federal obligation to enact such a measure simply because the majority in the province so wishes? Conversely, does the federal Parliament owe a special obligation to protect the denominational school rights of minority groups who are liable to be outvoted in the political process?

The second amendment was challenged in the courts on the ground that the appropriate amending formula was s 38, not s 43, because denominational school rights were elements of national citizenship. The challenge was rejected on the grounds that term 17 applied only to Newfoundland, and hence s 43 was the appropriate provision to amend it: *Hogan v Newfoundland (AG)*, [2000 NFCA 12](#), leave to appeal refused, [2000] SCCA No 191 (QL). The Quebec amendments also abolished denominational school rights in that province by providing, in a new s 93A, that s 93 no longer applied to Quebec (Constitutional Amendment, 1999 (Quebec)). A similar constitutional challenge was rejected by the Quebec courts: *Potter c Québec (Procureur général du)*, [2001 CanLII 20663](#), [2001] RJQ 2823 (CA), leave to appeal refused, [2002] CSCR No 13 (QL). Do you agree with these holdings?

2. *Population and power.* The general amending formula creates asymmetries among provinces with regard to their power to drive or block an amendment. A professor of mathematics has concluded that “under paragraph 38(1)(b), the provinces are not all equal. The inequality is a consequence of the different provincial populations and the requirement that, to succeed, an amendment must be supported by a coalition of at least seven provinces containing at least one-half of the total population of the provinces.” As a result, at the time he conducted his study, “an amendment supported by all provinces except Ontario and Quebec will fail, whereas one supported by all except British Columbia and Alberta will succeed”: see D Marc Kilgour, “A Formal Analysis of the Amending Formula of Canada’s Constitution Act, 1982” (1983) 16 Can J Polit Sci 771 at 772. Does this exacerbate regional divisions in Canada? Is there any other way to design the general amending formula without requiring unanimity?

3. *Opting out.* The right to opt out provided in s 38(3) is not without its critics. On one view, the incompleteness of the opt-out right—it does not authorize compensation on all matters—has the potential to generate provincial inequalities:

Consider, for example, environmental protection, which falls under both federal and provincial jurisdiction. If the other provinces agreed to hand over all authority in this area to Ottawa, Quebec could express its disagreement and withdraw from such a constitutional amendment; it would not, however, have a constitutional right to receive any federal funding for environmental projects, since they would fall outside the areas of education and culture. The citizens of Quebec, by paying federal taxes, would be paying for the environmental protection of all the provinces while at the same time taking on the expense of their own protection system. In other words, except for matters of culture and education, a province choosing to opt out of a particular amendment would see its citizens doubly taxed.

See Gil Rémillard, "The Constitution Act, 1982: An Unfinished Compromise" (1984) 32 Am J Comp L 269 at 277. Do you agree with Rémillard that the opt-out right raises the risk of provincial inequalities?

4. *Public participation in the amendment process.* The amendment procedure in part V of the *Constitution Act, 1982* imposes no requirement of public participation (such as a referendum) and has been criticized for being elitist and undemocratic. We will consider this criticism in more detail below after we examine the failed attempts at constitutional reform associated with the Meech Lake and Charlottetown accords.

5. *A complicated process.* Writing in the year of patriation, an American scholar observed that "perhaps as a reflection of the complex politics of Canadian federalism, the new domestic amendment procedures are unusually complicated." It reflected, he said, "the inescapable fact" that "Canada is a society of weak national loyalties." For him, "an amendment process which reflects the decentralized quality of such a society is neither good nor bad. It is only accurate": see Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45 Law & Contemp Probs 283 at 297, 302. Do you agree that Canada's amendment formula is too complicated? Would we be better served with only one amendment procedure to amend any part of the Constitution? If so, how would you design that single procedure? What degree of provincial agreement would be necessary, if any, to amend the Constitution? One scholar has argued that the varying levels of difficulty reflected in the five procedures of Canada's amending formula serve an important purpose: the hierarchy of amendment difficulty signals which provisions of the Constitution are more important, and therefore harder to amend, than others: see Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 McGill LJ 225.

6. *Amending the amending formula.* Section 49 of the *Constitution Act, 1982* required the prime minister to convene a first ministers' conference by 1997 in order to review the amending formula:

A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

The amending formula was discussed at a meeting of first ministers on June 20-21, 1996, but so little time was devoted to them—only a few minutes, it is said—that one observer has stated that "clearly no review of the provisions of Part V was actually conducted": see John D Whyte, "A Constitutional Conference ... Shall Be Convened ...": Living with Constitutional Promises" (1996) 8 Const Forum Const 15 at 16. The prime minister at the time nonetheless declared after the meeting that the constitutional obligation imposed by s 49 had been fulfilled. Do you believe the first ministers should have devoted more time to reviewing the amending formula? Why do you think they spent so little time on them? Had you been sitting at the first ministers' table on the day the amending formula came up for discussion, how would you have suggested it be amended, if at all?

7. *Thinking about part V.* There remain many open questions about the amending formula. For further readings, see Benoit Pelletier, "Amending the Constitution of Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 253; Kate Glover, "Hard Amendment Cases in Canada" in Richard Albert, Xenophon Contiades & Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart, 2017) at 273; Sébastien Grammon, "The Protective Function of the Constitutional Amending Formula" (2017) Rev Const Std 171; Hoi L Kong, "Deliberative Constitutional Amendments" (2015) 41 Queen's LJ 105; Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383; Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42 UTLJ 139; Peter W Hogg, "Formal Amendment of the Constitution

of Canada" (1992) 55 Law & Contemp Probs 253; Samuel V LaSelva, "Federalism and Unanimity: The Supreme Court and Constitutional Amendment" (1983) 16 Can J Polit Sci 757.

D. FAILED CONSTITUTIONAL REFORMS: MEECH LAKE AND CHARLOTTETOWN

Alongside the eleven constitutional amendments that have been made since 1982, there have been two significant failures: the Meech Lake Accord and the Charlottetown Accord. Both accords began as efforts to win Quebec's acceptance of the 1982 constitutional amendments. The Meech Lake Accord included constitutional recognition of Quebec as a distinct society, entrenchment of the Supreme Court of Canada and provincial nomination of its justices, an increase in the number of items requiring unanimity under the amending formula, and controls on the federal spending power. Many of these elements reappeared in the Charlottetown Accord, along with changes to the distribution of powers, an entrenched Aboriginal right to self-government, an elected Senate with equal provincial representation, and a guaranteed level of Quebec representation in the House of Commons. How did we get to these efforts at wholesale constitutional reform in Canada so soon after the *Patriation Reference*? Richard Simeon offers a useful summary:

For many, the exclusion of Quebec grievously undermined the legitimacy of the new constitutional order. In the short run, it meant that Quebec would proclaim a blanket use of the "notwithstanding clause" exempting all Quebec legislation from challenge under important sections of the new Charter; and that Quebec would refuse to engage in further discussion of constitutional renewal. In the longer run, it was feared that, however muted the Quebec independence movement now seemed, the imposition of the constitution on Quebec would be a powerful weapon in the hands of a future separatist movement. Many commentators felt that the country had reneged on a moral commitment, the 1980 promise that a "no" vote in the referendum was a vote for a renewed federalism and that no constitution could be fully secure without the voluntary accession of the second largest province, and the only one with a French-speaking majority.

From this perspective, then, the overriding constitutional question which remained was to find some way to "[b]ring Quebec in" to the Canadian constitutional family. Two essential conditions had to be met First, there had to be a federal government in office which placed reconciliation with Quebec at the top of its agenda, and, more important, which was prepared to accept at least some of the fundamental assumptions about the distinctive character of Quebec which had underlain the aspirations of all Quebec governments since the Quiet Revolution of the 1960s. Second, there must be a government in Quebec which was equally committed to this goal, and which was unequivocally federalist in orientation.

The first condition was met with the federal election of September, 1984. The new Conservative government was pledged to "national reconciliation"—including restoring harmony to the embittered state of federal–provincial relations and, more particularly, to constitutional reconciliation with Quebec (Mulroney, 1984). The second condition was met with the defeat of the PQ and the election of the federalist Liberals under Robert Bourassa in 1985.

See Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism" (1988) 14 Can Pub Pol'y S7 at S8-S9.

1. The Meech Lake Accord

For the rest of the story of how the Meech Lake Accord came to be, we now turn to Mary Dawson, the person responsible for drafting all constitutional amendments starting in 1981 and the lead legal adviser to the Government of Canada on constitutional matters from 1986

until her retirement. In 2012, Dawson gave a lecture at McGill University in which she offered a glimpse, from her unique perspective, into Canada's constitutional evolution:

The constitutional negotiations known as the "Quebec Round" began quietly, indeed secretly. The foundation was laid in May 1986 at a symposium at Mont Gabriel, Quebec, where the Quebec minister of intergovernmental affairs confirmed Quebec's five conditions for acceptance of the patriation package of 1982. The Government of Quebec was asking for changes to the constitution that would have symbolic meaning but that it felt would have minimal impact on the constitution for those outside Quebec. The changes would relate to Quebec's distinctiveness, immigration agreements, the Supreme Court of Canada, the federal spending power, and the amending formula. This relatively short list was in sharp contrast to the much longer lists of demands that had been coming from Quebec in recent years.

The provincial premiers agreed, in August 1986 at a meeting in Edmonton, to make the issues identified by Quebec their first priority and to set aside their other priorities until Quebec's demands had been addressed. Prime Minister Mulroney had written to them earlier in the summer to request that they consider this approach. ...

Through the fall of 1986 and the winter of 1987, a series of bilateral meetings took place out of the public eye. . . . During this period, federal officials began to work on draft amendments with their Quebec counterparts. As a rule, no paper was exchanged. ...

While the Government of Quebec was reaching out to the rest of Canada through this process, at the same time it appeared to be doing everything that it could to avoid what it would consider to be yet another humiliation in the event of a public failure to achieve its modest set of conditions. ...

When all the governments met at Meech Lake on April 30, 1987, the five conditions of Quebec had been well canvassed even though there had only been one meeting of officials, held early in March. ...

The main point of contention was the "distinct society" clause, and this was the last component of the package to be agreed upon. ...

Although the first ministers had before them detailed draft provisions for most of the elements of the package, the Meech Lake Communiqué issued that night contained only general descriptions of these various elements. The one exception was the distinct society clause. ...

The agreement covered the five elements requested by Quebec, some of them generalized to apply to all provinces either at or before the April 30 meeting at Meech Lake or in the months immediately following that meeting, and there was a sixth element added at the April 30 meeting. This addition was to entrench in the constitution a requirement for annual first ministers' conferences, which were to cover Senate reform and fisheries roles and responsibilities, as well as for annual first ministers' conferences on the economy.

It was also agreed that, until the Senate amendments were achieved, Senate appointments were to be made from lists provided by the provinces, so long as they were acceptable to the federal government. Senate reform was a high priority for the Western provinces. In recognition that this was intended to be the Quebec Round, detailed proposals for Senate reform were not developed, but the interim arrangement was included in the package. This procedure was to apply until comprehensive Senate amendments were made.

The Meech Lake Communiqué of April 30, 1987, was approved unanimously by the prime minister and the premiers of all the provinces, including Quebec, and was met with great enthusiasm and the hope that this might be the end of our constitutional difficulties. That mood held through the technical discussions over the next month or two at the officials' level as small changes were discussed.

See Mary Dawson, "From the Backroom to the Frontline: Making Constitutional History or Encounters with the Constitution—Patriation, Meech Lake, and Charlottetown" (2012) 57 McGill LJ 955 at 979-82. (Citations omitted.)

The Meech Lake Accord contained within it many items that required unanimous approval for constitutional amendment—for example, changes to the amending formula—as well as items that could be approved under the general formula in s 38. As a consequence, the question of how the different amending formulas would interact was an important one. In theory, the Accord could have been voted on by legislative assemblies in two ways. The first route would have been to vote on each component separately according to the appropriate amending formula. This approach would have raised the possibility that some aspects of the Accord would have been adopted, but others rejected, an unacceptable political outcome because the package represented a compromise that its proponents believed stood or fell together. The second route was to present the amendments for approval as a package. The requirements of ss 38 and 41 were taken to apply to the entire package, meaning that unanimous approval was required within three years. The Accord died in June 1990, having failed to meet these requirements. The Charlottetown Accord, which was voted down in a national referendum in 1992, also contained a mix of amendments, some requiring approval under s 38, others under s 41.

The choice to apply the three-year time limit to ratify the Meech Lake Accord was controversial. Gordon Robertson, a former high-ranking civil servant in Canada, argued that there should be no time limit on its ratification. Robert Hawkins responded that the three-year time limit did indeed apply to the Meech Lake Accord. In a subsequent response written that same year, Ted Morton considered the implications of removing the three-year time limit in the middle of the ratification process and proposed a solution to improve the amendment process going forward:

Every discussion and every legislative vote since the details of the Meech Lake Accord were agreed to by the eleven first ministers in June, 1987, have assumed that the Accord had to be ratified within a three year time limit or die. This apparently unanimous understanding was recently challenged by Gordon Robertson

For Mr. Robertson, it follows that since the Meech Lake Accord can only be ratified under the unanimity rule of Section 41, it does not have any time limit. ...

To uncover the flaw in Mr. Robertson's logic, one must separate out what Meech Lake has blended together: two separate amending formulas. ... If the first ministers had had the foresight to separate their amendments into two distinct proposals—a section 38 package and a section 41 package—there would be no controversy about time limits. (The section 38 package would have one; the section 41 package would not). Unfortunately, this is not the case. The result is confusion: Which amending rules govern the Meech Lake Accord?

Mr. Robertson's solution is to subsume the section 38 amendments under the section 41 requirements—unanimity, and no time limit. ...

Since the Accord is a package, it must be approved by the procedure necessary for whatever part or parts of the package requires the highest level of approval. That "highest level" is unanimity of the legislatures of all the provinces. Constitutional changes that require unanimity must be made pursuant to Section 41 and this is what is being done.

Mr. Robertson's argument is plausible but not persuasive. Another solution is to import the three year time limit of section 38 into the section 41 procedure. The result is a procedure that requires unanimity (per section 41) and imposes a three year time limit (per section 38). This is truly "the highest level of approval," to use Mr. Robertson's own phrase, and it is the option the first minister (and the rest of Canada) thought they were choosing in the Spring of 1987. It is certainly as plausible as the Robertson option, and for the same reasons. While there are irrefutable reasons for preferring the unanimity requirement of section 41 to the "7/50 rule" of section 38, there is not any obvious reason for jettisoning the three year time limit. True, this makes it more difficult to gain approval for the Accord, but this may be its virtue not its vice.

The Meech Lake Accord ... contain[s] a very distinctive—and it turns out, controversial—vision of Canada's future. Surely when constitutional changes of this magnitude and extent are contemplated, it makes sense to require the highest degree of political consensus to effect these changes. ...

One conclusion is the intriguing possibility that the Accord itself may be invalid and "unratifiable," because it violates the "manner and form" requirements of the Constitution by lumping together matters that must be treated separately.

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A less draconian solution is that when governments combine section 38 and section 41 amendments into a single constitutional "package," they must meet the full requirements of both sections: unanimity and the three year time limit. This approach satisfies all the requirements of both amending formulas. With the June, 1990 deadline approaching, Mr. Robertson's modest proposal would be a welcome lifeboat indeed.

The problem is that it would be much more than a lifeboat. It would be an indefinite extension of Meech Lake into the future, without end! Is it really acceptable that constitutional change as far-reaching as Meech Lake should hang in the balance for five, ten, twenty years[?]

Political logic also precludes another recently rumored solution to the "deadline problem": retrospectively dividing the Accord into two separate packages—section 38 amendments and section 41 amendments.

While this division is probably what should have been done at the outset—in June, 1987—it is much too late to do it now. How many times have Meech critics been told that the Accord is a "seemless webb" [sic], to be accepted or rejected intact. For governments suddenly to reverse themselves on this issue would be perceived as a hypocritical[;] ... would further poison the well of public opinion[;] and further divide the country.

The lesson for the future seems clear. At a minimum, future proposals to amend the Constitution must not mix section 38 and section 41 type amendments in a single "package." Serious consideration should be given to adding a time limit to the section 41 amending formula. [Its] omission was probably an oversight in the first place. More generally, the very concept of a "package" approach to constitutional amendments may no longer be politically acceptable. This type of constitutional deal-making—consummated by eleven first ministers, behind closed doors, and then presented as a *fait accompli*—is a hangover from the pre-Charter era.

The Charter has created the perception that the Constitution is no longer the exclusive preserve of the First Ministers. As the opposition to Meech Lake has so clearly demonstrated, there are now many groups in Canadian society who see themselves as stakeholders in the "new" constitution. These "Charter Canadians," as they have been labelled, are not going to accept exclusion from future constitutional changes. While the initiative for proposing constitutional amendments will still rest with Canada's eleven first ministers, they will have to defend any future changes in a public process that allows all interested parties to participate in a meaningful manner.

See FL Morton, "How Not to Amend the Constitution" (1989-90) 12:4 Can Parliamentary Rev 9.

Had you been advising the first ministers on whether or not the Constitution of Canada requires the three-year limit to apply to the Meech Lake Accord, what would have been your advice? Would your answer have been different if the first ministers had asked you for your advice not about what the Constitution requires but about what would make it more likely for the Accord to be approved? Setting aside the Meech Lake Accord, do you think it is a good idea to impose a time limit to approve an amendment? Is it a good idea for all kinds of possible constitutional amendments or only for certain kinds?

The sequence of events leading ultimately to the defeat of the Meech Lake Accord suggests that defeat was a result of much more than the three-year time limit alone. As Ian Peach explains, the Accord faced substantial resistance from many corners of the country:

By the time of the 1988 federal election, support for the Meech Lake Accord was beginning to unravel. The concerns of Indigenous peoples provided a key platform for those seeking amendment to the Accord. From this began to arise a greater understanding of Indigenous claims among the public and sympathy for their constitutional aspirations. Thus, when Elijah Harper stood up against the passage of the Meech Lake Accord, he was strongly backed by not only Indigenous groups, such as the Assembly of Manitoba Chiefs (who provided Harper with direct support and encouragement), the Assembly of First Nations, the Inuit Tapirikat of Canada, the Native Council of Canada, and the Dene Nation but also by many Canadians who applauded his action and viewed him as championing their own dislike of the Accord. ...

Premiers who were elected subsequent to the negotiation of the Accord also articulated concerns about it As well, in the wake of Quebec premier Bourassa's decision to use the notwithstanding clause to preserve Quebec's sign law, Manitoba premier Gary Filmon ... declared that he would not bring the Accord forward to the Manitoba legislature unless substantial changes were made to it. ... [I]t became clear by the spring of 1990 that something had to be done to secure acceptance of the Accord in the three provinces that had not yet approved it.

Several provinces [...] expressed concerns about the exclusion of Indigenous peoples, among others. In an effort to move beyond the impasse that had developed over the Accord, [New Brunswick Premier Frank] McKenna introduced a "companion resolution" to the Accord in the New Brunswick Legislative Assembly on 21 March 1990, as a strategy to address concerns about the Accord and secure the necessary support to allow its passage in the New Brunswick, Newfoundland, and Manitoba legislatures. On 27 March 1990, the government of Brian Mulroney decided to study this option with the establishment of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Constitutional Accord, commonly known as the Charest Committee.

The Charest Committee tabled its report on 17 May 1990. The report generally agreed with the content of the New Brunswick companion resolution and recommended its adoption. On the treatment of Indigenous issues, the committee recommended that the companion resolution provide for a separate process of constitutional conferences every three years, beginning no later than one year after the companion resolution came into force, and that first ministers recognize Indigenous peoples in the body of the constitution, building on the "Canada clause" proposed by Manitoba.

With the results of the Charest Committee and the provincial studies in hand, the Mulroney government called a final First Ministers Conference for 3 June 1990 [T]he outcome was an agreement by all premiers to secure passage of the Accord and the companion resolution by the 23 June 1990 deadline. Among other elements, the agreed-upon companion resolution contained a commitment to future constitutional conferences on Indigenous issues. The commitment to future discussions instead of addressing Indigenous issues directly in the companion resolution, however, generated a negative reaction among Indigenous leaders, who argued that it continued the "two founding nations" myth and the hierarchy of recognition contained in the Meech Lake Accord itself. Indigenous leaders also protested their exclusion from the June 1990 First Ministers Conference.

Three days after the conclusion of the June 1990 First Ministers Conference, Premier Filmon attempted to introduce a resolution to approve the Accord into the Manitoba legislature, but [legislative assembly member] Elijah Harper refused to provide the necessary unanimous consent to introduce the motion. Four days later, on June 16th, the Assembly of Manitoba Chiefs made public its intention to defeat the Meech Lake Accord. The following day, Prime Minister Mulroney sent Senator Lowell Murray and others to negotiate with the

Assembly of Manitoba Chiefs in an attempt to persuade them to end their efforts to defeat the Accord, but to no avail. Although Premier Filmon eventually introduced the motion to approve the Accord on June 20th, there was insufficient time for the legislature to approve it prior to a scheduled adjournment on June 22nd. With passage in Manitoba impossible, Premier Wells adjourned the Newfoundland House of Assembly for an indeterminate period on June 22nd, thereby cancelling the proposed free vote on a motion to approve the Meech Lake Accord and ensuring the Accord's defeat.

See Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16 Rev Const Stud 1 at 8-11 (footnotes omitted).

Although one cannot know for certain, it is likely that the Manitoba legislature would have approved the resolution had it been put to a vote, and Newfoundland's House of Assembly would have thereafter approved the resolution as well, thus making the Meech Lake Accord official. But history took a different path, and, for better or worse, the name Elijah Harper will forever be linked to the defeat of the Meech Lake Accord. Harper, you will remember, was the Manitoba member of the Legislative Assembly (MLA) who refused to give his consent to allow the Manitoba premier to introduce the resolution to approve the Accord. Below is how he was remembered in an obituary written shortly after his death:

Not since Louis Riel in the late 19th century had a person of aboriginal descent had such an impact on Canadian history. Except in mid-June, 1990, Elijah Harper, a 40-year-old Ojibwa-Cree and Manitoba MLA, made his bold stand peacefully, though defiantly, holding an eagle feather.

In his opposition to the Meech Lake Accord, which included Quebec's five demands before it would sign the Constitution of 1982, Mr. Harper became an instant media sensation. He was the Canadian Press newsmaker of 1990 and the subject of hundreds of newspaper and television stories and commentaries. He became an overnight celebrity, and people started wearing T-shirts with his photograph on them and badges that proclaimed, "Elijah Harper for Prime Minister." A CTV movie, *Elijah*, was even made about him in 2007.

For Mr. Harper, however, his refusal to support the accord was always much more than a quest for his 15 minutes of fame. Indeed, he did not even want it. "I don't like this notoriety," he told former Manitoba NDP premier Howard Pawley in the midst of the deliberations. "I am looking forward to getting back to the trapline and looking at the stars at night."

Nonetheless, few images from the constitutional battles of the 1980s and 90s are as memorable as that of Mr. Harper, with his long black hair pulled back in a ponytail sitting in the Manitoba Legislature with an eagle feather in his hand refusing to give his consent so that Manitoba premier Gary Filmon could introduce a motion to ratify the accord by the June 23, 1990, deadline.

As Mr. Filmon recalls, Mr. Harper spoke to him before the crucial session began. "I don't want to do this," he told Mr. Filmon, "but I have to do it for my people." Added Jack London, who was at the time the legal counsel for the Assembly of Manitoba Chiefs (AMC): "The emotional toll on Elijah was immense. But he did not take his decision lightly or without considerable thoughtfulness."

Mr. Filmon, head of a Conservative minority government, required unanimous consent from all MLAs to introduce the motion for debate, which was to be followed by 10 days of public hearings. It was going to be close to meet the deadline. Yet eight times between June 12 and June 21, on each occasion that the Speaker asked if there was unanimity to proceed, Mr. Harper said, "No, Mr. Speaker."

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The next day, the Manitoba legislature adjourned without voting on the accord, essentially killing it (a deed completed when, soon after, Newfoundland premier Clyde Wells refused to allow a vote on the accord).

In Ottawa, prime minister Brian Mulroney was naturally livid that a technicality could derail his prized accord. Later, in one of Mr. Mulroney's unguarded conversations with Peter C. Newman, he put it like this, "Aboriginals are not to blame for Meech Lake's failure despite Elijah Harper's stupidity. ... He turned down a sweetheart deal."

Mr. Harper saw the situation much differently. A spiritual man, he had a dignified calming influence on Manitoba and Canadian politics. "I was listening to the people," Mr. Harper said in 2005 when Mr. Mulroney's comments became public. "When he says I'm stupid, he calls our people stupid. We're not stupid. We're the First Nations people. We're the very people who welcomed his ancestors to this country and he didn't want to recognize us in the Constitution."

Elijah Harper died on May 17 from cardiac failure resulting from complications from diabetes and kidney problems.

See Allan Levine, "Native Leader Elijah Harper Helped Scuttle Meech Lake," *The Globe and Mail* (20 May 2013), online: <<http://www.theglobeandmail.com/news/politics/native-leader-elijah-harper-helped-scuttle-meech-lake/article12033338>>.

There were many criticisms levelled against the Meech Lake Accord. As one scholar has written:

Women's organizations, aboriginal peoples and multicultural groups were among the more vigorous dissenters from the Accord. Many women were concerned that the loose language of the Accord, referring to certain Charter guarantees but not to others, would undermine sexual equality which was not expressly mentioned. Aboriginal peoples were dismayed that a constitutional agreement could be concluded with such secrecy and swiftness to meet Quebec's demands when no progress had been made towards their quest for self-determination at four successive constitutional conferences.

See WH McConnell, "The Meech Lake Accord: Laws or Flaws" (1988) 52 Sask L Rev 115; see also Beverley Baines, "Women's Equality Rights and the Meech Lake Accord" (1988) 52 Sask L Rev 265 (arguing that Meech Lake put the Charter-based equality rights of women in jeopardy); David Taras, "Television and Public Policy: The CBC's Coverage of the Meech Lake Accord" (1989) 15 Can Pub Pol'y 322 (arguing that media coverage was oriented toward conflict and gave Canadians a distorted view of what was at stake); Thomas J Courchene, "Meech Lake and Socio-Economic Policy" (1988) 14 Can Pub Pol'y S63 (arguing that the implications for socio-economic management were positive).

In an important article written shortly after the demise of the Meech Lake Accord, Roderick Macdonald summarized the five major legal critiques of the Accord that had gained traction by the fall of 1988, fewer than two years before its defeat:

The first of these to emerge was the "progressive" critique, in which the *Meech Lake Accord* was condemned for the succor which it offered to the discredited constitutional agenda of federal/provincial relations, language rights, and provincialism. The *Meech Lake Accord* was also criticized on this basis for reinforcing the political ethic of executive federalism and elite accommodation. Implied in this critique was the more general claim that traditional (or pre-1982) constitutional politics in Canada was outdated because it served only the interests of the country's political and economic elites. Those who advanced this claim were especially anxious to argue that the 1982 round empowered ordinary Canadians and enfranchised previously excluded constituencies.

Closely linked with this first critique was a second—the "Charter" argument. These skeptics of the *Meech Lake Accord* were deeply troubled by the "distinct society" clause. They feared, notwithstanding their quasi-entrenchment in 1982, that modern and more fundamental concerns about the relationship of individual and state were being moved once again to the bottom of the constitutional agenda; and] that Canadian and Quebec politicians had conspired successfully to recapture legislative authority to override recent constitutional

gains relating to respect for individual liberty, to the promotion of equality, and to the greater enfranchisement of women.

The "distinct society" clause also provided a focus for the third, or "provincial egalitarian" critique of the Meech Lake Accord. On this view, the clause was inimical to a true federalism. By creating a special status for one province it fundamentally undermined the notion of equality of citizens, regardless of provincial residence, upon which Canadian political institutions were argued to have been built. Many who took this position also suggested that the clause would confer additional legislative jurisdiction on Quebec, not exercisable by other provinces.

A fourth criticism of the Meech Lake Accord, the "centralist" critique, found its roots in the belief, first advanced by Sir John A. Macdonald a century ago, that the federal government must be ascendant for Canada to resist assimilation by the United States. Critics argued that the spending power provisions of the agreement would enfeeble the federal government. These provisions would also operate a massive power shift to larger and more economically self-sufficient provinces such as British Columbia, Alberta, Ontario, and Quebec at the expense of the country's poorer provinces. Coupled with this critique ... was the assertion that, by giving up exclusive control over national institutions such as the Senate and the Supreme Court, the central government was destroying ... the quasi-unitary model of federalism upon which the country was built.

A final objection ... may be characterized as the "paralysis" critique. Many early Meech Lake Accord opponents argued that the extension to all provinces of a constitutional veto over amendments relating to federal institutions such as the Senate would nullify all hope for their reform. ... Also connected with this concern was the belief that other pressing items of constitutional reform—Western alienation, Aboriginal rights, the accession of the territories to provincehood, multiculturalism, and regional economic disparity—would never be addressed.

See Roderick A Macdonald, "... Meech Lake to the Contrary Notwithstanding (Part I)" (1991) 29 Osgoode Hall LJ 253 at 269-70.

Quite apart from the *content* of the Meech Lake Accord, many questioned the *process* by which the text had been written and ultimately proposed to Canadians. See Brian Schwartz, "Fathoming Meech Lake" (1987) 17 Man LJ 1 at 4.

Perhaps the most vocal critic of all was former Prime Minister Pierre Trudeau, the driving force behind the patriation of Canada's Constitution. After the Prime Minister and the provincial premiers had agreed in principle to the Accord, Trudeau published the following:

What a magician this Mr. (Brian) Mulroney is, and what a sly fox! ...

In a single master stroke, this clever negotiator has thus managed to approve the call for Special Status (Jean Lesage and Claude Ryan), the call for Two Nations (Robert Stanfield), the call for a Canadian Board of Directors made up of the 11 first ministers (Allan Blakeney and Marcel Faribault), and the call for a Community of Communities (Joe Clark).

He has not quite succeeded in achieving sovereignty-association, but he has put Canada on the fast track for getting there. It doesn't take a great thinker to predict that the political dynamic will draw the best people to the provincial capitals, where the real power will reside, while the federal capital will become a backwater for political and bureaucratic rejects.

What a dark day for Canada was this April 30, 1987! In addition to surrendering to the provinces important parts of its jurisdiction (the spending power, immigration), in addition to weakening the Canadian Charter of Rights, the Canadian state made subordinate to the provinces its legislative power (Senate) and its judicial power (Supreme Court); and it did this without hope of ever getting any of it back (a constitutional veto granted to each province). It even committed itself to a constitutional "second round" at which the demands of the provinces will dominate the agenda.

All this was done under the pretext of "permitting Quebec to fully participate in Canada's constitutional evolution." As if Quebec had not, right from the beginning, fully participated in Canada's constitutional evolution!

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The possibility exists, moreover, that in the end Mr. Bourassa, true to form, will wind up repudiating the Meech Lake accord, because Quebec will still not have gotten enough. And that would inevitably clear the way for the real saviours: the separatists.

As for Mr. Mulroney, he had inherited a winning hand.

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But since 1982, Canada had its Constitution, including a Charter which was binding on the provinces as well as the federal government. From then on, the advantage was on the Canadian government's side; it no longer had anything very urgent to seek from the provinces; it was they who had become the supplicants. ... Even a united front of the 10 provinces could not have forced the federal government to give ground: With the assurance of a creative equilibrium between the provinces and the central government, the federation was set to last a thousand years!

Alas, only one eventuality hadn't been foreseen: that one day the government of Canada might fall into the hands of a weakling. It has now happened. And the Right Honourable Brian Mulroney, PC, MP, with the complicity of 10 provincial premiers, has already entered into history as the author of a constitutional document which—if it is accepted by the people and their legislators—will render the Canadian state totally impotent. That would destine it, given the dynamics of power, to eventually be governed by eunuchs.

See Pierre Elliott Trudeau, "Say Good-bye to the Dream of One Canada," *La Presse* and the *Toronto Star* (27 May 1987).

2. The Charlottetown Accord

After the failure of the Meech Lake Accord, the first ministers went back to the drawing board. In contrast to the closed-door process that had produced the Meech Lake Accord, the Charlottetown process was more open. Patrick Monahan has argued that the process surrounding the Charlottetown Accord illustrates the democratic potential of constitutional amendment in Canada. The federal government established the Citizens Forum on Canada's Future (chaired by Keith Spicer) in November 1990, and established a joint House–Senate committee to consider proposals for changes to the amending formula (the Beaudoin–Edwards Committee) in December 1990. The federal government's constitutional proposals were then released in September 1991. Initially, these proposals were put before a second joint House–Senate committee (the Beaudoin–Dobbie Committee). However, in response to public demand for greater participation, the federal government convened five conferences held in early 1992, attended by federal and provincial politicians, interest groups' representatives, and everyday Canadians. The final phase of the Charlottetown process was an intergovernmental negotiation, in which governments and Indigenous representatives were the sole participants. See Patrick J Monahan, "The Sounds of Silence" in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 222.

The Charlottetown process culminated in a national referendum on October 26, 1992, asking Canadians the following question: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?" See Government of Canada, "Proclamation Directing a Referendum Relating to the Constitution of Canada, SI/92-180, Registration 1992-10-07" (last modified 10 January 2022), online: Justice Laws Website <<https://lois-laws.justice.gc.ca/eng/regulations/SI-92-180/FullText.html>>. This

agreement was the package of amendments known as the Charlottetown Accord—an ambitious group of proposals agreed to by Canada's first ministers, including the leaders of the Yukon and the Northwest Territories, as well as Indigenous leaders. In an article published the year after the failure of the Accord, Robert Vipond explained what the Accord had sought to do and how the referendum came to be.

Robert C Vipond, "Seeing Canada Through the Referendum: Still a House Divided"

(1993) 23 Publius 39 at 40-47

The failure of Meech was particularly bitter because this was the first time in living memory that the government of Quebec had actually accepted the risk of agreeing to a multilateral and comprehensive package of constitutional reforms with English Canada, only to have the agreement scuttled by provincial legislatures in English Canada. ... For many Quebecers, the rejection of Meech entailed the rejection of Quebec.

The powerful sense of rejection ... had several consequences. [I]t pushed support for greater Quebec sovereignty to unprecedented heights—60-65 percent in some polls. ... [T]he death of Meech led Bourassa to announce that he would boycott all multilateral intergovernmental negotiations Within Quebec itself, the failure of Meech produced two large-scale efforts to chart Quebec's constitutional future on its own terms and, if necessary, unilaterally.

The first, popularly known as the Allaire report, was commissioned by the governing Liberal party in Quebec and was adopted as party policy in March 1991. The second, the Bélanger-Campeau Commission, was a sort of Quebec "Estates General" and included representatives from the Quebec National Assembly, business, labor, the cooperative movement, and the arts community among others. ... Both called for a referendum in Quebec, by the end of October 1992, on Quebec's constitutional future.

Bourassa accepted the referendum recommendation, but he also left open the possibility that a constitutional referendum in Quebec could be framed around a new federalist constitutional proposal from the rest of Canada—should one be forthcoming. Bourassa thus purchased some maneuverability at the same time as he "laid down the gauntlet to the Rest of Canada."

The rest of Canada was initially slow to respond

... However reluctantly, the federal and provincial governments concluded that the national unity question was perhaps even more urgent than ever before, that sentiment favoring separation in Quebec had grown dangerously since the failure of Meech, and that it therefore was crucial to respond fairly (though not cravenly) to Quebec's constitutional demands.

This time, however, the approach would be different. ... As Richard Johnston observed, the basic idea was to create a constitutional logroll, in which the rest of Canada would get something it wanted out of constitutional reform in return for accommodating Quebec. With that premise in place, the Quebec round of constitutional negotiations gave way to the Canada round.

Two candidates for inclusion on the constitutional agenda stood out. One was Senate reform. ...

The other compelling subject of constitutional reform was aboriginal self-government. ...

The demands for Senate reform and aboriginal self-government arose from radically different grievances, but both were couched in the powerful language of equality. ...

There was also the question of process. If the intergovernmental class learned nothing else from Meech, it learned that the prevailing constitutional reform process was deeply flawed. One problem was essentially tactical and, in principle, easily corrected. By the terms of the Constitution Act of 1982, constitutional amendments proceed differently according to their subject matter When the accord was negotiated in 1987, the first ministers agreed to submit all of the amendments to the more rigorous requirement of unanimity rather than sever the package into two distinct lots. The clear, yet largely unforeseen, consequence of this tactic was to straitjacket the process This time the federal government promised that things would be different, either by uncoupling the two sorts of amendments or by leaving those that required unanimity to another day.

The other process problem ran considerably deeper. In the fallout from Meech, the intergovernmental class learned very quickly that the Canadian public would no longer tolerate the closed processes of "executive federalism" (i.e., high-level intergovernmental bargaining). Determined not to repeat the error, virtually all of the governments engaged in constitutional discussions set about to create a more open and consultative process that would forestall the sort of populist and democratic criticism that helped to derail Meech.

The challenge of creating a constitutional package that could negotiate these different and often cross-cutting priorities was formidable. Quebec's demand for significant—even massive—decentralization was unacceptable to those who looked to the national government for leadership on matters of redistributive social and economic policy and who wanted a strong Ottawa to resist the pressures of continental economic integration. One possible solution was to create an "asymmetrical" federal system in which Quebec would have jurisdiction over a number of policy areas not available to the other provinces, thus giving Quebec the control it wanted without producing wholesale decentralization. Yet, the argument that asymmetry is a legitimate and well established part of Canadian federalism was simply no match for the sleek principle, now become orthodoxy, that provincial equality or uniformity is a fundamental and inviolable constitutional value.

Senate reform posed a different sort of problem. Quebec, already wary of its declining demographic position in Canada, could never support a scheme that would reduce its representation to that of any other province—especially if one of the other goals of institutional reform was to create the conditions under which the Senate could stand up effectively to the House of Commons. What Senate reformers were less prepared for was the still more fundamental question concerning the definition of representation. [W]hy assume that territorial identity is the best or only basis of representation? Why not, alternatively, create a Senate that would be apportioned on the basis of gender, dividing representation equally between women and men?

Even the question of aboriginal self-government proved nettlesome. One might have thought that recognizing a right of self-government for aboriginal peoples was morally unambiguous and politically compelling, but it was not. For one thing, it was unclear what would happen if the claims of aboriginal self-government conflicted with those of Quebecois self-determination.

The federal government tabled its constitutional proposals before Parliament in September 1991. Most of the subjects addressed by the Meech Lake Accord reappeared, albeit in slightly different form. The reform of national representative institutions received prominent treatment. The government proposed some recalibration of the division of powers toward the provinces. It also recommended the entrenchment

of a lavish "Canada Clause," an introductory constitutional statement "to affirm the identity and aspirations of the people of Canada." Once tabled, these proposals were considered by an all-party, special joint parliamentary committee. The Beaudoin-Dobbie Committee subsequently held hearings across Canada on the proposals and, after considerable tribulation and six mini-constitutional assemblies, produced a refined version of the federal proposals at the end of February 1992.

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Despite [a number of] missteps, the outlines of a constitutional reform package began to take shape by the spring of 1992. ... [M]ultilateral meetings continued throughout the summer of 1992 until an agreement was reached in Charlottetown in late August. Quebec, British Columbia, and Alberta were already committed to holding constitutional referenda. Following suit, the federal government announced that it would introduce legislation calling for a full national referendum on the Charlottetown Accord, to be held 26 October 1992.

... [T]he Charlottetown Accord was a complex compromise among several divergent constitutional claims. First, the accord attempted to respond to Quebec's constitutional demands by replicating the major elements of Meech, albeit with several new twists. Like Meech, the Charlottetown Accord included a provision delimiting the federal spending power, another guaranteeing Quebecois representation on the Supreme Court, and a third that would give Quebec (and any other province) a veto over constitutional amendments that would materially alter national institutions. Finally, Charlottetown followed Meech in recognizing Quebec as a "distinct society" However, the clause was more narrowly circumscribed than its predecessor in Meech, and it was placed within a larger statement of the fundamental values underlying the Canadian nation—the Canada Clause.

Second, Charlottetown proposed several changes to the division of powers, all of them essentially decentralizing in nature.

Third, the Charlottetown Accord envisioned important changes to the structure and functioning of Parliament. Responding to calls for Senate reform, the upper house would be reconstituted, providing equal representation for each province Under the proposal, the Senate would not be a "confidence chamber" in the sense that its disagreement with the House of Commons would not bring down the government. Rather, in most cases, the Senate was to have a suspensive veto that, when exercised, would trigger a joint sitting with the House of Commons. Concurrently, the House of Commons would be enlarged, principally to compensate large provinces (e.g., Ontario and Quebec) for the equalization of representation in the Senate. Moreover and more controversially, the final negotiations with Bourassa produced a provision to guarantee Quebec at least 25 percent of the seats in the House of Commons in perpetuity, a hedge against the demographic trends that show Quebec's population declining as a proportion of Canada's population.

Fourth, the Charlottetown Accord enshrined the "inherent right" of aboriginal self-government, recognizing aboriginal governments as one of three orders of government in the country. The self-government provisions tugged in different directions. On one hand, Charlottetown committed itself to an "inherent" right of self-government that would allow aboriginal peoples "to safeguard and develop their languages, cultures, economies, identities, institutions, and traditions." On the other hand, aboriginal laws would be subject both to the Charter of Rights (though aboriginal governments, like others, would be allowed to use the override clause), and to the requirement that aboriginal laws be consistent with "peace, order, and good government in Canada." How aboriginal self-government was to be realized was left to a series of political agreements that would define the process. To buy time for this

process to take shape, the accord explicitly delayed judicial enforcement of the self-government provisions for five years.

It was perhaps inevitable that even the supporters of the Charlottetown Accord would have difficulty finding a common thread to hold this sprawling agreement together. In point of fact, however, there was a basic idea that underlay both the accord and other recent attempts at constitutional reform, namely, the idea of inclusion. ... The Meech Lake Accord, for its part, attempted to respond to modern Quebec nationalism ... by reinforcing what was different about Quebec. Paradoxical or not, the explicit purpose of Meech remained, as Mulroney repeatedly said, to bring Quebec "back into the constitutional family."

In an important sense, Charlottetown was but the next stage of this inclusionary constitutional politics ... Yet there was one crucial difference ... Both in 1982 and again at the time of Meech, the communities that stood to gain from the inclusionary thrust of the effort largely supported constitutional reform. This time they did not—at least not among the general citizenry. Put to the test of a national referendum, the Charlottetown Accord was defeated in Quebec, rejected decisively in western Canada, and both supported and opposed by aboriginal communities. In short, the accord was unpopular in the very communities that were meant to benefit most from its provisions.

NOTES AND QUESTIONS

1. *The outcome.* The people of Canada voted against the Charlottetown Accord. Canadian electors outside Quebec rejected the Accord by a margin of 54.3 percent to 45.7 percent. In British Columbia, 68.3 percent voted against; in Manitoba, Alberta, and Saskatchewan, the votes against were, respectively, 61.6 percent, 60.2 percent, and 55.3 percent. In Yukon, the final vote was 56.3 against, and in Nova Scotia, the Accord was rejected by 51.2 percent of voters. Only in New Brunswick (61.8 percent), Newfoundland (63.2 percent), the Northwest Territories (61.3 percent), and Prince Edward Island (73.9 percent) did a significant majority of the province or territory support the Accord. In Ontario, the Accord secured the approval of the slimmest majority (50.1 percent): see Elections Canada, "The 1992 Federal Referendum: A Challenge Met—Report of the Chief Electoral Officer of Canada" (17 January 1994), online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2013/elections/SE1-8-2-1992-1-eng.pdf> at 58. In Quebec, where 83 percent of the province turned out to vote, the Accord was rejected by a majority of voters: see Référendums au Québec, online: *Elections Quebec* <<https://www.electionsquebec.qc.ca/francais/tableaux/referendums-quebec-8484.php>>.

2. *Mega-constitutional politics.* Peter Russell has argued that in the wake of the Meech Lake and Charlottetown accords, the politics of constitutional reform has become so-called mega-constitutional: see Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004). The characteristic feature of mega-constitutional politics is the unwillingness of various constitutional actors to undertake piecemeal or incremental constitutional reform through constitutional amendment, tackling issues one at a time—for example, Senate reform and the spending power. Instead, complex amendment packages of the sort found in the Meech Lake and Charlottetown accords will be the norm for major constitutional amendment proposals into the foreseeable future. Arguably, one of the legal implications of mega-constitutional politics is that ss 38 and 41 will apply cumulatively to future packages of constitutional amendments, making major amendments extraordinarily difficult, if not impossible, as we discuss in Section V of this chapter. But it appears that piecemeal or incremental constitutional reform outside the procedures in part V of the *Constitution Act, 1982* has since become a new strategy, and may perhaps be

more probable now than pursuing major reforms using the procedures in part V. We have seen evidence of this new strategy of non-constitutional reform with respect to the process for Senate appointments. We discuss these reforms and their implications in Section V of this chapter.

3. *Is part V undemocratic?* Alan Cairns has argued that the dominance of governments in the amending formula is inconsistent with popular sovereignty and the "citizens' constitution" enshrined with the Charter of Rights in 1982:

The amending formula defines Canada as a country of governments presiding over and speaking for the national and provincial communities that federalism sustains. Its implicit assumption is that only the cleavages defined by federalism have to be catered to in the amending formula, and they can be represented by governments. The Charter, however, defines Canadians as a single community of rights-bearers, makes only limited concessions to provincialism, and clearly engenders a non-deferential attitude toward those who wield government power. The community message of the Charter contradicts the community message of the amending formula. The Charter, in addition to defining Canadians in terms of rights, also singles out specific categories for particular recognitions and rights—women, official-language minorities, multicultural Canadians, and others. By so doing it states that the federal–provincial cleavage, and the communities derived from it, do not exhaust the constitutionally significant identities that Canadians now possess. Succinctly, the Charter states what the amending formula denies, that "federalism is not enough"—that Canadians are more than a federal people.

See Alan C Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1991) at 6-8. Do you agree with Cairns? If so, should there be some guarantee of popular input in the amendment process? Should it come at the stage of formulating an amendment—for example, in the form of a constituent assembly—or at the time of approval—for example, in a referendum? Cairns levelled his criticism at the process that led to the negotiation of the Meech Lake Accord, which occurred almost entirely behind closed doors and with minimal input from legislatures (which were presented with the Accord by first ministers as a *fait accompli*), let alone citizens. Matthew Mendelsohn agrees, but takes a different route to reach the same answer that citizens must participate in the process of constitutional reform. He argues that the key is to "elaborate an appropriate process for the inclusion of the public in a nonmajoritarian manner" because we in Canada "have not yet fully accepted that the requirement of citizen participation must go beyond ratification in a referendum." He adds that "the process of constitutional reform is flawed because the negotiation process relies on elites and brokerage, while the ratification process is public and majoritarian, with public participation grafted onto institutions that remain essentially unchanged in their requirement of executive leadership": see Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33 Can J Polit Sci 245 at 271.

4. *A constitutional convention requiring a referendum.* Some commentators have argued that resorting to a referendum during the Charlottetown process established a constitutional convention of popular ratification of amendments. Do you think a convention exists that there should be a referendum before any constitutional amendment? Before a package of major constitutional changes? What about prior to a major reform to our electoral system—even though part V makes no express mention of whether any of its five procedures should be used to formalize changes to Canada's electoral system? For the view that a convention might exist, see Jeffrey Simpson, "The Referendum and Its Aftermath" in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 193 at 193; Roger Gibbins & David Thomas, "Ten Lessons from the Referendum" (1992) 15 Can Parliamentary Rev 3 at 3. For the view that a convention might not exist, see Benoit Pelletier, "Reinventing Canada: The Challenges that Canada Faces in the

Twenty-First Century" (2010) 4 JPP 133 at 142; Peter Meekison, "Canada's Quest for Constitutional Perfection" (1993) 4 Const Forum Const 55 at 56. For a framework to answer the question on your own, see Richard Albert, "The Conventions of Constitutional Amendment in Canada" (2016) 53 Osgoode Hall LJ 399 at 413-15, 422-33.

5. *Lessons learned.* Immediately after the defeat of the Accord, Kathy Brock suggested three lessons that could be learned from the failure of the Charlottetown Accord. First, "in future any rounds of macro-constitutional change must necessarily be inclusive and open." Second, "the roles and responsibilities of the political leaders must be significantly altered." Brock specifies that "leaders must be responsible to public demands but willing to make independent decisions and then to defend those decisions before the public in terms that are meaningful to them." And third, "any amendments intended to respond to the needs of specific groups or provinces within the Canadian community must strengthen the nation as a whole." Brock concludes her third lesson by suggesting that "perhaps the *Economist* summed up this aspect of the Canadian mind-set when it observed that Canada is the only country that could have a popular revolution in favour of the status quo": see Kathy L Brock, "Learning from Failure: Lessons from Charlottetown" (1993) 4 Const Forum Const 29 at 31-32. Are these the only lessons to be learned from the failure of the Charlottetown Accord?

6. *Money and the referendum.* The Charlottetown Accord campaign complicates what we know about the effect of money in politics. It is commonly believed that the expenditure of money—in advertisements, individual voter contact, and get-out-the-vote operations—can determine outcomes in elections. Supporters of the Charlottetown Accord spent \$11.25 million to promote it while its opponents spent \$883,000 against it: see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 115. How can we explain the Accord's rejection in light of this imbalance in expenditures? Could it be that money does not matter as much in politics as we might think?

7. *Markets and the referendum.* In the course of the Charlottetown campaign, some supporters resorted to financial arguments to persuade voters to approve the Accord. They argued that economic disaster would befall Canada if the Accord were rejected; the other side described this argument as a scare tactic. The day after Canada rejected the Accord, the TSE 300 (a now-obsolete stock market index linked to the performance of 300 stocks listed on the Toronto Stock Exchange) rose 48.27 points, and the one-month treasury bill rate fell 0.45 percent—both evidence that the financial market did not collapse as had been predicted: see Pauline M Shum, "The Canadian Constitutional Referendum: Using Financial Data to Assess Economic Consequences" (1995) 28 Can J Economics 794 at 795.

8. *The root causes of amendment failure.* In her study of modern efforts to reform the Constitution of Canada, Jamie Cameron traces the roots of the problems all the way back to Confederation.

Jamie Cameron, "Legality, Legitimacy and Constitutional Amendment in Canada"

in Richard Albert & David R Cameron, *Canada in the World: Comparative Perspectives on the Constitution of Canada* (Cambridge: Cambridge University Press, 2017) at 81-97

Patriation came in 1982 at high cost: Quebec was dealt a grave insult that largely robbed patriation of legitimacy in that province and radically escalated the danger of separation. Quebec's exclusion and the gaping legitimacy deficit it caused set off a chain reaction that further imperiled the fragile status of constitutional reform and threatened Canada's durability as a nation. On its face, the Meech Lake Accord (MLA)

was a well-intentioned reform initiative aimed at completing patriation by healing the wounds of 1982 through a "Quebec Round" which would redress the province's grievances. Unanimous agreement at the level of executive federalism anchored the Accord's legitimacy, gestured in humility toward amend-making with Quebec, and initially augured well for the MLA's acceptance.

By courting Quebec's agenda, entertaining asymmetric arrangements and privileging Quebec as a distinct society, the MLA ignored pent-up demands and expectations for movement on women's and aboriginal rights, as well as on Senate reform. Over the MLA's three-year ratification period from 1987 to 1990, the legitimacy of prioritizing Quebec and sidelining other issues steadily declined. Process deficits were a further, critical aggravation: the MLA process was closed, lacking in transparency and non-inclusive; it shut out newly empowered voices that had the resources, political will and visibility to confront the bygone legitimacy of executive federalism. Three years after its announcement was celebrated, the Accord failed for want of ratification on 23 June 1990. The text of the Accord required unanimity and, as the deadline neared, the Manitoba and Newfoundland legislatures refused to ratify the MLA.

In a climate of escalating anxiety over Canada's future, Meech Lake's defeat made the next initiative inevitable. ... The "Canada Round" was the result of an expedited but nationally inclusive process of democratic renewal, which proposed constitutional reforms across a range of institutional and substantive issues. Addressing the substantive and procedural deficits of the MLA backfired, however, because the Charlottetown Accord's unwieldy reforms did not register as authentic in the democratic domain. ...

Each of the post-patriation textual initiatives set a high threshold for the legality of constitutional reform. But in each instance, the proposals for change were misaligned with pre-existing and developing expectations of what legitimizes constitutional change. The lesson and legacy of the Accords is that constitutional reform cannot be attempted again, with any realistic prospect of success, until that threshold misalignment is addressed. ...

In the aftermath of failed reform, the amendment process was described as "deeply dysfunctional," because managing concurring and competing legitimacies spun out of control, creating a "widespread sense of powerlessness" and perception that constitutional change had been rendered impossible. Time has not substantially altered that assessment. ... There is little doubt that reform cannot realistically be initiated again until the legality and legitimacy of constitutional amendment are better aligned.

Patriation and the Accords were high-stakes initiatives, and each gambled in its own way on the legitimacy of constitutional reform. Legitimacy deficits that were unquestionably situational found strong voice in the fractures, expectations, demands, and emotions in play at a time when Canada's survival was in peril. Those dynamics spiraled during the patriation crisis and could not be contained when the follow-up Accords were proposed. Though the "current states of affairs" and factual rigidities of this narrative are compelling, the particulars of Canada's extended patriation crisis were forged in the longer history of amendment and a text that never provided for the legality—or legitimacy—of change. It is the central purpose of this article to show that Canada's experience of amendment in and after 1982 is vitally connected to the primal challenge since Confederation in 1867, and that has been to define the terms of Canada's amendment sovereignty. That could and can only be done by bringing the legality and legitimacy of change into alignment. A project that has been a key preoccupation throughout is, today, still the unfinished work of Canada's 150-year-old Constitution.

... It is instructive that Part V's amendment rules place Canada at the extreme end of spectrum of textual rigidity, but perhaps more telling that a textual measure dramatically understates the obstacles to constitutional change. In principle, textual singularity is incomplete as a measure of amendment rigidity because it fails to validate a host of non-quantitative elements—including situational or factual rigidities—which play a determinative role in enabling and disabling constitutional change. Significantly, it also fails to account for amendment rigidities which are grounded in legitimacy deficits that compromise or subvert the process of change. As shown in this chapter, these points have particular salience for Canada's amendment history.

This, then, is the object lesson for Canada, and for theories of amendment and amendment rigidity more generally. Just as a regime of legality is necessary to legitimize amendments to a constitutional text, legality has limits and is not sufficient where extra-textual legitimacy deficits undermine the authority and acceptability of constitutional change.

E. IS COMPREHENSIVE CONSTITUTIONAL REFORM POSSIBLE?

The failure of the Meech Lake and Charlottetown accords has raised the question whether constitutional amendment on such a scale is possible in Canada. Before we can determine whether major reforms are possible, it is helpful to understand why the two most recent constitutional amendment packages in Canada failed to succeed. Two scholars have developed a theory of "amending process overload" that may explain constitutional amendment failure in Canada.

Christopher P Manfredi & Michael Lusztig, "Why Do Formal Amendments Fail? An Institutional Design Analysis"

(1998) 50 World Politics 377 at 381-93

[W]e argue that conditions are ripe for amending process overload where (1) constitutions are difficult to amend, (2) the institutional structure allows for the existence of numerous constitutional actors (both state and societal), and (3) the existing constitutional language and judicial practice provide for a wide range of interpretation.

The proximate cause of amending process overload is what might be termed *redistributive indeterminacy*. Redistributive indeterminacy entails uncertainty on the part of constitutional actors about the redistributive impact of constitutional modification. This redistributive indeterminacy has three sources: what we call *amending process rigidity*, *interpretive fluidity*, and *institutional inclusiveness*. In turn, redistributive indeterminacy manifests itself in two ways, through what we refer to as *regulative rule demands* and *interpretive rule demands*.

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[H]igh levels of amending process rigidity increase the importance of redistributive indeterminacy. Mistakes are more difficult to redress. Rather than imitating the fluidity of the legislative process, high amending process rigidity ensures that each amendment is treated as a discrete issue. As a result, not only are groups less willing to compromise on their demands for the sake of maintaining policy coalitions, but these

groups are also more likely to make their demands in unambiguous language that is invulnerable to interpretations that may run counter to the sponsoring group's intent.

Interpretive fluidity is a second variable impacting on redistributive indeterminacy, and it is a function of how much scope constitutional language leaves for interpretation. ... Indeed, judicial interpretation is especially important because it alone has the status of constitutional law; it is therefore more authoritative and less easily challenged or altered than other types of interpretation. Thus, while political actors must be concerned with future interpretation by all sources, it is judicial interpretation that contributes most to interpretive fluidity.

... Occasionally certain groups, typically those that have historically not had political status and that have fared poorly in the public policy arena, will seek ambiguous language in proposed constitutional amendments. They do this as an innocuous means of entrenching constitutional objectives, subsequently hoping for the chance of favorable interpretations through the courts. The aboriginal movement in Canada attempted this strategy in both the 1981 Patriation Round and the 1992 Charlottetown Round. By contrast, groups that are more firmly established in the political process are more likely to seek the entrenchment of carefully worded amendments, even if it is more difficult to secure agreement on such amendments. This is because groups that enjoy a high degree of political status do not want to risk losing gains already made to the vagaries of interpretively fluid constitutional language.

Of course, as mentioned, interpretive fluidity is more contentious where constitutions feature high levels of amending process rigidity. It is especially contentious in circumstances where there is a large and indeterminate number of constitutional actors—thus the importance of our third variable.

The relevance of the institutional inclusiveness variable is based on the presumption that constitutionally entrenched institutions reflect the interests of those who brought about their creation. ... [T]he constitutional arena is confined to those who can mobilize for special or enhanced constitutional status

... The number and types of groups that can claim enhanced constitutional status is conditioned by constitutional rules in two ways. First, rules can specifically privilege certain groups. A federal constitution, for example, privileges national and subnational governments to the exclusion of other collectivities. This explicit recognition of status provides a power base that privileged groups seek to protect and, where possible, expand. The history and development of Canadian constitutional politics can be understood from such a perspective.

The second means by which rules condition enhanced constitutional status is that they have the potential to provide market niches for aggressive new political entrepreneurs. Indeed, an externality associated with the construction of certain types of rules is that such rules may provide unanticipated opportunities for groups to acquire enhanced constitutional status.

Redistributive indeterminacy conditioned by the three factors described above manifests itself in two types of demands by constitutional actors: *regulative rule demands* and *interpretive rule demands*. Regulative rule demands are direct attempts to reduce the ambiguity of redistributive indeterminacy. ...

Constitutional actors also make demands for interpretive rules to clarify the impact of existing rules and principles. In other words, they seek to ensure that the redistributive impact of rules and policies will be as favorable as possible

Both regulative and interpretive rule demands are attempts by groups to overcome redistributive indeterminacy by limiting the maneuverability of judicial decision makers. These demands are typically contentious and invite counterdemands by groups that are hostile or even indifferent to such demands. Such counterdemands are most likely, we argue, where a large number of constitutional actors

perceive a one-shot opportunity to amend an interpretively fluid constitution. This perception, in turn, increases the likelihood that the politics of constitutional modification will generate multiple demands for regulative and interpretive rules designed to ensure particular policy outcomes. The result is a degree of overload that may cause the amending process to collapse. . . .

The 1982 amending formula intensifies amending process rigidity in two ways. First and most obviously, it gives all provinces a veto over many comprehensive reforms. Thus, all constitutional actors are aware that constitutional change will be more difficult to achieve than in the past. The result is an incentive for elites to front-load their constitutional demands into one omnibus package, rather than deal with issues sequentially and discretely. . . .

Second, the 1982 amending formula intensifies amending process rigidity through the inclusion of a sunset clause (section 29(2)), whereby all amendments must be ratified by the appropriate legislatures within three years of the date that the first legislature ratifies. Section 29(2) therefore creates an incentive for provinces to delay ratification in the hopes of extracting concessions . . . Provinces that delay ratification can thus make public demands for concessions that are very difficult to retract. As such, bargaining that once took place in private—so-called elite accommodation—is subjected to a second, more public round of bargaining in the ratification stage. It is in this second stage that the original agreement can potentially break down. The Charlottetown Accord process institutionalized this second round of bargaining through the use of a nationwide series of referenda.

The post-1982 era also witnessed a number of problems associated with interpretive fluidity

The Constitution Act (1982) entrenched a weak commitment to aboriginal rights under sections 25 and 35. However, the act left the precise meaning and function of aboriginal rights undefined, to be worked out in a series of constitutional conferences held between 1983 and 1987. Thus, aboriginal leaders came to the bargaining table in 1983 with regulative rule demands regarding a native charter of rights and freedoms and an aboriginal veto. In addition, they made a series of interpretive rule demands dedicated to clarifying the operation of native self-government . . . These interpretive rule demands have been fairly consistent since 1983. Indeed, it was intransigence on the part of many governmental actors that led to the failure of constitutional conferences on aboriginal rights in 1983, 1984, 1985, and 1987. It also explains why, in June 1990, aboriginal leaders rejoiced in the irony that Elijah Harper—a native Indian—was afforded the opportunity to scuttle the Meech Lake Accord single-handedly.

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The Charlottetown Accord affords the best illustration of the problems associated with the amending process overload model. By 1992 the degree of amending process rigidity inherent in the 1982 amending formula was apparent to all constitutional actors. Thus, these actors were not willing, as were the Western provinces during the Meech Lake negotiations, for example, to postpone discussion of their objectives to future constitutional rounds. There was a general consensus that Charlottetown represented a one-shot opportunity to effect constitutional change and that opportunities missed were opportunities lost. The result was a host of regulative rule demands that contributed in part to the Charlottetown Accord's ballooning to sixty amendments—a dramatic increase from the seven amendments contained in the Meech Lake Accord. . . .

Interpretive fluidity also played an important role at Charlottetown. The most controversial component of the Meech Lake Accord was the Distinct Society Clause . . . At Charlottetown other constitutional actors had become aware of the

potential significance of interpretive clauses on the redistributive impact of existing constitutional language. As a result of a number of (often contradictory) interpretive rule demands by constitutional actors, the Charlottetown Accord included a "Canada Clause" that sought to accommodate these demands. The clause was an ensemble that recognized both the equality of the provinces and Quebec's status as a distinct society; it committed Canadians to a respect for individual and collective rights, without specifying how inevitable clashes between the two might be resolved; and it committed Canadians to racial, ethnic, and gender equality, despite the fact that racial and ethnic equality were already guaranteed under section 15 of the charter and gender equality was guaranteed under section 15 and section 28. The only rationale for this redundancy would be to influence the redistributive impact of competing rights claims and hence to privilege certain social cleavages over others. Interpretive fluidity and the interpretive rule demands that resulted also account in large part for the size of the Charlottetown Accord. Indeed, a full twenty-two amendments were dedicated to interpreting "aboriginal rights" as they exist under sections 25 and 35 of the Constitution Act (1982).

Finally, the Charlottetown Accord also conforms to the third source of amending process overload described in our model: it featured unprecedented societal input. ... Indeed, the referendum campaign witnessed the emergence of a number of societal opinion leaders who evidently carried a good deal of influence with their respective constituents. The referenda resulted in the defeat of the accord in most provinces, as well as at the aggregate level.

In summary, the 1982 Constitution Act was a watershed document in more than the obvious ways, since it changed the institutional context of constitutional modification in Canada. It transformed a flexible and exclusive modification environment without the unique interpretive fluidity of rights-based litigation into one that was inflexible, inclusive, and dominated by judicial interpretation of individual rights. As a result, a much higher level of redistributive indeterminacy became attached to proposals for constitutional modification. The impact of this change became fully apparent during the Charlottetown Accord process, when amending process overload contributed to the accord's ultimate failure.

It is one thing to look backward to understand why the Meech Lake and Charlottetown accords failed. But what about the future of constitutional reform in Canada? Michael Lusztig argues that major amendment proposals like the ones in the Meech Lake and Charlottetown accords are "doomed to fail" because they create the wrong incentives and they require compromises too great for political actors to swallow. See Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail" (1994) 27 Can J Polit Sci 747 at 748.

Another way to describe the Constitution of Canada is to call it unamendable. Many constitutions around the world expressly identify rules, principles, procedures, symbols, and values as unamendable, meaning that no measure of support for changing any of them is sufficient to amend them in any way. For example, republicanism is unamendable in France, as is secularism in Turkey and human dignity in Germany. The Constitution of Canada is not unamendable in the same manner, yet it may nonetheless be unamendable in the sense that major constitutional reform is now virtually impossible. Richard Albert has argued that the Constitution of Canada is "constructively unamendable" for matters that are in theory amendable using the general amending formula or the unanimity procedure:

Constructive unamendability "takes root where the political climate makes it practically unimaginable, though nonetheless always theoretically possible, to achieve the necessary

agreement from political actors to entrench a formal amendment. This type of unamendability derives from deep divisions among political actors who reach the point of stalemate in their dialogic interactions. Under these conditions, formal amendment becomes impossible unless constitutional politics somehow manages to perform heroics to break the stalemate. The stalemate may itself derive from political incompatibilities, unpalatable pre-conditions to formal amendment, or a simple unwillingness to entertain thoughts of formal amendment despite the constitutional text authorizing the change political actors are unwilling to attempt. Alternatively or in addition, the stalemate may derive from the structural design of the constitution, for instance, a complex horizontal and/or vertical separation of powers that creates multiple veto points along the path to formal amendment.”

See Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67 SCLR (2d) 181 at 195.

Even if the Constitution of Canada is constructively unamendable today, it may not be tomorrow as political forces realign into a configuration more open to major constitutional change. In addition, moments of crisis or emergency could overcome the present constructive unamendability of the Constitution, if indeed, it has reached this point of stasis. Kate Glover cautions that we should not overdo claims of the impossibility or complexity of constitutional amendment in Canada. The reason why is important for democracy and legitimacy in Canadian constitutional law and government:

When we start from the position that Part V is unclear and difficult to apply, political actors can too easily avoid the hard work of negotiating multilateral reform. They can rely on interpretive uncertainties to feed claims about political impossibilities and to challenge alternative proposals. Further, when we frame our understanding of Part V in terms of complexity, the courts become the default site for resolving disputes about formal amending procedure. The courts’ involvement has benefits. It ensures that the issues are canvassed in a public forum. It provides the opportunity for a range of perspectives to be heard. And, it can resolve disputes that stall reform, providing analytical frameworks for future deliberations. But there are downsides. A judge-centric approach to understanding Part V grounds constitutional legitimacy in judicial interpretation rather than in the effective action of government or the lived experience of the community. That is, it shifts beliefs about where governance happens. Moreover, when procedural issues are resolved judicially, the actors involved in the amending process miss out on the potential benefits of working through problems of procedure cooperatively before sitting down to negotiate the merits of particular reforms. The potential benefits include building collegiality, articulating common ends, narrowing issues, enhancing political investment in the amending process, learning others’ positions, adjusting expectations, constructing frameworks for further negotiation, accommodating competing interests, reconciling rights and responsibilities, suspending absolutes, agreeing to disagree, and so on.

See Kate Glover, “Complexity and the Amending Formula” (2015) 24 Const Forum Const 9 at 10.

The amendment process overload thesis helps explain why the Meech Lake and Charlottetown accords failed. The theory of mass input/legitimization predicts that future constitutional amendment proposals are unlikely to succeed. The idea of constructive unamendability suggests that the Constitution of Canada may be just as unamendable, if only temporarily, as some of the world’s constitutions that explicitly take certain items off the amendment table. These theories, however, have consequences not only for how we think about the Constitution but also about how its meaning changes over time, and who does the changing. When, if ever, might it be profitable for a constitution to be difficult, and perhaps even impossible, to amend? Are there certain periods of time in the life of a constitutional democracy when we might want to discourage major constitutional reforms or at least complicate them more than would ordinarily be the case?

V. MODERN CHALLENGES TO CONSTITUTIONAL CHANGE

A. INDIGENOUS PEOPLES AND RESTORATIVE JUSTICE

1. Section 35.1

In 1983, the Constitution of Canada was amended to include a “commitment to participation” for Indigenous peoples in future constitutional conferences. See Government of Canada, “Constitutional Amendment Proclamation, 1983, SI/84-102” (1 October 1995), online: *Solon.org* <https://www.solon.org/Constitutions/Canada/English/cap_1983.html>. The commitment reads as follows:

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Section 35.1 was passed as an amendment to the Constitution of Canada using s 38, requiring approval resolutions from both houses of Parliament and seven of the ten provinces, whose total population amounts to at least half of the total provincial population. That was the first and only successful use s 38.

Section 35.1 requires that any amendment proposal affecting three specific sections of the Constitution must be preceded by a constitutional conference of first ministers and representatives of Indigenous peoples. Those three sections are, first, s 91(24) of the *Constitution Act, 1867*, which concerns the legislative authority of Parliament as to “Indians, and Lands reserved for the Indians”; second, s 25 of the *Constitution Act, 1982*, which concerns “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” in relation to land claims agreements and the Royal Proclamation of 1763; and, third, s 35.1 itself.

This commitment to participation does not impose a duty to obtain the consent of Indigenous peoples. Should the Constitution be revised to give Indigenous peoples the right to withhold consent on amendments affecting these matters? If yes, how would consent be obtained—directly from the Indigenous peoples in Canada, from their representatives, or in some other way?

Nonetheless, s 35.1 “affirms by implication that Aboriginal ‘peoples’ have a distinct constitutional character and role. That unique character is political and governmental in nature.” See Paul LAH Chartrand, “Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada” (2011) 19 Waikato L Rev 14 at 20. Chartrand offers further background on s 35.1:

Section 35.1 itself resulted from national conferences on constitutional reform at which the participants were all Canadian first ministers and representatives of the Aboriginal peoples of Canada. Representatives of the Aboriginal peoples of Canada have, since the 1980s participated in intergovernmental meetings on national and provincial political issues.

An Aboriginal “people” is a distinct constitutional entity that has governmental functions and that has a distinct role in constitutional statecraft. The history of Aboriginal peoples, in particular the negotiations and agreements leading to the historic treaties with the First Nations, demonstrates that Aboriginal peoples are distinct constitutional entities whose consent matters for constitutional legitimacy.

It will be recalled that s 35.1 constitutionalises the commitment of the federal and provincial governments to the “principle” that Aboriginal peoples have a role in constitutional reform on matters that affect their interests and rights. If this is a principle then s 35.1 ought to be read so as to apply beyond the specific provisions that are listed in s 35.1 and to include all provisions of the Constitution that affect the interests and rights of Aboriginal peoples, including the relevant provisions of the Constitution Act 1930. This interpretation makes the present argument applicable to the intention of First Nations to seek changes to the lands and natural resources provisions in that Constitutional document, as mentioned above.

The principle that Aboriginal peoples’ representatives have a legitimate role in governmental and intergovernmental affairs in Canada is reinforced by the federal policy first adopted in 1995 which recognises the inherent right of self-government and leads to negotiations on the modern treaties with First Nations.

See Chartrand at 20-21. For more background, see Patrick Macklem & Douglas Sanderson, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016).

Moving from 1983 to 1992, the agreement that was reached on final text of the Charlottetown Accord acknowledged the insufficiency of s 35.1. This is clear in both the length and detail that was proposed to replace what currently appears in s 35.1. Here is what was proposed to replace s 35.1:

35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

(3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

(4) Where an issue arises in any proceedings in relation to the scope of the inherent right of self-government, or in relation to an assertion of that right, a court or tribunal

(a) before making any final determination of the issue, shall inquire into the efforts that have been made to resolve the issue through negotiations under section 35.2 and may order the parties to take such steps as may be appropriate in the circumstances to effect a negotiated resolution; and

(b) in making any final determination of the issue, shall take into account subsection (3).

(5) Neither the right referred to in subsection (1) nor anything in subsection 35.2(1) creates new aboriginal rights to land or abrogates or derogates from existing aboriginal or treaty rights to land, except as otherwise provided in self-government agreements negotiated under section 35.2.

35.2(1) The government of Canada, the provincial and territorial governments and the Aboriginal peoples of Canada, including the Indian, Inuit and Metis peoples of Canada, in the various regions and communities shall negotiate in good faith the implementation of the right of self-government, including issues of

- (a) jurisdiction,
- (b) lands and resources, and
- (c) economic and fiscal arrangements,

with the objective of concluding agreements elaborating relationships between governments of aboriginal peoples and the government of Canada and provincial or territorial governments.

(2) Negotiations referred to in subsection (1) may be initiated only by the representatives or governments of the Aboriginal peoples concerned, and shall, unless otherwise agreed by the parties to the negotiations, be conducted in accordance with the process for negotiations outlined in an accord entered into by the government of Canada, the provincial and territorial governments and representatives of the aboriginal peoples.

(3) All the Aboriginal peoples of Canada shall have equitable access to negotiations referred to in subsection (1).

(4) Agreement negotiated under this section may provide for bodies or institutions of self-government that are open to the participation of all residents of the region to which the agreement relates as determined by the agreement.

(5) The parties to negotiations referred to in subsection (1) shall have regard to the different circumstances of the various aboriginal peoples of Canada.

(6) Where an agreement negotiated under this section

(a) is set out in a treaty or land claims agreement, or in an amendment to a treaty including a land claims agreement, or

(b) contains a declaration that the rights of the aboriginal peoples set out in the agreement are treaty rights, the rights of the Aboriginal peoples set out in the agreement are treaty rights under subsection 35(1).

(7) Nothing in this section abrogates or derogates from the rights referred to in section 35 or 35.1, or from the enforceability thereof, and nothing in subsection 35.1(3) or in this section makes those rights contingent on the commitment to negotiate under this section.

35.3(1) Except in relation to self-government agreements concluded after the coming into force of this section, section 35.1 shall not be made the subject of judicial notice, interpretation or enforcement for five years after this section comes into force.

(2) For greater certainty, nothing in subsection (1) prevents the justiciability of disputes in relation to

(a) any existing rights that are recognized and affirmed in subsection 35(1), including any rights relating to self-government, when raised in any court; or

(b) the process of negotiations under section 35.2.

(3) Nothing in subsection (1) abrogates or derogates from section 35.1 or renders section 35.1 contingent on the happening of any future event, and subsection (1) merely delays for five years judicial notice, interpretation or enforcement of that section.

35.4(1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.

(2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.

(3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

35.5(1) Subsections 6(2) and (3) of the Canadian Charter of Rights and Freedoms do not preclude a legislative body or government of the Aboriginal peoples of Canada from exercising authority pursuant to this Part through affirmative action measures that have as their object the amelioration of conditions of individuals or groups who are socially or economically disadvantaged or the protection and advancement of aboriginal languages and cultures.

(2) For greater certainty, nothing in this section abrogates or derogates from section 15, 25 or 28 of the Canadian Charter of Rights and Freedoms or from section 35.7 of this Part.

35.6(1) The treaty rights referred to in subsection 35(1) shall be interpreted in a just, broad and liberal manner taking into account their spirit and intent and the context of the specific treaty negotiations relating thereto.

(2) The government of Canada is committed to establishing treaty processes to clarify or implement treaty rights and, where the parties agree, to rectify terms of the treaties, and is committed, where requested by the Aboriginal peoples of Canada concerned, to participating in good faith in the process that relates to them.

(3) The governments of the provinces and territories are committed, to the extent that they have jurisdiction, to participating in good faith in the processes referred to in subsection (2), where jointly invited by the government of Canada and the Aboriginal peoples of Canada concerned or where it is specified that they will do so under the terms of the treaty concerned.

(4) The participants in the processes referred to in subsection (2) shall have regard to, among other things and where appropriate, the spirit and intent of the treaties, as understood by the aboriginal peoples concerned.

(5) For greater certainty, all those Aboriginal peoples of Canada who have treaty rights shall have equitable access to the processes referred to in this section.

(6) Nothing in this section abrogates or derogates from any rights of the Aboriginal peoples of Canada who are not parties to a particular treaty.

35.7 Notwithstanding any other provision of this Act, the rights of the Aboriginal peoples of Canada referred to in this Part are guaranteed equally to male and female persons.

[35.8* The government of Canada and the provincial governments are committed to the principle that, before any amendment described in section 45.1 is made,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces will be convened by the Prime Minister of Canada; and

(b) The Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.]

(* SQUARE BRACKETED ITEM: The final wording of this provision (based on existing section 35.1 added in 1984) is to be revisited when the consent mechanism is finalized for section 45.1, at which time concerns will be addressed in respect of amendments directly referring to Aboriginal peoples in some but not all regions of Canada).

35.9(1) At least four constitutional conferences on aboriginal issues composed of the Prime Minister of Canada, the first ministers of the provinces, representatives of the Aboriginal peoples of Canada and elected representatives of the governments of the territories shall be convened by the Prime Minister of Canada, the first to be held no later than 1996 and the three subsequent conferences to be held one every two years thereafter.

(2) Each conference convened under subsection (1) shall have included in its agenda such items as are proposed by the representatives of the Aboriginal peoples of Canada.

35.91 For greater certainty, nothing in this part extends the powers of the legislative authorities or governments of the territories.

The differences between the two are vast. How does the Charlottetown version improve upon the current version? Are there improvements you would make to the Charlottetown version? What would they be? And which of part V's amendment procedures would be required to bring them into law?

2. The Uluru Statement from the Heart

Canada is, of course, not the only jurisdiction currently working toward reconciliation. A fellow Commonwealth country, Australia, is currently in the midst of a national discussion on whether and how to amend its constitution.

In December 2015, the Government of Australia and the Opposition agreed on a 16-member Referendum Council "to consult widely throughout Australia and take the next steps towards achieving constitutional recognition of the First Australians." Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (October 2016) at 1, online (pdf): <https://www.referendumcouncil.org.au/sites/default/files/2016-12/referendum_council_discussion_paper.pdf>.

The Referendum Council was interested in the views of Australians on whether the constitution should be reformed and, if so, how. The driving force behind these efforts was to invite Australians to "think about some specific proposals for symbolic and practical reform and how they might ensure that the Constitution treats Aboriginal and Torres Strait Islander peoples more fairly" (at 1). The Referendum Council also committed to consulting with Indigenous peoples in a forum and format designed and led by Indigenous peoples themselves.

Amending the Constitution of Australia requires a referendum, hence the name of the commission created in Australia. Here is the Australian amendment procedure:

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

See Commonwealth of Australia Constitution Act, s 128.

In May 2017, First Nations from across Australia issued what is known as the Uluru Statement from the Heart. The Uluru Statement calls for two reforms: a First Nations Voice to Parliament and a Makarrata Commission. These reforms would require a constitutional amendment, which is possible only with a referendum.

The first reform would create a permanent institution to express the views of First Nations to the Parliament and to the government on issues affecting First Nations. The second reform would create a commission to oversee treaty-making and truth-telling in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, UN GA res 61/295.

Here is the full text of the Uluru Statement:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

See "The Uluru Statement from the Heart" (2017), online: *Referendum Council* <<https://ulurustatement.org/the-statement>>.

Here in Canada, the Truth and Reconciliation Commission issued a report enumerating 94 Calls to Action. But none called expressly for constitutional reform in Canada. Could Canada benefit from its equivalent of the Referendum Council created in Australia to examine how the Constitution of Canada should be reformed to advance the objectives of the Truth and Reconciliation Commission Report? Could Canada benefit from its equivalent of the Uluru Statement, tailored to the specificities of the history and context of the Canadian experience?

B. CONSTITUTIONAL AMENDMENT AND QUEBEC SOVEREIGNTY

1. A Quebec Veto and the Regional Veto Act

Quebec governments have pressed for the inclusion of a Quebec veto in the amending formula. To date they have been unsuccessful, except for the list of matters in s 41 (the unanimity formula), which gives a veto to all the provinces. The Meech Lake and Charlottetown accords would have expanded the list of matters subject to s 41. Would this have been advisable?

In October 1995, a referendum on sovereignty was narrowly defeated in Quebec (discussed below). This prompted the federal Parliament to enact *An Act respecting constitutional amendments*, SC 1996, c 1 (the Regional Veto Act), which provides a regional veto—including a veto for Quebec—in the form of a federal government promise not to propose any constitutional amendment without the agreement of the five regions of Canada, except in circumstances where a province affected can exercise a veto or opt out of the amendment. The Act reads:

(1) No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the *Constitution Act, 1982* or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by a majority of the provinces that includes:

- (a) Ontario;
- (b) Quebec;
- (c) British Columbia.

(d) two or more of the Atlantic provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Atlantic provinces; and

(e) two or more of the Prairie provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Prairie provinces;

(2) In this section,

Atlantic provinces means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador;

Prairie provinces means the provinces of Manitoba, Saskatchewan and Alberta.

Does this make the amending formula unnecessarily rigid? As we discuss below in Section VI, the Constitution of Canada is already difficult to amend. The Regional Veto Act makes it harder. But is it now too hard?

Two scholars have shown that the effect of the Regional Veto Act is to end the legal equality of the provinces in the constitutional amendment process. Whereas part V of the *Constitution Act, 1982* treats all provinces equally, with no province having any special power in the amendment process, the Regional Veto Act creates two classes of provinces—those with veto power, and those without: see Andrew Heard & Tim Swartz, "The Regional Veto Formula and Its Effects on Canada's Constitutional Amendment Process" (1997) 30 Can J Polit Sci 339. There is another point to note: the Regional Veto Act now imposes new requirements for a constitutional amendment under s 38—requirements that do not appear in part V of the *Constitution Act, 1982*. Do either of these provide grounds to argue that the Regional Veto Act is constitutionally invalid?

2. Quebec Secession

In recent years, discussions of the amending formula have centred on the potential secession of Quebec. This issue has attracted the attention of legal commentators because of the 1995

sovereignty referendum in that province, which rejected sovereignty by an extremely narrow margin. Part of the federal government's response was to convince Quebecers that the road to independence would be costly and difficult. In particular, the federal government sought to respond to the view, asserted by some Quebec sovereigntists, that a "yes" vote would automatically effect the legal secession of the province. They did this by asserting that a "yes" vote had no concrete legal effect and would at best result in a political process of intergovernmental negotiations that might culminate in a package of constitutional amendments that would have to comply with the rules spelled out in part V to become effective. The centrepiece of this part of the federal strategy—referred to as "Plan B"—was the posing of the following three reference questions to the Supreme Court of Canada on September 30, 1996:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

See *Order in Council PC 1996-1497* (30 September 1996) as cited in *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 at para 2.

The expectation among legal commentators was that the Court would answer the first two questions in the negative and that, as a consequence, it would decline to answer the third question. With respect to question 1, it was thought that the Court would simply point out that although the Constitution contains no provisions governing secession of a province, the Constitution does not expressly prohibit it, meaning that secession is legally possible. However, what secession requires is a constitutional amendment and, hence, compliance with the amending formulas in part V of the *Constitution Act, 1982*. The legal secession of a province from Canada would require many constitutional amendments: for one list, see Peter Russell & Bruce Ryder, *Ratifying a Postreferendum Agreement on Quebec Sovereignty* (Toronto: CD Howe Institute, 1997). Legal commentators generally assumed that most of the required changes would engage amending formulas other than s 45 (the provincial unilateral procedure) because the required changes would go much further than the constitution of a province. And because every other amending formula requires the consent of the federal government, it was thought that the Court would simply hold that a unilateral secession, by definition, is unconstitutional.

In its advisory opinion, the Supreme Court confounded those expectations. The following extract contains the part of the Court's judgment dealing specifically with the constitutionality of unilateral secession. The earlier portions of the judgment, in which the Court set out the principles of the Canadian Constitution on which it drew to deal with the secession issue, are found in Chapter 2, Judicial Review and Constitutional Interpretation.

Reference re Secession of Quebec

[1998] 2 SCR 217, 1998 CanLII 793

THE COURT (Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, and Binnie JJ):

[83] Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving

statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession “[u]nder the Constitution of Canada.” This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. ...

[84] The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

[85] The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. ... By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada *unilaterally*.

[86] The “unilateral” nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is “unilateral.” We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede “unilaterally” is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

[87] Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the

Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

[88] The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

[89] What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

[90] The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. ...

[91] For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

[92] However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no

obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. ... The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

[93] Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. ... A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

[94] In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of *all* the participants in the negotiation process.

[95] Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. ...

[96] No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. ... Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, ... when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation

[97] In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

[98] The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the *Patriation Reference [Re: Resolution to amend the Constitution, [1981] 1 SCR 753, 1981 CanLII 25]*, a distinction was drawn between the law of the

Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

• • •

[100] The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. ... The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. ... Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

[101] If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. ...

• • •

[104] Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. ... However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

NOTES AND QUESTIONS

1. *Clear majority, clear question, and the duty to negotiate.* Until the judgment, it had been thought that referenda played no role in constitutional amendment. Indeed, an earlier draft of part V would have permitted amendment on the basis of a positive result in a national referendum; this procedure was ultimately removed. The central holding in the *Secession Reference* is that "a decision of a clear majority of the population of Quebec on a clear question to pursue secession" (at para 93) would trigger a duty to negotiate the required constitutional amendments to give effect to the desire to secede. However, the Court did not define "clear majority" or "clear question." Commentators have given the clear majority requirement varying interpretations: a super-majority requirement—for example, 60 percent or two-thirds; a simple majority but with the results free from doubt that could be created, for example, by voting irregularities;

or a majority of eligible voters, as opposed to simply a majority of votes cast. What do you think? On the issue of what a clear question would be, the Court says no more than that the question should be on secession. Would this preclude posing a question that omitted any reference to secession—for example, a question that referred to sovereignty, or to renewed federalism? In this context, consider the question posed to voters in the 1995 referendum:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

See Secrétariat du Québec aux relations canadiennes, "Historical Background" (last visited 22 November 2021) at para 19, online: *Gouvernement de Québec* <<https://www.ssrc.gouv.qc.ca/relations-canadiennes/politique-affirmation/rappels-historiques-en.asp>>.

Is this question "a clear question to pursue secession"? Recall that the Court did not specify who the parties to constitutional negotiations would be—that is, which parties would be under the duty to negotiate. The judgment refers variously to "the other provinces and the federal government" (at paras 86, 88, 151), "the representatives of two legitimate majorities" (at para 93), and "participants in Confederation" (at paras 69, 88, 149, 150). Does this mean that negotiations would be bilateral—that is, between Quebec and the federal government—or multilateral? If the negotiations are multilateral, would they be limited to representatives of the federal and provincial governments, or would they include Indigenous peoples?

2. *No judicial supervision*. Arguably, the ambiguities in the judgment would not have posed a difficulty if the Court had indicated its future willingness to flesh out the legal framework governing secession and to supervise both the process and outcome of constitutional negotiations. However, the Court declined to do so, effectively leaving the interpretation and application of the rules of the Canadian Constitution governing secession to "the political actors." Is this the normal division of labour between courts and legislatures in constitutional interpretation? If not, what reasons did the Court give for departing from this norm? Are these reasons convincing? Consider the following explanation offered by Sujit Choudhry and Robert Howse:

[O]nce we examine the political context surrounding the *Quebec Secession Reference*, it becomes evident that the Court acted in the face of the failure of federal political institutions to face the challenge posed by the referendum process in Quebec to the legitimacy of the Canadian constitutional order . . . Before the reference questions had been issued, it was entirely open to the federal government to lay down principles governing referenda and secession.

See Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13 Can JL & Jur 143.

Both the federal Parliament and the Quebec National Assembly have accepted the Court's invitation to contextualize the constitutional norms regarding secession: see *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26 (the federal Clarity Act) and *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, SQ 2000, c 46 (Quebec's Fundamental Rights Act). On what constitutes a clear majority, s 2 of the Clarity Act provides:

2(1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

- (2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account
- the size of the majority of valid votes cast in favour of the secessionist option;
 - the percentage of eligible voters voting in the referendum; and
 - any other matters or circumstances it considers to be relevant.

(3) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant.

(4) The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada unless the House of Commons determines, pursuant to this section, that there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

By contrast, s 4 of the Fundamental Rights Act provides (citations omitted):

When the Québec people [are] consulted by way of a referendum under the Referendum Act, the winning option is the option that obtains a majority of the valid votes cast, namely fifty percent of the valid votes cast plus one.

Do these provisions potentially conflict? How? If they do, do you think the Court will intervene in a subsequent case? Note that the Court did seem to suggest that it would pronounce on the correct amending formula for achieving secession (although the note below raises some questions about this).

3. *Secession without a constitutional amendment?* In the *Secession Reference*, the Court refers to the need for a constitutional amendment to effect secession, states that the constitutional negotiations to secure such an amendment could be unsuccessful, and refuses to speculate on what the consequences of a failure of negotiations would be. However, consider the following paragraph:

[103] To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

Does this passage effectively create a right to unilateral secession after good-faith negotiations? If so, can this be squared with the Court's holding that unilateral secession is unconstitutional?

Conversely, does it explain the Court's statement that a right to unilateral secession is "the right to effectuate secession without prior negotiations with the other provinces and the federal government" (at para 86), as opposed to the right to secede without prior consent? Does it leave the enforcement of the rules of the Canadian Constitution governing secession to the international community?

4. *Section 45, Quebec Nationhood, and the French Language.* In November 2006, the House of Commons adopted a motion recognizing that "the Quebecois form a nation within a united Canada." See "House Passes Motion Recognizing Quebecois as Nation," CBC News (27 November 2006), online: <<https://www.cbc.ca/news/canada/house-passes-motion-recognizing-quebecois-as-nation-1.574359>>. Fifteen years later, in May 2021, the National Assembly of Quebec introduced Bill 96, an omnibus bill intended to protect the French language in Quebec. One of the Bill's provisions proposes to amend the *Constitution Act, 1867* using Quebec's power to unilaterally amend its provincial constitution under s 45 of the *Constitution Act, 1982*. Here is the text of the proposal:

159. The Constitution Act, 1867 (30 & 31 Victoria, c. 3 (U.K.); 1982, c. 11 (U.K.)) is amended by inserting the following after section 90:

"FUNDAMENTAL CHARACTERISTICS OF QUEBEC"

"90Q.1. Quebecers form a nation."

"90Q.2. French shall be the only official language of Quebec. It is also the common language of the Quebec nation."

See Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 42nd Leg, 2021 (adopted in principle 3 November 2021), online: <<http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-96-42-1.html>>.

What is the scope of a province's power under s 45? By its own terms and the design of part V of the *Constitution Act, 1982*, the provincial unilateral amendment power in s 45 is limited expressly to those matters that do not exceed the scope of a province's jurisdictional authority. But are there additional limitations? Consider this analysis:

Several implicit constitutional issues also limit the scope of section 45. For one thing, provinces cannot unilaterally amend their constitution in a way that would jeopardize the conditions of the 1867 union or the federal principle. The same can be said of section 93 of the *Constitution Act, 1867*, which recognizes denominational education rights, and therefore is a limit to section 45. Furthermore, provisions considered indispensable for the implementation of the federal principle were declared *ultra vires* to section 92(1) in *OPSEU*, and thus escape the scope of section 45. Accordingly, the unilateral secession of a province was deemed unconstitutional in *Reference re Secession of Quebec*.

Another important implicit limit to the unilateral modification of provincial constitutions constitutional rights and freedoms. Every right protected in the Charter constitutes a limit to section 45. The only way to circumvent this limit is for a province to invoke the notwithstanding clause found in section 33. Then again, this clause applies only to sections 2 and 7–15 of the Charter, and has a five-year sunset clause. Even before the entrenchment of the Charter, there was the belief that the Canadian Constitution encompassed an implied bill of rights. This theory was based on the fact that the Constitution was similar in principle to that of the United Kingdom. Although not all constitutionalists agree on the merits of this theory, it could still be a limit on section 45.

Furthermore, provincial legislatures cannot delegate their powers—for example, via deliberative referendums—under section 45. This conclusion is based on *In re The Initiative & Referendum Act (Manitoba)*, which posited that allowing provincial laws to be adopted or modified directly by citizens instead of the legislature was *ultra vires* section 92(1). It was also confirmed in *obiter dictum* in *OPSEU*. Finally, provinces cannot unilaterally remove

subject-matter jurisdictions from section 96 courts, which are administered by the provinces but appointed by the federal government, as determined by case law.

See Emmanuel Richez, "The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 164 at 168.

Class activity: Assemble yourselves into two pairs of two separate groups. In the first pairing, one group will make the case that Quebec may use its power in s 45 to insert the newly proposed s 90Q.1 into the *Constitution Act, 1867*. The other group in the first pairing will argue that s 45 does not grant Quebec this authority. In the second pairing, one group will make the case that Quebec may use its power in s 45 to insert the newly proposed s 90Q.2 into the *Constitution Act, 1867*. The other group in this second pairing will argue that s 45 does not grant Quebec this authority. Which side in each pairing is more compelling to you?

5. *Section 43 and Quebec's future in Canada*. It has long been assumed that securing Quebec's constitutional future in Canada would require the use of either the general amending formula in s 38 or the unanimity procedure in s 41. For some matters of constitutional importance, it is clear that recourse to one of these sections is mandatory; but for others, it is an open question that David Cameron and Jacqueline Krikorian have recently answered by suggesting that the bilateral procedure in s 43 could be used to amend the Constitution to give Quebec the reassurance and recognition that many of its political leaders have in the past demanded.

**David R Cameron & Jacqueline D Krikorian,
"Recognizing Quebec in the Constitution of Canada:
Using the Bilateral Constitutional Amendment Process"**

(2008) 58 UTLJ 389 at 414-20

Canada has ... been trapped in an unsatisfactory state of irresolution with respect to national unity since 1982. Quebec—as reflected in its government, its legislature, and, arguably, its people—has not assented to the constitutional arrangements by which it is governed. While this appears at the moment to make little difference in the day-to-day lives of ordinary citizens, it is a state of affairs widely regarded as unsatisfactory for a constitutional democracy. Moreover, it is seen by many as exposing the country to an unacceptable risk of fracture should a crisis arise. Yet while many would acknowledge that there remains some unfinished business as far as Quebec is concerned, doing nothing seems to be the best option available to policy makers. There has been a sense that an impasse between Quebec and the rest of Canada is better than another round of failed constitutional talks.

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To date, Quebec's constitutional concerns have not been addressed in a manner that would make it acceptable for its residents, its government, or its legislature to formally consent to the 1982 Constitution. For reasons outlined above, events are at an impasse. The recent success of the initiative of the government of Canada, however, appears to suggest that there may be an opportunity for progress. Building on the resolution recognizing the Québécois as a nation within Canada, the House of Commons and the National Assembly could introduce a bilateral constitutional amendment that would give official status to the French language in the province of Quebec and possibly recognize the French culture in the province.

A bilateral constitutional amendment addressing language issues is expressly permitted under s. 43 of the *Constitution Act, 1982*. New Brunswick, in conjunction with the federal government, adopted such an amendment for this very purpose when it bestowed a kind of enhanced status on the French and English languages. Moreover, the Supreme Court of Canada has already both accepted and endorsed the notion that French is the predominant language in Quebec. In [*Ford v Quebec (AG)*, [1988] 2 SCR 712, 1988 CanLII 19], it held that the National Assembly could adopt a law providing that French would have greater public visibility than English, expressly stating that the government of Quebec could require the French language to be given predominance on signage in order to reflect the "*visage linguistique*" of the province. In the process, the Court effectively acknowledged and endorsed the notion that the vitality of the French language and culture in Quebec is a valid public-policy goal.

In this context, it would be possible for the governments of Canada and Quebec to use New Brunswick's bilateral constitutional amendment as a precedent to introduce a measure that builds upon the essence of the November 2006 House of Commons resolution recognizing the Québécois nation in Canada. We are arguing, in other words, that a bilateral constitutional amendment is a potential process by which the long-standing concerns of Quebec could begin to be addressed in the Constitution. Our overall objective here is not to provide solutions to the constitutional impasse, or even the text of a possible provision; rather, our goal is to map out a process by which the real and valid concerns of the francophone community in Quebec might successfully be addressed and to indicate the issues that could be considered if and when such discussions should occur.

We envision that such an amendment would reaffirm Quebec's existing legislative authority and act as an interpretive provision that informs how the Constitution is read and understood in Quebec. We are not advocating a measure that allocates new powers or redistributes existing heads of power; such a proposal would change the nature and balance of Canadian federalism and require the consent of all the provinces. Rather, we are arguing for consideration of a bilateral constitutional amendment that pertains only to Quebec. To this end, we believe there are at least two options worthy of consideration. The first is to introduce an amendment to s. 16 of the Charter dealing with official languages, while the second is to introduce a provision similar in nature to s. 27 of the Charter that would apply exclusively to Quebec.

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The focus of the proposed bilateral constitutional amendment would pertain to the French language, and possibly the French culture, in Quebec. It could entrench French as the official language of the province and acknowledge that the National Assembly has the authority to both preserve and protect Quebec's distinct cultural institutions. Such a provision would, in effect, simply reflect the existing status of the French language in Quebec by constitutionalizing the *raison d'être* of the provisions legally enacted in Bill 101 . . . [A] constitutional amendment of this nature would entrench the status of one of the core elements of the Québécois nation in the province, as well as beginning to address one of Quebec's legitimate core concerns, namely, the amendment of the Canadian Constitution in 1982 without Quebec's priorities being addressed and without Quebec's consent. In this sense, our proposal is positive in nature—to constitutionalize the rights of the French community, not to detract or take away from the existing rights of anglophones in the province. In fact, a provision in the proposed bilateral amendment expressly recognizing and protecting the existing rights of the English community in the province of Quebec would be an essential part of any bilateral amendment, in order to reassure the anglophone community in the province that their status has not been altered.

A second option for a bilateral amendment recognizing the predominance of French in Quebec would be to adopt a provision akin to s. 27 of the Charter:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 27 ... informs how the Constitution is to be interpreted, but it does not give special powers or legislative authority to one government or community over another; rather, it acknowledges the importance and value that Canadians accord to multiculturalism and provides an assurance that these considerations will give guidance to any court that must render a decision in a constitutional challenge to a government measure or action.

We believe that a provision similar in nature to s. 27 could be introduced as a bilateral constitutional amendment, with the proviso that it applied to Quebec. ... It is our position that the Québécois nation is no less deserving of recognition in the Constitution than is our multicultural heritage and that, in the context of Quebec, such recognition is extremely important both politically and symbolically.

... [W]e would suggest that the nature of the bilateral amendment should be focused on the use and status of the French language and, possibly, the French culture. The overwhelming success of the Canadian government's resolution recognizing the Québécois as a nation—which Harper explained was specifically linked to the French language—suggests that Parliament accepts that the specificity of Quebec and the French language is a distinctive feature of the Quebec reality, a position that is obviously accepted by the National Assembly of Quebec.

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... [I]t is worth noting that one of the main reasons that the Meech Lake and Charlottetown Accords were so strongly contested was not simply the fact that the amendments required the consent of other provinces but also that each purported to declare something about the country as a whole This is not the case with the suggestions we have put forward. The bilateral amendment process involves two government actors—the National Assembly and government of Quebec, on the one hand, and Parliament and the government of Canada, on the other—not all the provinces and territories. Furthermore, the amendment makes no attempt to capture a Canadian vision and situate Quebec within it; rather, it identifies one vital element in Quebec's existing laws and complex reality and offers that element a degree of constitutional recognition.

Such a bilateral amendment would serve two important public-policy objectives. First, the constitutional provision would have considerable symbolic importance for Canadians both inside and outside of Quebec. ...

A second rationale for this type of bilateral amendment is that it would be used as an interpretive aid in any future constitutional litigation challenging measures to promote or protect the French language in Quebec Although Quebec legislation entrenching French language rights might still be found to violate, for example, the Charter's freedom-of-expression or equality measures, a bilateral constitutional amendment of this nature would, in effect, mandate the courts to carefully balance the language rights of the Québécois community within the province and the rights of the individual before striking down a contested statute. ...

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We recognize that this proposal may provoke controversy because some may feel that it has the potential to affect the standing of the English minority in Quebec. In the years since the passage of Bill 101, however—through court cases, legislative adjustment, and social adaptation—Quebec has achieved a condition of "linguistic

peace," in which the anglophone minority, by and large, has accepted the basic provisions of Bill 101, has learned French, and has accommodated itself to the position of English in the linguistic landscape of Quebec. The proposed amendment would recognize contemporary reality and give greater security to the French language and to francophones within the framework of the Constitution of Canada. We also believe that, in the "big picture," by assuring the Québécois nation that they have a secure future within the Canadian federation, we would be providing stability and security to the anglophone community in Quebec.

QUESTIONS

Does your reading of s 43 accommodate the range of amendments that Cameron and Krikorian suggest is possible? Would amendments of the kind suggested be accepted as legitimate outside Quebec? Would Quebec be satisfied by amendments like these without their being approved by the rest of Canada?

C. CONSTITUTIONAL AMENDMENT AND ALBERTA SOVEREIGNTY

While secessionist sentiment appears to have declined for now in Quebec, it appears to have risen in Alberta, and there now exists a federal political party with the capacity to harness the energies of Albertans and more generally of persons elsewhere in Western Canada. Founded in 2019 as the Wexit Party—a play on Brexit to promote the West's exit from Canada—today the party is known as the Maverick Party.

On November 9, 2019, the Premier of Alberta created the Fair Deal Panel. In his mandate letter to the Panel, the Premier acknowledged the forces that had led to the creation of Wexit:

Recent public opinion surveys suggest that as many as one third of Albertans support the concept of separating from the Canadian federation, and that three quarters of Albertans understand or sympathise with this sentiment. Many Albertans who indicate support for federalism are demanding significant reforms that will allow the province to develop its resources, and play a larger role in the federation, commensurate with the size of its economy and contribution to the rest of Canada.

See *Letter from the Premier to the Fair Deal Panel*, 9 November 2019, online (pdf): Government of Alberta <<https://www.alberta.ca/external/news/letter-from-premier-to-panel.pdf>>.

The Panel's nine members were directed to "listen to Albertans and their ideas for Alberta's future," focusing on "ideas that would strengthen [the] province's economic position, give [it] a bigger voice within Confederation, or increase provincial power over institutions and funding in areas of provincial jurisdiction." See *Letter from the Premier* at 1.

In its final report submitted in May 2020, the Fair Deal Panel wrote that it "encourages the Government of Alberta to act vigorously and swiftly ... to secure a fair deal for Albertans. Some Albertans believe that the only way to get Ottawa and other provinces to pay attention to unfairness and misunderstandings is to use the threat of separation Listening to Albertans, the panel understands their anger But we do not believe the threat of secession is a constructive negotiating strategy. However, we believe that if the federal government and the rest of Canada do not respond positively and quickly to Albertans' demands for a fair deal, then support for secession will only grow. The panel also wishes to make clear ... the best option is to achieve a fairer deal for Albertans, and for all Canadians, within Confederation. How will we know when we have a fair deal for Alberta? In the panel's opinion, we will know when Albertans trust people in Ottawa to act in this province's best interests, and when Alberta's position within the Canadian federation has been equitably reset." See *Fair Deal Panel, Report to*

Government, May 2020 at 8, online (pdf): *Government of Alberta* <<https://open.alberta.ca/dataset/d8933f27-5f81-4cbb-97c1-f56b45b09a74/resource/d5836820-d81f-4042-b24e-b04e012f4cde/download/fair-deal-panel-report-to-government-may-2020.pdf>>.

The Panel's final report made 25 recommendations. One of its recommendations urged the Government of Alberta to proceed with a referendum on equalization, "asking a clear question along the lines of: 'Do you support the removal of Section 36, which deals with the principle of equalization, from the Constitution Act, 1982?'" (*Fair Deal Panel Report* at 7, 16-18).

On June 7, 2021, the Premier introduced a motion in the Legislative Assembly to propose the following question for a referendum to be held on October 18, 2021: "Should Section 36(2) of the *Constitution Act, 1982*—Parliament and the Government of Canada's commitment to the principle of making equalization payments—be removed from the Constitution?" See *Referendum Question on Equalization Introduced*, 7 June 2021, online: *Government of Alberta* <<https://www.alberta.ca/release.cfm?xID=793270E30BF4E-EC74-8973-B92812EA0E3AB9F3>>.

Asked to explain his motivation, the Premier of Alberta explained that a "yes" vote on the referendum would give the province a strong claim to request negotiations to change the equalization formula in Canada.

Equalization would require either a change of federal policy or a constitutional amendment using the procedure outlined in s 38 of the *Constitution Act, 1982*, otherwise known as the 7/50 formula. Given that, what do you suppose was the strategy behind the equalization referendum, since a successful referendum will not on its own change equalization?

D. SENATE REFORM

Since Confederation, the Senate has been the subject of several reform proposals. No major constitutional amendments have been made with regard to the function of the institution, but it has been amended in two noteworthy ways over the years. First, the size of the Senate, as detailed in s 22 of the *Constitution Act, 1867*, has changed. In its initial version, s 22 created a Senate consisting of three regional divisions—Ontario, Quebec, and the maritime provinces (Nova Scotia and New Brunswick), each with 24 senators. When Prince Edward Island joined Canada in 1873, it was given four senators, and Nova Scotia and New Brunswick were reduced to ten seats each. In 1915, the Senate was reorganized into four regional divisions to accommodate a new Western division. This new division consisted of already-admitted provinces—Alberta, British Columbia, Manitoba, and Saskatchewan—and it was given an equal complement of 24 senators. The addition of Newfoundland into Canada in 1949 entitled the province to six senators. The Yukon and the Northwest Territories were given one senator each in 1975, and, in 1999, the new territory of Nunavut was also given one senator.

A second noteworthy change was an amendment to its terms of service. At Confederation, according to s 29 of the *Constitution Act, 1867*, a senator could serve for life. In 1965, a mandatory retirement age of 75 for all new senators was imposed.

Heather Hughson, "Senate Reform: The First 125 Years"

(21 September 2015), online: *Policy Options* <<http://policyoptions.irpp.org/magazines/september-2015/the-future-of-the-senate/senate-reform-the-first-125-years>>

The Senate is an institution about which we—citizens, academics, and politicians alike—know very little, except that we dislike it, and so concocting new ideas for reform is something of a Canadian pastime. But as significant as Senate reform could be, it has always had a low priority. Few governments have the political will to see

through a plan whose benefits will not be immediately visible to voters and whose potential costs, in the event of failure, could be astronomically high. The result is a long trail of discarded and forgotten alternative Senate models, dating back nearly all the way to Confederation.

Most of the delegates at the 1864 Quebec conference, where the institutions of government for Canada were conceived, had direct experience with elected upper houses, and many of them were even the same people who had pushed for the change to election in the united Province of Canada (now Ontario and Quebec) and Prince Edward Island only a few years earlier. Despite this, the delegates at the conference were nearly unanimous in their disapproval . . . Their eventual solution was to have a second chamber that was democratically illegitimate by design, so that it could not challenge the House of Commons for parliamentary supremacy yet could still perform vital democratic functions.

Delegates at the Quebec conference spent more time discussing the Senate—its functions, purpose and design—than any other institution of governance. Nevertheless, dissatisfaction arose almost immediately. Long-standing concerns about regional or provincial representation at the federal level had not been dispelled by a Senate where seats were distributed equally by region but the regions had no choice in who those representatives would be; and subsequent proposals have overwhelmingly aimed to make the Senate into a proper chamber of federalism, usually by devolving powers to the provinces in some way.

This tendency appears clearly in the very first times that Senate reform came to the floor of Parliament, in 1874 and 1875, when Liberal MP David Mills tabled a motion calling for the devolution of Senate appointment powers to the provinces, calling federal appointment “inconsistent with the Federal principle.” Although the Commons agreed to the 1875 resolution, he never produced any actual plan for reform and eventually withdrew his motion; but the same phrase appeared again in a motion at [the] 1893 Liberal Party convention, where it received unanimous support. Devolution first appeared in an official party campaign platform in 1908 under Robert Borden’s Liberal-Conservatives, and it became such a frequent fixture in election campaigns that by 1925, when it appeared once more in the Liberal Party’s campaign platform, Conservative Leader Arthur Meighen sarcastically remarked, “So that old bird is to be provided with wooden wings and told to fly again.” Devolution, in some form or another, remained the dominant model for Senate reform in Canada until the 1980s.

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It was not until the 1960s that Senate reform began to look like a credible possibility—because Canadian federalism had evolved to include more power-sharing between levels of government and a greater role for the provinces in national affairs. . . .

During this time of increased interest in upper house reform, one small change was actually implemented: the introduction of mandatory retirement at age 75 in 1965. . . .

Real Senate reform came to the national agenda in 1969, when the government of Pierre Trudeau accepted in principle some degree of devolution that would secure formal and direct expression of provincial interests in the Senate, though no agreement was reached regarding the specifics. . . .

The turning point was the government’s 1978 White Paper on constitutional reform, which set out a two-stage plan for patriating the Constitution. [The first stage . . .] included the creation of a new upper house, the House of the Federation, which would be indirectly elected by the provincial and federal legislatures and have a 120-day suspensive veto over parliamentary legislation. What followed was a back-and-forth series of plans for Senate reform as part of a constitutional overhaul, as

the federal government asserted the right to proceed unilaterally while the provinces demanded to be involved in the reform of a central institution of Canadian federalism. ... The unilateral approach ended with the Supreme Court's 1979 ruling on upper house reform, which required provincial consultation for anything that would "affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process."

The Senate was left nearly untouched during the patriation of the Constitution in 1982, ... because Canadian political thought about the Senate was undergoing a paradigm shift. In 1981, the Canada West Foundation published a booklet advocating a completely different model from any seen before. The Triple-E model called for an equal number of senators per province, direct election of senators and effective powers capable of challenging the House of Commons. In a few years, it completely replaced "devolution plus" as the default model for upper house reform, particularly in the western provinces

What happened next warrants a much longer account in the history of Senate reform, as the plans changed quickly and frequently. But it was that haphazard and overly complicated approach that made the Meech Lake and Charlottetown Accords particularly frustrating for reformers

Major Senate reform was a key part of the Charlottetown Accord, preparations for which began almost immediately after the demise of Meech. At the end of a series of meetings with all provinces but Quebec, Premier Bob Rae of Ontario agreed to a Triple-E Senate, on the condition that the House of Commons would have seats distributed purely on the basis of population, which would give Ontario an additional 18 MPs. The agreement, however, was rejected [by] Quebec, and a final round of negotiations produced a "One and a Half E" Senate plan. There would be an equal number of seats, but provinces could decide whether to appoint or elect those senators. The third E, effectiveness, was dropped entirely, with the Senate reduced to a very brief suspensive veto, after which any disputes would be resolved in a joint sitting, where senators would be outnumbered by MPs by over five to one. It was a quintessentially Canadian plan, combining features of nearly every prior popular proposal in an attempt to create a hybrid chamber that would satisfy all types of reformers, but ultimately it satisfied none, and the Accord was defeated.

The difficulty of large-scale constitutional amendment suggested that Senate reform, if it were to happen at all, would occur outside of the multilateral amendment procedures in part V of the *Constitution Act, 1982*. A minority Conservative government elected in 2006 began with a Senate term-limits bill that would have set an eight-year term limit for new senators: see Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Sess, 39th Parl, 2006 (first reading 30 May 2006). The government then proposed to establish a framework for consultative provincial and territorial elections to fill vacancies: see Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess, 39th Parl, 2007 (first reading 13 November 2007). Neither of these bills went anywhere, but after winning a majority in the federal general elections of May 2011, the government reintroduced both proposed reforms in a single bill: see Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess, 41st Parl, 2011 (first reading 21 June 2011). These reforms entailed recourse to the federal unilateral amendment procedure in s 44—or so the government thought. In 2014, the Supreme Court weighed in on these and other possible reforms.

Reference re Senate Reform

2014 SCC 32 (footnotes omitted)

THE COURT (McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ):

I. Introduction

[1] The Senate is one of Canada's foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation. Yet from its first sittings, voices have called for reform of the Senate and even, on occasion, for its outright abolition.

[2] The Government of Canada now asks this Court [by way of a reference] to answer essentially four questions: (1) Can Parliament unilaterally implement a framework for consultative elections for appointments to the Senate? (2) Can Parliament unilaterally set fixed terms for Senators? (3) Can Parliament unilaterally remove from the *Constitution Act, 1867* the requirement that Senators must own land worth \$4,000 in the province for which they are appointed and have a net worth of at least \$4,000? and (4) What degree of provincial consent is required to abolish the Senate?

[3] We conclude that Parliament cannot unilaterally achieve most of the proposed changes to the Senate, which require the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces. We further conclude that abolition of the Senate requires the consent of all of the provinces. Abolition of the Senate would fundamentally change Canada's constitutional structure, including its procedures for amending the Constitution, and can only be done with unanimous federal-provincial consensus.

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III. The Senate

[13] It is appropriate to briefly introduce the institution at the heart of this Reference.

[14] The framers of the *Constitution Act, 1867* sought to adapt the British form of government to a new country, in order to have a "Constitution similar in Principle to that of the United Kingdom": preamble. They wanted to preserve the British structure of a lower legislative chamber composed of elected representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state.

[15] The upper legislative chamber ... was modeled on the British House of Lords, but adapted to Canadian realities. As in the United Kingdom, it was intended to provide "sober second thought" on the legislation adopted by the popular representatives in the House of Commons However, it played the additional role of providing a distinct form of representation for the regions that had joined Confederation and ceded a significant portion of their legislative powers to the new federal Parliament While representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population. This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada

[16] Over time, the Senate also came to represent ... ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process

[17] Although the product of consensus, the Senate rapidly attracted criticism and reform proposals. Some felt that it failed to provide "sober second thought" and reflected the same partisan spirit as the House of Commons. Others criticized it for failing to provide meaningful representation of the interests of the provinces as originally intended, and contended that it lacked democratic legitimacy.

[18] In the years immediately preceding patriation of the Constitution, proposals for reform focused mainly on three aspects: (i) modifying the distribution of seats in the Senate; (ii) circumscribing the powers of the Senate; and (iii) changing the way in which Senators are selected for appointment. These proposals assumed the continued existence of an upper chamber, but sought to improve its contribution to the legislative process.

[19] In 1978, the federal government tabled a bill to ... [readjust] the distribution of seats between the regions; remov[e] the Senate's absolute veto over most legislation and replac[e] it with an ability to delay the adoption of legislation; and giv[e] the House of Commons and the provincial legislatures the power to select Senators: *Constitutional Amendment Act, 1978* (Bill C-60), June 20, 1978, cls. 62 to 70. The bill was not adopted and, in 1980, this Court concluded that Parliament did not have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it: *Reference re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 ("Upper House Reference").

[20] ... The question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution. ...

IV. The Part V Amending Procedures

[21] The statute that created the Senate—the *Constitution Act, 1867*—forms part of the Constitution of Canada and can only be amended in accordance with the Constitution's procedures for amendment: s. 52(2) and (3), *Constitution Act, 1982*. Consequently, we must determine whether the changes contemplated in the Reference amend the Constitution and, if so, which amendment procedures are applicable.

[22] Before answering these questions, we discuss constitutional amendment in Canada generally. We examine in turn the nature and content of the Constitution of Canada, the concept of constitutional amendment, and the Constitution's procedures for amendment.

A. The Constitution of Canada

[23] The Constitution of Canada is "a comprehensive set of rules and principles" that provides "an exhaustive legal framework for our system of government": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("Secession Reference"), at para. 32. It defines the powers of the constituent elements of Canada's system of government—the executive, the legislatures, and the courts—as well as the division of powers between the federal and provincial governments And it governs the state's relationship with the individual. Governmental power cannot lawfully be exercised, unless it conforms to the Constitution

[24] The Constitution of Canada is defined in s. 52(2) of the *Constitution Act, 1982* as follows:

- 52. ...
 - (2) The Constitution of Canada includes
 - (a) the *Canada Act 1982*, including this Act;

- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The documents listed in the Schedule to the *Constitution Act, 1982* as forming part of the Constitution include the *Constitution Act, 1867*. Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada: *Supreme Court Act Reference*, at paras. 97-100; *Secession Reference*, at para. 32.

[25] The Constitution implements a structure of government and must be understood by reference to "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning": *Secession Reference*, at para. 32; see generally H. Cyr, "L'absurdité du critère scriptural pour qualifier la constitution" (2012), 6 *J.P.P.L.* 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law

[26] These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an "internal architecture," or "basic constitutional structure": *Secession Reference*, at para. 50 The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole": *Secession Reference*, at para. 50 In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

B. Amendments to the Constitution of Canada

[27] The concept of an "amendment to the Constitution of Canada," within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture.

C. The Part V Amending Procedures

[28] Part V of the *Constitution Act, 1982* provides the blueprint for how to amend the Constitution of Canada It tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement.

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(2) The Amending Procedures

[32] Part V contains four categories of amending procedures. The first is the general amending procedure (s. 38, complemented by s. 42), which requires a substantial degree of consensus between Parliament and the provincial legislatures. The second is the unanimous consent procedure (s. 41), which applies to certain changes deemed fundamental by the framers of the *Constitution Act, 1982*. The third is the special arrangements procedure (s. 43), which applies to amendments in relation to provisions of the Constitution that apply to some, but not all, of the provinces. The

fourth is made up of the unilateral federal and provincial procedures, which allow unilateral amendment of aspects of government institutions that engage purely federal or provincial interests (ss. 44 and 45).

(a) The General Amending Procedure

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[34] The process set out in s. 38 is the general rule for amendments to the Constitution of Canada. It reflects the principle that substantial provincial consent must be obtained for constitutional change that engages provincial interests. Section 38 codifies what is colloquially referred to as the "7/50" procedure—amendments to the Constitution of Canada must be authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces. Additionally, it grants to the provinces the right to "opt out" of constitutional amendments that derogate from "the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province."

[35] By requiring significant provincial consensus while stopping short of unanimity, s. 38 "achieves a compromise between the demands of legitimacy and flexibility". J. Cameron, "To Amend the Process of Amendment," in G.-A. Beaudoin et al., *Federalism for the Future: Essential Reforms* (1998), 315, at p. 324. Its "underlying purpose ... is to protect the provinces from having their rights or privileges negatively affected without their consent": Monahan and Shaw, at p. 192.

[36] The s. 38 procedure represents the balance deemed appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments, apart from those contemplated in one of the other provisions in Part V. Section 38 is thus the procedure of general application for amendments to the Constitution of Canada. As a result, the other procedures in Part V should be construed as exceptions to the general rule.

[37] Section 42 complements s. 38 by expressly identifying certain categories of amendments to which the 7/50 procedure in s. 38(1) applies [here the Court quoted the section]

[38] This provision serves two purposes. First, the express inclusion of certain matters in s. 42 provided the framers of the *Constitution Act, 1982* with greater certainty that the 7/50 procedure would apply to amendments in relation to those matters Second, the provincial right to "opt out" from certain amendments contemplated in s. 38(2) to (4) does not apply to the categories of amendments in s. 42. This ensures that amendments made under s. 42 will apply consistently to all the provinces and allows the changes contemplated in the provision to be implemented in a coherent manner throughout Canada.

[39] Section 42(1)(b) of the *Constitution Act, 1982* expressly makes the general amendment procedure applicable to amendments in relation to "the powers of the Senate and the method of selecting Senators." We discuss below the meaning of this statutory language and its bearing on the questions before us.

(b) The Unanimous Consent Procedure

[40] Section 41 of the *Constitution Act, 1982* sets out an amending procedure requiring unanimous consent in relation to certain matters:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great

Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

- (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
- (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
- (c) subject to section 43, the use of the English or the French language;
- (d) the composition of the Supreme Court of Canada; and
- (e) an amendment to this Part.

[41] Section 41 requires the unanimous consent of the Senate, the House of Commons, and all the provincial legislative assemblies for the categories of amendments . . . It is an exception to the general amending procedure. It creates an exacting amending procedure that is designed to apply to certain fundamental changes to the Constitution of Canada. . . .

(c) The Special Arrangements Procedure

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[43] Section 43 applies to amendments in relation to provisions of the Constitution of Canada that apply to some, but not all, of the provinces. The determination of its scope and of the effects of its interaction with other provisions of Part V presents significant conceptual difficulties . . . We will limit our remarks on s. 43 to what is necessary to answer the Reference questions before us.

[44] At the very least, s. 43 is triggered when a constitutional amendment relates to a provision of the Constitution of Canada that contains a "special arrangement" applicable only to one or several, but not all, of the provinces. In such cases, the use of the 7/50 procedure would overshoot the mark, by making adoption of the amendment contingent upon the consent of provinces to which the provision does not apply. Section 43 also serves to ensure that those provisions cannot be amended without the consent of the provinces for which the arrangement was devised: Monahan and Shaw, at p. 210.

(d) The Unilateral Federal and Provincial Procedures

[45] Sections 44 and 45 of the *Constitution Act, 1982* provide for unilateral federal and provincial procedures of amendment:

[44] Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

[45] Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

[46] These sections fulfill the same basic function as ss. 91(1) and 92(1) of the *Constitution Act, 1867*, which were repealed when the *Constitution Act, 1982* was enacted . . .

• • •

[48] . . . [S]s. 44 and 45 give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government. This limited ability to make changes unilaterally reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional

design. Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact.

V. How Can the Senate Changes Contemplated in the Reference Be Achieved?

[The Court went on to conclude that the majority of the changes to the Senate contemplated in the Reference could only be achieved through amendments to the Constitution, with substantial federal–provincial consensus. The implementation of consultative elections and senatorial term limits was found to require the consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half the population of all the provinces (s 38 and s 42(1)(b), *Constitution Act, 1982*). A full repeal of the property qualifications was found to require the consent of the legislative assembly of Quebec (s 43, *Constitution Act, 1982*). As for Senate abolition, it was found to require the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces (s 41(e), *Constitution Act, 1982*). Select portions from the reasoning on these issues have been included below.]

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A. Consultative Elections

[50] [Section 24] of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada

[51] The Attorney General of Canada (supported by the attorneys general of Saskatchewan and Alberta as well as one of the *amici curiae*) submits that implementing consultative elections for Senators does not constitute an amendment to the *Constitution of Canada*. He argues that this reform would not change the text of the *Constitution Act, 1867*, nor the means of selecting Senators. He points out that the formal mechanism for appointing Senators—summons by the Governor General acting on the advice of the Prime Minister—would remain untouched. Alternatively, he submits that if introducing consultative elections constitutes an amendment to the Constitution, then it can be achieved unilaterally by Parliament under s. 44 of the *Constitution Act, 1982*.

[52] In our view, the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.

[53] We conclude that each of the proposed consultative elections would constitute an amendment to the Constitution of Canada and require substantial provincial consent under the general amending procedure, without the provincial right to "opt out" of the amendment (s. 42). ...

(1) Consultative Elections Would Fundamentally Alter the Architecture of the Constitution

[54] The implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its architecture. It would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought.

[55] The *Constitution Act, 1867* contemplates a specific structure for the federal Parliament, "similar in Principle to that of the United Kingdom": preamble. The Act creates both a lower *elected* and an upper *appointed* legislative chamber: s. 17. It expressly provides that the members of the lower chamber—the House of Commons—"shall be elected" by the population of the various provinces: s. 37. By contrast, it provides that Senators shall be "summoned" (i.e. appointed) by the Governor General: ss. 24 and 32.

[56] The contrast between election for members of the House of Commons and executive appointment for Senators is not an accident of history. The framers of the *Constitution Act, 1867* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of "sober second thought."

[57] As this Court wrote in the *Upper House Reference*, "[i]n creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could *canvass dispassionately the measures of the House of Commons*": p. 77 (emphasis added). The framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives.

[58] Correlatively, the choice of executive appointment for Senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process. Appointed Senators would not have a popular mandate—they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons. . . .

• • •

[60] The proposed consultative elections would fundamentally modify the constitutional architecture we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.

[61] Federal legislation providing for the consultative election of Senators would have the practical effect of subjecting Senators to the political pressures of the electoral process and of endowing them with a popular mandate. Senators selected from among the listed nominees would become popular representatives. . . .

[62] The Attorney General of Canada counters that this broad structural change would not occur because the Prime Minister would retain the ability to ignore the results of the consultative elections[.] . . . [T]he purpose of [Bills C-20 and C-7] is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections . . . A legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.

[63] In summary, the consultative election proposals set out in the Reference questions would amend the Constitution of Canada by changing the Senate's role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy.

[The Court went on to add that s 42 expressly made the general amending procedure applicable to a change of this nature and that the proposed change was beyond the scope of the unilateral federal amending procedure in s 44 both because it was covered by s 42 and because it involved a change to the Senate's fundamental nature and role.]

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B. Senatorial Tenure

[71] It is not disputed that a change in the duration of senatorial terms would amend the Constitution of Canada, by requiring a modification to the text of s. 29 of the *Constitution Act, 1867* ... [which provides that a Senator who is summoned to the Senate shall hold his place in the Senate until he attains the age of 75 years]. The question before us is which Part V procedure applies to amend this provision.

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[73] In essence, the Attorney General of Canada proposes a narrow textual approach to this issue. Section 44 of the *Constitution Act, 1982* provides: "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to ... the Senate" Neither s. 41 nor s. 42 expressly applies to amendments in relation to senatorial tenure. It follows, in his view, that the proposed changes to senatorial tenure are captured by the otherwise unlimited power in s. 44 to make amendments in relation to the Senate.

[74] We agree that the language of s. 42 does not encompass changes to the duration of senatorial terms. However, it does not follow that all changes to the Senate that fall outside of s. 42 come within the scope of the unilateral federal amending procedure in s. 44

[75] We are unable to agree with the Attorney General of Canada's interpretation of the scope of s. 44. ... The history, language, and structure of Part V indicate that s. 38, rather than s. 44, is the general procedure for constitutional amendment. Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure. Section 44, as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role.

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[78] The question is thus whether the imposition of fixed terms for Senators engages the interests of the provinces by changing the fundamental nature or role of the Senate. ... In our view, this question must be answered in the affirmative.

[79] As discussed above, the Senate's fundamental nature and role is that of a complementary legislative body of sober second thought. The current duration of senatorial terms is directly linked to this conception of the Senate. ...

[80] The imposition of fixed senatorial terms is a significant change to senatorial tenure. We are not persuaded ... that the fixed terms contemplated in the Reference are a minor change because they are equivalent in duration to the average term historically served by Senators. ... Fixed terms provide a weaker security of tenure. They imply a finite time in office and necessarily offer a lesser degree of protection

from the potential consequences of freely speaking one's mind on the legislative proposals of the House of Commons.

[81] It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure. ...

[82] ... The imposition of fixed terms, even lengthy ones, constitutes a change that engages the interests of the provinces as stakeholders in Canada's constitutional design and falls within the rule of general application for constitutional change—the 7/50 procedure in s. 38.

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C. Property Qualifications

[The Court found that the removal of the net worth requirements would not alter the fundamental nature of the Senate and was exactly the kind of amendment intended to be covered by the unilateral federal amendment power in s 44].

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[91] Similarly, the removal of the real property requirement (s. 23(3), *Constitution Act, 1867*) would not alter the fundamental nature and role of the Senate. However, the removal of the real property requirement for Quebec's Senators would constitute an amendment in relation to a special arrangement [for senators from that province]. It would thus attract the special arrangements procedure and require the consent of Quebec's National Assembly (s. 43, *Constitution Act, 1982*).

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VI. Senate Abolition: How Can It Be Achieved?

[95] Finally, the Reference asks which of two possible procedures applies to abolition of the Senate: the general amending procedure or the unanimous consent procedure?

[96] The Attorney General of Canada argues that the general amending procedure applies because abolition of the Senate falls under matters which Part V expressly says attract that procedure—amendments in relation to "the powers of the Senate" and "the number of members by which a province is entitled to be represented in the Senate" (s. 42(1)(b) and (c)). Abolition, it is argued, is simply a matter of "powers" and "members": it literally takes away all of the Senate's powers and all of its members. Alternatively, the Attorney General of Canada argues that since abolition of the Senate is not expressly mentioned anywhere in Part V, it falls residually under the general amending procedure.

[97] We cannot accept the Attorney General's arguments. Abolition of the Senate is not merely a matter of "powers" or "members" under s. 42(1)(b) and (c) of the *Constitution Act, 1982*. Rather, abolition of the Senate would fundamentally alter our constitutional architecture—by removing the bicameral form of government that gives shape to the *Constitution Act, 1867*—and would amend Part V, which requires the unanimous consent of Parliament and the provinces (s. 41(e), *Constitution Act, 1982*).

A. Abolishing the Senate Does Not Fall Within Section 42(1)(b) and (c)

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[102] To interpret s. 42 as embracing Senate abolition would depart from the ordinary meaning of its language and is not supported by the historical record. The

mention of amendments in relation to the powers of the Senate and the number of Senators for each province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of Senators. But it is outside the scope of s. 42 to altogether strip the Senate of its powers and reduce the number of Senators to zero.

B. Abolishing the Senate Would Alter the Part V Amending Formula

[103] The Attorney General of Canada argues that Senate abolition can be accomplished without amending Part V and that it therefore does not fall within the scope of s. 41(e), which requires unanimous federal–provincial consent for amendments to Part V. He argues that the Senate can be abolished without textually modifying the provisions of Part V. The references to the Senate in Part V would simply be viewed as “spent” and as devoid of legal effect.

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[106] We disagree with these submissions. Once more, the Attorney General privileges form over substance. Part V is replete with references to the Senate and gives the Senate a role in all of the amending procedures, except for the unilateral provincial procedure Part V was drafted on the assumption that the federal Parliament would remain bicameral in nature, i.e. that there would continue to be both a lower legislative chamber and a complementary upper chamber. Removal of the upper chamber from our Constitution would alter the structure and functioning of Part V. Consequently, it requires the unanimous consent of Parliament and of all the provinces (s. 41(e)).

[107] ... [T]he notion of an amendment to the Constitution of Canada is not limited to textual modifications—it also embraces significant structural modifications of the Constitution. The abolition of the upper chamber would entail a significant structural modification of Part V. Amendments to the Constitution of Canada are subject to review by the Senate. The Senate can veto amendments brought under s. 44 and can delay the adoption of amendments made pursuant to ss. 38, 41, 42, and 43 by up to 180 days: s. 47, *Constitution Act, 1982*. The elimination of bicameralism would render this mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. The constitutional structure of Part V as a whole would be fundamentally altered.

NOTES AND QUESTIONS

1. *The motivations for the Reference.* It is worth asking why this matter was referred to the Supreme Court to begin with. Adam Dodek has considered the possibilities and concluded that the choice was both reactive and proactive:

For over a year and a half Bill C-7 was stalled in the House of Commons, reportedly due to internal opposition within the Conservative caucus. And this came after Senate reform legislation was shifted from the Senate to the House due to opposition within the Conservative Senatorial ranks. However, the Harper Government could not simply abandon its commitment to Senate reform without significant political cost, as the Prime Minister had personally invested much political capital in the issue. Abandoning Senate reform would have injured Mr. Harper as a leader and would have hurt the image of [the] Conservative Party with its followers who actively, and often fervently, supported Senate reform. ... Mr. Harper was forced to demonstrate some action, and referring his legislation to the Supreme Court for a

ruling both demonstrated action and bought him some time while the matter was under consideration by the Supreme Court.

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In November 2013, Prime Minister Harper gave a speech to Conservative Party members in which he blamed "the courts" for standing in the way of Senate reform, presumably referring to the ruling of the Québec Court of Appeal against the government's unilateral Senate reform proposals, but also presaging the Supreme Court of Canada's hearing of the Senate Reform Reference later that same month. ... On the day that the Supreme Court issued its "advisory opinion," the Prime Minister "shut the door" on his "career pledge to reform the Senate" and blamed the Supreme Court for stranding Canadians with a scandal-plagued Senate. ...

Whether the Prime Minister expected to "lose" the reference or not, the case was a political win-win for the Harper Government. If the Supreme Court ruled in his favour, the Prime Minister could proceed unilaterally with enacting Bill C-7. In the face of a green light from Supreme Court and pressure from the Senate scandal, it is hard to imagine that internal caucus opposition would have been sufficient to overcome the Prime Minister's will to implement his reforms to the Senate. If the Supreme Court ruled against him, as it did, then the Prime Minister would be able to claim—as he did—that he had tried but that the Supreme Court had thwarted his attempts at Senate reform. The Senate Reform Reference thus presented an opportunity for the Harper Government to both obtain political sanction and deflect political blame for desired policy choices.

A critical factor in explaining the timing of the Harper Government's decision to bring the reference is ... the proactive strike. ... On May 2, 2012, the Québec government initiated a reference of its own to its Court of Appeal [A] ruling on the constitutionality of Bill C-7 by the Supreme Court became inevitable because there is an automatic right of appeal from a provincial court of appeal reference to the Supreme Court of Canada. ... The decision of the Québec government forced the Harper Government's hand; it had to act. By initiating a reference to the Supreme Court of Canada, the Harper Government could frame the questions and have some control over the timing and the process. Thus the decision to bring the reference can be seen as both a reaction to the Government of Québec and as a proactive strike to get ahead of the Québec Court of Appeal decision and attempt to best defend the Harper Government's strategy of federal unilateralism.

See Adam Dodek, "The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism" (2015) 60 McGill LJ 623 at 653-56. The reference procedure has been discussed in Chapter 13, The Role of the Judiciary. Do the government's motivations for referring this matter of Senate reform to the Supreme Court give fodder to detractors of the reference procedure, who argue that the procedure politicizes the judiciary? Or are these motivations squarely within the type we expect to lead to a reference? This was not the first time the Court was asked to advise the government on Senate reform; the earlier occasion, referred to in the Senate Reform Reference was *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, 1979 CanLII 169 [Upper House Reference]. For further discussion of the use of references as political strategy, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) ch 9.

2. *The Court in constitutional reform.* One possible consequence of the Senate Reform Reference is that the Court may have assured itself a central role in future constitutional reforms. Although the Court has in the past invoked the idea that the Constitution has an "internal architecture," this time the Court relied on the idea of the Constitution's "architecture" to conclude that the proposed reforms to the Senate would not be possible without recourse to the multilateral amendment procedures in part V. But the Court did not explain precisely what that architecture entails in connection with the amending formula. There may have been good reasons for the Court not to give a full account of the Constitution's

architecture and which changes to it would require recourse to which particular amendment procedure. The Court has reserved to itself future room to identify and define the specificities of the Constitution's architecture, and in doing so it has all but ensured that it will be an integral player in any effort to amend the Constitution in a materially significant way, whether or not the amendment touches the Senate. Is this a positive development, in your view? Dennis Baker and Mark Jarvis have suggested that it may not be:

At one time, the Court told Canadians that "constitutional conventions plus constitutional law equal the total constitution of the country"; now Canadians have learned to expect novel constitutional components to appear whenever they are necessary to determine the outcome of a particular constitutional controversy. If it is not in the text, perhaps it is in the architecture? By failing to restrict itself to constitutional law, the Court has expanded the potential effect of constitutional entrenchment. Whatever the "constitutional architecture" is, it appears to be beyond the reach of ordinary statutes.

And given that "constitutional architecture" might bolster an argument that one must consider not only the form but also the substance of a reform, it becomes important for other political actors to know precisely what it entails. While we can read the constitutional text, we can only guess what the Court sees behind it. There is a certain irony in that, as the Court delves further into more informal and expansive interpretations in judgments across a variety of fields, it forces other political actors to undertake more formal and narrow amendments.

This approach privileges the Court over other institutions in controlling the content of the Constitution.

See Dennis Baker & Mark Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 185 at 200-1.

3. *Deliberation in democracy.* The proposal for consultative elections would have improved the democratic pedigree of the Senate insofar as its new members would have been elected by voters, assuming provinces and territories had adopted the plan. Yet, the Court concluded that the government could not enact this constitutional reform unilaterally using the amendment power in s 44. The Court's interpretation of part V therefore appears to be rooted in a commitment not to just any kind of democracy but to a particular vision of deliberative democracy. As Yasmin Dawood has argued, "[t]he Court's interpretation of the amending procedures is based on a fundamental democratic commitment to consultation and deliberation between and among the relevant stakeholders." She adds that, according to the Court's reasons in the *Senate Reform Reference*, "constitutional change cannot take place through unilateral decision making by Parliament even if the proposed reforms improve the democratic caliber of a given institution": see Yasmin Dawood, "The Senate Reference: Constitutional Change and Democracy" (2015) 60 McGill LJ 737 at 760. Should the Court have placed less emphasis on the procedure proposed by the government to reform the Senate in light of the likelihood that the Senate would have become more democratic? Why should process stand in the way of a favourable outcome?

4. *Reimagining the Senate's role.* If you could give the Senate a new role, what function or functions would you give to it? One proposal suggests

assigning the Senate the task of reviewing the constitutionality of bills proposed by the House of Commons with the purpose of ameliorating the democratic deficit created by the institution of judicial review of legislation, and therefore contributing to the overall democratic legitimacy of the constitutional order.

In this role, the Senate "would be acting as a chamber of 'sober second thought,' not as to the desirability of the policies advanced in the relevant bills, but as to their consistency with the constitution": see Joel I Colón-Ríos & Allan C Hutchinson, "Constitutionalizing the Senate: A Modest Democratic Proposal" (2015) 60 McGill LJ 599 at 617-18. Although controversial,

there may be a lot to commend in this proposal. It gives the Senate a role that actually matters in improving Parliament's legislative output, by helping the House of Commons steer its bills clear of constitutional invalidity. There would, of course, be no guarantee of constitutional validity until the Supreme Court has addressed the matter, but the senatorial review of bills for constitutionality could help reassure the House that its bills were consistent with the Constitution. The proposal could also contribute to better use and management of judicial resources; presumably, the Senate's review could point the House of Commons' attention to problem areas in its bills and thereby perhaps reduce future claims of constitutional invalidity, which would, in turn, foster more efficient use of scarce judicial resources. That said, Parliament already employs legal counsel to help evaluate bills for constitutionality, and the government is advised by the Department of Justice on the constitutional validity of its bills. The proposal might therefore be duplicative, at least in part, of the roles of other actors in the legislative process. Do you think this proposal is a good idea?

5. *Senate reform after the Reference.* A new majority Liberal government elected in October 2015 undertook an important reform to the method of selecting persons for eventual appointment to the Senate. The new method involved two stages. In the first stage, introduced in early 2016, a new Independent Advisory Board for Senate Appointments was convened to give advice to the prime minister to fill vacancies in the Senate. The first batch of individuals selected through this new method was appointed in March 2016. The second stage of the new method of senatorial selection began in July 2016. In this new phase—intended by the government to be permanent—individual Canadians can apply to be considered by the advisory board, which will in turn choose from among those applicants to make recommendations to the prime minister for Senate vacancies. The purpose of these reforms was to create an independent appointments process that would, according to the new government, lessen the partisanship and improve the effectiveness of the Senate. The effect of these reforms has been to avoid the familiar and indissoluble problems that have felled prior large-scale efforts at constitutional reform across many Canadian public institutions. This incremental approach is also non-constitutional in the sense that it is said by the government not to require a constitutional amendment. Do you think this new method of senatorial selection is a good idea? Do you believe it can be adopted—it is already in use—without a constitutional amendment? For a defence and explanation of an early version of this new method of selecting senators, see Stephane Dion, "Time for Boldness on Senate Reform, Time for the Trudeau Plan" (2015) 24 Const Forum Const 61. For a deep dive into Senate reform, with the appropriate distance of time since the Senate Reform Reference, see Emmett Macfarlane, *Constitutional Pariah* (Vancouver: UBC Press, 2021).

6. *The Senate and reconciliation.* As you contemplate the possibility of Senate reform, it is worth wondering whether the Senate, despite its shortcomings, can be a site of reconciliation. One scholar makes just this point:

The under-representation of Indigenous people and Nations in the Senate (and Canada's other central political institutions) is an important challenge that must be tackled if the Senate is to become an institution for reconciliation. It is interesting to note that the Senate has historically been much better than the House of Commons in representation for Aboriginal people ... and that trend has continued in the contemporary period. Approximately 11.6% of the current senators identify as Aboriginal, and historically about 2.5% of all senators since Confederation have been Aboriginal people. In comparison, 3.1% of the members of the most recent (42nd) Parliament were Aboriginal people, and only approximately 1% of all members historically have identified as Aboriginal. This difference is likely due to the prime minister's discretion in the appointment process for the Senate, which has been recognized as a better tool than elections for increasing minority representation in political institutions.

Why is the direct representation of Indigenous people important for reconciliation? Some would critique this notion as being essentialist and would argue that representation of

Indigenous people (or any other minority population) does not guarantee fairer or more just policy-making in relation to members of that population. I share the view of Melissa Williams (2005, 26), who argues that "fair political representation of marginalised groups requires the legislative presence of those groups." "Sharing the River: Aboriginal Representation in Canadian Political Institutions" in Robert C Thomsen and Nanette L Hale, eds, *Canadian Environments: Essays in Culture, Politics and History* (Brussels: Peter Lang, 2005) 25 at 26.

Both Indigenous and non-Indigenous scholars see the potential for a critical role for Indigenous people in Canada's political institutions like legislatures and the Senate. Williams's argument relies on two fundamental concepts in social justice: voice and trust.

The concept of trust relates to the fact that Indigenous people have little reason to trust that a majority settler political institution would act in the best interests of Indigenous Peoples or, relating to the concept of voice, even know what those interests might be. The issue of broken trust is a recurring theme in Canada's and the Crown's relationship with Indigenous Peoples, stretching from the early days of treaty-making. ...

For the Senate to truly be an institution of reconciliation, ... seats need to be reserved for members of Indigenous Nations. This goes beyond simply increasing the number of Indigenous people in the Senate. ... These types of reforms do not effectively challenge the dominant institutional culture. Instead, reserved seats as a mechanism for reconciliation ensures that Indigenous people are able to represent the interests of Indigenous Nations in the Senate in a treaty federalism relationship. As Richard Simeon argues, "To maintain unity in territorially divided societies, 'building out' through devolution and decentralization needs to be accompanied by 'building in,' ensuring that regional minorities have an effective voice and presence at the center." See "Constitutional Design and Change in Federal Systems: Issues and Questions" (2009) 39 *Publius* 241 at 247-48. Applying this concept to Indigenous Peoples and their place in Canada suggests that moving toward a more decentralized model of Indigenous-state relationship based in reconciliation and treaty federalism requires a concurrent move to "build in" Indigenous Peoples to Canada's central institutions, including the Senate. This move would have the additional positive benefit recognized by Williams (*supra* at 49), who aptly states, "Symbolically, separate representation for Aboriginal peoples within the Senate would represent Aboriginal peoples as a distinct partner in Canadian confederation." ... The UNDRIP affirms that Indigenous Peoples have the right to participate in central state institutions if they choose to do so (United Nations 2007). The creation of reserved seats would give Indigenous Peoples a similar institutional status to the provinces and territories, which would aid in the recognition of their coexisting sovereignties in the relationship of treaty federalism.

The distribution of seats is likely one of the more contentious questions in regard to reserved representation for Indigenous people in the Senate. The provinces and territories guard their number of seats in the Senate very closely, so removing seats from one or more of the provinces and territories to accommodate reserved Indigenous representation would likely be out of the question. A longstanding convention has been in place since 1873 that "no province or region has lost Senators as a result of other entries to Confederation" so it makes sense that this convention would have to be followed in constituting Indigenous Nations as another partner in Confederation. ... The clear path forward is adding seats to achieve the goal of reserved representation, as recommended in the Charlottetown Accord. The question then becomes, how many seats? ... It makes sense that the minimum number of seats must be four—one for First Nations, one for the Inuit, one for the Métis Nation, and one for off-reserve, non-treaty, and non-Status Indigenous people, as represented by the four national Indigenous organizations. ...

... One option for reserved Indigenous representation would be to treat Indigenous Peoples as the equivalent of a new province and award them six seats [as was done for the provinces admitted to Confederation after 1867]. ...

A more radical option would be to consider Indigenous Peoples as a separate entity deserving of its own allotment of seats equivalent to a region, so 24 seats in total. Those 24

seats could be subdivided evenly, allowing each Indigenous group to have 6 seats equivalent to province within the "region." This would arguably be the best fit with a framework of reconciliation and treaty federalism, as it recognizes both the diversity of Indigenous Peoples and their individual contributions as founding partners in Confederation.

Should neither of these options prove persuasive, yet another option is to allot seats based on population. ... While seats in the Senate have not historically been allotted based strictly on population, this option might be a path toward compromise with those who are concerned about the threat to conventional understandings of federalism or undermining of the power of the provinces, as it can be justified based on population.

This section has provided four different options for moving forward. The 24-seat solution outlined above would arguably be the allotment that best reflects a vision of treaty federalism, which I see as the best analytical framework for moving toward a new relationship between the Canadian state and Indigenous Peoples. Nevertheless, the final number ... would have to be determined through dialogue ... as recommended in the Charlottetown Accord. While reaching consensus will likely be difficult, having this dialogue is a fundamental part of moving toward a relationship of reconciliation.

See Susan M Manning, "The Canadian Senate: An Institution of Reconciliation?" (2020) 54 J Can Stud 1 at 10-14.

E. THE STATUS OF THE SUPREME COURT

In this section, we return to the Supreme Court of Canada, a subject discussed in a number of chapters.

The importance of the Supreme Court in Canada's constitutional order was confirmed by part V of the *Constitution Act, 1982*. You will recall (see Section IV.C above) that part V creates five procedures to amend the Constitution, and two require a larger aggregation of majorities than the others. Different features of the Court are entrenched under each of these two amendment procedures: first, any amendment to the "composition of the Supreme Court of Canada" requires the use of the unanimity procedure in s 41(d); and second, any other change to the Supreme Court of Canada not related to its "composition" but that nonetheless amounts to an amendment to the Constitution of Canada requires the use of the general amending formula in s 38, as stated in s 42(d).

Patriation left open a question about the status of the Supreme Court: was the *Supreme Court Act*, RSC 1985, c S-26, which established the Court, considered part of the Constitution of Canada? Section 52(2) of the *Constitution Act, 1982* tells us that "the Constitution of Canada includes ... the Acts and orders referred to in the schedule" appended to the Act. The *Supreme Court Act* is not listed. What are we to make of this? On one reading, this is an insignificant omission because s 52(2), by using the term "includes," is not exhaustive. On another reading, however, the omission of such an important Act could not have been without reason—but what is it? Still another reading is that it would have been redundant to list the Act since part V already protected the Supreme Court's composition and other constitutional features.

The question is far from an academic one. On the contrary, it has real consequences. If the Constitution of Canada does not "include" the *Supreme Court Act*, then Parliament can freely use its legislative authority under s 101 to make amendments to it. But if the Constitution of Canada does "include" it, then Parliament's powers require some clarification. This was the subject of controversy in the *Supreme Court Act Reference*, also known as the *Nadon Reference*, discussed in Chapter 13.

Reference re Supreme Court Act, ss 5 and 6

2014 SCC 21 (most footnotes omitted; some integrated into text)

[In October 2013, Justice Nadon of the Federal Court of Appeal was appointed to the Supreme Court of Canada pursuant to s 6 of the *Supreme Court Act*. Section 6 stipulates that three of the nine judges of the Supreme Court should be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province."

Justice Nadon was not at that time a member of the *barreau du Québec*, although he had previously been a member for more than ten years. A lawyer filed suit in Federal Court to have the appointment vacated on the basis that it was not authorized under s 6 of the *Supreme Court Act*. Parliament then amended the Act to provide, via declaratory provisions, that for the purpose of s 6 of the Act, an appointee to the Supreme Court was from among the advocates of the province of Quebec if, at any time, they were an advocate of at least ten years' standing at the bar of that province. The governor in council then referred two questions to the Supreme Court. The first question asked whether a person who was, at any time, an advocate of at least ten years' standing at the *barreau du Québec* qualified for appointment under s 6 of the Act as being "from among the advocates of that Province." The second question asked whether Parliament could enact legislation to make such a person eligible for appointment in the event that they did not qualify under the statute in its unamended form.

By a majority of six to one, the Supreme Court answered both questions in the negative. The portion of the judgement dealing with question one has been reproduced in Chapter 13. Here we include excerpts from the Court's reasons on question two.]

McLACHLIN CJ and LeBEL, ABELLA, CROMWELL, KARAKATSANIS, and WAGNER JJ:

V. Question 2

A. The Issue

(2) Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled *Economic Action Plan 2013 Act, No. 2* [which were subsequently enacted as ss 5.1 and 6.1 of the *Supreme Court Act*]?

[72] In light of our conclusion that appointments to the Court under s. 6 require current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec, in addition to the criteria set out in s. 5, it is necessary to consider the second question, which is whether Parliament can enact declaratory legislation that would alter the composition of the Supreme Court of Canada.

[73] The Attorney General of Canada argues that the eligibility requirements for appointments under s. 6 have not been entrenched in the Constitution, and that Parliament retains the plenary power under s. 101 of the *Constitution Act, 1867* to unilaterally amend the eligibility criteria under ss. 5 and 6.

[74] We disagree [with the Attorney General of Canada on this point]. Parliament cannot unilaterally change the composition of the Supreme Court of Canada. Essential features of the Court are constitutionally protected under Part V of the *Constitution Act, 1982*. Changes to the composition of the Court can only be made under the procedure provided for in s. 41 of the *Constitution Act, 1982* and therefore require

the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42 of the *Constitution Act, 1982*, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.

[The majority quoted s 41(d) and s 42(1)(d) of part V.]

[75] We will first discuss the history of how the Court became constitutionally protected, and then answer the Attorney General of Canada's arguments on this issue. Finally, we will discuss the effect of the declaratory provisions enacted by Parliament.

B. Evolution of the Constitutional Status of the Supreme Court

• • •

(1) The Supreme Court's Evolution Prior to Patriation

[77] At Confederation, there was no Supreme Court of Canada. Nor were the details of what would eventually become the Supreme Court expounded in the *Constitution Act, 1867*. It was assumed that the ultimate judicial authority for Canada would continue to be the Judicial Committee of the Privy Council in London. ...

[78] The *Constitution Act, 1867*, however, gave Parliament the authority to establish a general court of appeal for Canada [under s 101]

[79] ... Sir John A. Macdonald, who was Canada's Prime Minister and Minister of Justice from 1867 to 1873 ... introduced bills for the establishment of the Supreme Court in 1869 and again in 1870 in the House of Commons. Both bills, which did not reserve any seats on the Court for Quebec jurists, faced staunch opposition from Quebec in Parliament. ...

• • •

[81] The bill that finally became the *Supreme Court Act* was introduced in 1875 by the federal Minister of Justice The new Supreme Court had general appellate jurisdiction over civil, criminal, and constitutional cases. In addition, the Court was given an exceptional original jurisdiction not incompatible with its appellate jurisdiction, for instance to consider references from the Governor in Council

[82] Under the authority newly granted by the *Statute of Westminster, 1931*, Parliament abolished criminal appeals to the Privy Council in 1933 Of even more historic significance, in 1949, it abolished *all* appeals to the Privy Council This had a profound effect on the constitutional architecture of Canada.

[83] ... [It] meant that the Supreme Court of Canada inherited the role of the Council under the Canadian Constitution. As a result, the Court assumed the powers and jurisdiction "no less in scope than those formerly exercised in relation to Canada by the Judicial Committee" , including adjudicating disputes over federalism. The need for a final, independent judicial arbiter of disputes over federal–provincial jurisdiction is implicit in a federal system

[84] In addition, the elevation in the Court's status empowered it to exercise a "unifying jurisdiction over the provincial courts" The Supreme Court became the keystone to Canada's unified court system. It "acts as the exclusive ultimate appellate court in the country"

[85] With the abolition of appeals to the Judicial Committee of the Privy Council, the continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces. The Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes, and became the final word on matters of public

law and provincial civil law. Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.

[86] The role of the Supreme Court of Canada was further enhanced as the 20th century unfolded. In 1975, Parliament amended the *Supreme Court Act* to end appeals as of right to the Court in civil cases (S.C. 1974-75-76, c. 18). This gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance. As a result, the Court's "mandate became oriented less to error correction and more to development of the jurisprudence"

[87] As a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Court's position within the architecture of the Constitution.

(2) The Supreme Court and Patriation

[88] ... The *Constitution Act, 1982* enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution.

[89] Patriation of the Constitution [in 1982] was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the "supreme law of Canada" [here the Court cited the supremacy clause, s 52]. The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the "guardian of the constitution" As such, the Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the *Constitution Act, 1982*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy"

[90] Accordingly, the *Constitution Act, 1982* confirmed the constitutional protection of the essential features of the Supreme Court. Indeed, Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures.

[91] Under s. 41(d), the unanimous consent of Parliament and all provincial legislatures is required for amendments to the Constitution relating to the "composition of the Supreme Court." The notion of "composition" refers to ss. 4(1), 5 and 6 of the *Supreme Court Act*, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. By implication, s. 41(d) also protects the continued existence of the Court, since abolition would altogether remove the Court's composition.

[92] The textual origin of Part V was the "April Accord" of 1981 (*Constitutional Accord: Canadian Patriation Plan (1981)*), to which eight provinces, including Quebec, were parties. The explanatory notes to this Accord confirm that the intention was to limit Parliament's unilateral authority to reform the Supreme Court Pointedly, the explanatory note to s. 41(d) states: "This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Québec and are, therefore, trained in the civil law" The intention of the provision was demonstrably to make it difficult to change the composition of

the Court, and to ensure that Quebec's representation was given special constitutional protection.

[93] ... Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. ... [This requirement precluded] the possibility that Quebec's seats on the Court could have been reduced or altogether removed without Quebec's agreement.

[94] Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*. The express mention of the Supreme Court of Canada in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

[95] In summary, the Supreme Court gained constitutional status as a result of its evolution into the final general court of appeal for Canada, with jurisdiction to hear appeals concerning all the laws of Canada and the provinces, including the Constitution. This status was confirmed in the *Constitution Act, 1982*, which made modifications of the Court's composition and other essential features subject to stringent amending procedures.

C. The Arguments of the Attorney General of Canada

[96] The Attorney General of Canada argues (i) that the mention of the Supreme Court in the *Constitution Act, 1982* has no legal force, and (ii) that the failed attempts to entrench the eligibility requirements in the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 demonstrate that Parliament and the provinces understood those requirements not to have been entrenched in 1982.

(1) The "Empty Vessels" Theory

[97] The Attorney General of Canada contends that the Supreme Court is not protected by Part V, because the *Supreme Court Act* is not enumerated in s. 52 of the *Constitution Act, 1982* as forming part of the Constitution of Canada. He essentially argues that the references to the "Supreme Court" in ss. 41(d) and 42(1)(d) are "empty vessels" to be filled only when the Court becomes expressly entrenched in the text of the Constitution . . . It follows from this, he argues, that Parliament retains the power to unilaterally make changes to the Court under s. 101 of the *Constitution Act, 1867* until such time as the Court is expressly entrenched.

[98] This contention is unsustainable. It would mean that the framers would have entrenched the Court's exclusion from constitutional protection . . . It would also mean that the provinces agreed to insulate this unilateral federal power from amendment except through the exacting procedures in Part V.

[99] Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot

have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.

[100] ... By setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the *status quo* in relation to the Court's constitutional role, pending future changes This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.

[101] It is true that at Confederation, Parliament was given the authority through s. 101 of the *Constitution Act, 1867* to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada." ... The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*. As a result, what s. 101 now requires is that Parliament maintain—and protect—the essence of what enables the Supreme Court to perform its current role.

(2) The Meech Lake Accord and the Charlottetown Accord

[102] The Attorney General of Canada argues that the Meech Lake Accord and the Charlottetown Accord would have expressly entrenched the qualifications for appointment to the Court in the Constitution, and that the failure to adopt these constitutional amendments means that the qualifications for appointment to the Court are not entrenched.

[103] We cannot accept this argument. As discussed above, the enactment of the *Constitution Act, 1982* protected the *status quo* regarding the Supreme Court. That expressly included the Court's composition, of which Quebec's representation on the Court is an integral part. The Meech Lake Accord and the Charlottetown Accord would have reformed the appointment process for the Court, and would have required that the Quebec judges on the Court be appointed from a list of candidates submitted by Quebec. These failed attempts at reform are evidence only of attempts at a broader reform of the selection process, but they shed no light on the issue of the Court's existing constitutional protection. The failure of the Meech Lake Accord and Charlottetown Accord simply means that the *status quo* regarding the Court's constitutional role remains intact.

D. The Effects of the Declaratory Provisions Enacted by Parliament

[104] Changes to the composition of the Supreme Court must comply with s. 41(d) of the *Constitution Act, 1982*. Sections 4(1), 5 and 6 of the *Supreme Court Act* codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982.

[105] Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the *Constitution Act, 1982*. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore requires the unanimous consent of Parliament and the 10 provinces.

[106] Since s. 6.1 of the *Supreme Court Act* (cl. 472 of *Economic Action Plan 2013 Act, No. 2*) substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6, it seeks to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and

the provincial legislatures. The assertion that s. 6.1 is a declaratory provision does not alter its import. Section 6.1 is therefore *ultra vires* of Parliament acting alone. ...

[At the same time as it amended the *Supreme Court Act* to add s 6.1, Parliament had also amended the Act to confirm eligibility for appointment under s 5 on the basis of current or former standing at the bar for ten years. The majority concluded that this amendment was valid because it simply confirmed the status quo.]

NOTES AND QUESTIONS

1. *The process of constitutionalization.* How does a law become constitutional in nature, or constitutionalized? A law can become constitutionalized at the time a constitution is written—in this case, the authors of the constitution choose to exempt a law from the ordinary legislative process and instead make it amendable only by a special procedure, usually more difficult than that required to pass or amend an ordinary law. A law can also become constitutionalized over time as it acquires some special public salience. There is today increasing attention given to the phenomenon of a constitutional statute or a quasi-constitutional law. These are laws that were passed in the ordinary legislative process, but which have become politically entrenched in the sense that there is unlikely to be any political will to repeal them. In the United States, this is best reflected by the concept of a “superstatute”: see William N Eskridge Jr & John Ferejohn, “Super-Statutes” (2001) 50 Duke LJ 1215. In the United Kingdom, Adam Perry and Farrah Ahmed have theorized the concept of a constitutional statute that is “quasi-entrenched”: see Adam Perry & Farrah Ahmed, “The Quasi-Entrenchment of Constitutional Statutes” (2014) 73 Cambridge LJ 514. The *Supreme Court Act Reference* suggests another way that a law can become constitutional: by judicial interpretation. The Court explained that the “essential features of the Court” (at para 94), detailed in the *Supreme Court Act*, are now subject to the general amending formula. These essential features, the Court wrote, “include, at the very least, the Court’s jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence” (at para 94). What about Parliament’s historical power under s 101? The Court explained that “Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court” (at para 101). Are you persuaded by how the Court arrived at its conclusion that the Constitution of Canada does indeed “include” those parts of the *Supreme Court Act* that reflect the Court’s “essential features”?

2. *The Court as historian.* The Court’s reasons in the Reference rely on its reading of its own historical evolution from Confederation to Patriation. There are questions, however, about whether the Court’s reading of evolution is complete; it may be that a selective account of history was written to reinforce the conclusion that the Court sought to reach. The following account invites us to dig deeper into the Court’s reading of history:

This reading of the historical record is reasonably convincing, but it does seem rather convenient ... in portraying the Court’s inevitable trajectory towards the apex of Canada’s constitutional structure. For instance, abolition of appeals to the Privy Council can be seen as yet another one of Canada’s slow, halting steps along the path towards independence—perhaps a halfway marker between the *Statute of Westminster, 1931* and patriation—rather than a positive affirmation of the role of a cherished national institution ... Canadian independence required the termination of appeals to the Privy Council, but “a realistic appraisal of the quality and stature of the Supreme Court [in the 1920s] demanded a delay.” In 1947, when the way had been cleared for abolition, the “government continued to hesitate, a good indication that public opinion was still ambivalent.” The Supreme Court’s metamorphosis into a

"keystone" could be read as emerging due to historical happenstance rather than popular or political acclaim.

There are several interesting omissions from the Court's account of its journey. I discuss these in ascending order of importance. First, the Court gave little weight to the understanding of the actors in post-patriation constitutional reform efforts. For example, the drafters of the Meech Lake Accord proposed to add new sections to the *Constitution Act, 1867* in order to formally entrench the Court. In this process, unanimity was required for anything touching the composition of the Court while the general amending formula applied to all other changes. Though not conclusive, this historical precedent lends itself to the argument that the Court was not immediately entrenched in 1982. More could have been done to address the argument.

Second, although the abolition of automatic civil appeals has generally been seen as a significant event in the Court's evolution, it remains the case that there are criminal appeals as of right. Accordingly, the Court's control over its own docket is not absolute, and its freedom to focus on matters of fundamental legal importance not unfettered. Third, it is notable that the Court does not mention its controversial, patriation-enabling decision in the *Reference Re Resolution to amend the Constitution (Patriation Reference)*. [See the discussion of the Reference above.] ... Its own decision [there] paved the way for the very patriation process that "enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution."

Fourth, there is no discussion of the clauses in the *Canadian Charter of Rights and Freedoms (Charter)*—which was entrenched by the adoption of the *Constitution Act, 1982*—that allow for the limitation of some protected rights. Notably, the notwithstanding clause contained in section 33 permits Parliament or a provincial legislature to expressly declare that legislation "shall operate notwithstanding" certain provisions of the Charter. The presence of this power has not prevented the emergence of a "highly juridical orientation to constitutionalism"

Here, the Court's own adoption of a proportionality test that gave it the authority to determine whether limits on *Charter* rights can be justified, and its own retention of the final word as to the compatibility of legislative modifications with judicial decisions, solidified its position at the apex of Canada's constitutional order. My point is not that the Court's ultimate conclusion was wrong, but that it relied on a supporting narrative that was somewhat selective. A fuller, more critical account highlights just how historically contingent the Court's ascent was and how the Court itself paved part of the way.

See Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41 Queen's LJ 1 at 9-14 (footnotes omitted).

3. *The Court's "essential features."* The Reference made clear that the Court's "essential features" are constitutionally protected under part V, either under the unanimity procedure or the general amending formula. What was made much less clear, however, is the identity and scope of those essential features. We know from the Reference that they include the Court's composition and independence, as well as its jurisdiction as the final court of appeal. But, as one scholar observes, "we still do not have an exhaustive list of the Court's 'essential' features, leaving considerable uncertainty as to what future reforms will or will not require constitutional amendment." As a result, "considering Canada's difficulty in achieving reform via constitutional amendment, in practice the Supreme Court might end up unpacking its own composition and 'essential features' on a case-by-case basis": see Erin Crandall, "DIY 101: The Constitutional Entrenchment of the Supreme Court" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 211 at 222-23. The choice to refrain from giving an exhaustive list of its own essential features could have been made by the Court for strategic reasons of self-preservation and also to reassert its authority as the ultimate interpreter of the Constitution of Canada. In this way, the Court's reasons in

the Reference would have the effect of entrenching the Court against future changes without the Court first agreeing to them. Setting aside the constitutional politics of the Reference, should the Court, in the interest of the clarity of our constitutional law, have delineated its essential features?

VI. COMPARATIVE AND THEORETICAL PERSPECTIVES ON CONSTITUTIONAL AMENDMENT

A. THE WORLD'S MOST RIGID CONSTITUTION?

We know from the recent failures of comprehensive constitutional amendment in the Meech Lake and Charlottetown accords that the Constitution of Canada can sometimes be extraordinarily difficult to amend.

What makes the Constitution so hard to amend is not only the difficulty of assembling the necessary approvals from the majorities required by the general amending formula in s 38 and the unanimity procedure in s 41. (With one exception, neither procedure has been successfully used: see Section IV.C, above.) It is that the requirements for constitutional amendment go beyond those found in part V. As discussed above (see Section V.B.1), the 1996 Regional Veto Act requires the consent of a majority of provinces—including British Columbia, Ontario, Quebec, and at least two each from the Atlantic and Prairie provinces, representing at least half of the regional population—before an amendment using the general amending formula in s 38 is even proposed.

There are also laws—for example, in Alberta and British Columbia—mandating a binding provincial referendum before the legislative assembly votes on a major amendment requiring provincial approval: see *Constitutional Referendum Act*, RSA 2000, c C-25, ss 2(1), 4; *Constitutional Amendment Approval Act*, RSBC 1996, c 67, s 1; *Referendum Act*, RSBC 1996, c 400, s 4. Similar laws have been passed across the country authorizing (but not requiring) binding or advisory referenda before the legislative assembly votes on an amendment. These provincial laws drive home a point made by Carissima Mathen that

both the general and unanimity formulas render the prospect of change vulnerable to idiosyncratic regional demands. In particular, the prospect that a single province could block an otherwise deeply popular change is open to criticism on the grounds of unfairness and, even, imperilling national unity.

See Carissima Mathen, "The Federal Principle: Constitutional Amendment and Intergovernmental Relations" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 65 at 75.

And, as we have discussed above (see Section IV.D) in connection with the Charlottetown Accord, some scholars have suggested that there now exists a constitutional convention requiring a national referendum before a major constitutional amendment is completed. What therefore makes the Constitution so difficult to amend is not only part V itself, but the legal and political infrastructure that has developed around it: see Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53 Alta L Rev 85 at 96-105.

How difficult is it to amend the Constitution of Canada in comparison with the constitutions of the world? Scholars have tried to answer this question. For example, Arendt Lijphart has concluded from a study sample of 36 countries that Canada ranks among the world's most rigid constitutions with respect to the majorities required for amendment, tied with Argentina, Australia, Germany, Japan, Korea, Switzerland, and the United States, each of which he identifies as requiring supermajorities exceeding two-thirds: see Arendt Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed (New Haven, Conn: Yale University Press, 2012) at 208. Another scholar, Astrid Lorenz,

studying 39 countries, concludes that Canada is tied with Chile and Switzerland, with an index of difficulty of 7.0, behind Belgium (9.5), the United States and Bolivia (9.0), and the Netherlands (8.5), followed by Australia, Denmark, and Japan, three countries tied at 8.0: see Astrid Lorenz, "How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives" (2005) 17 J Theor Polit 339 at 358–59.

In what is today the most referenced study of amendment difficulty, Donald Lutz generated a ranking of 36 countries, not including Canada, in which the United States holds the top score for amendment difficulty (5.10), followed by Switzerland and Venezuela (4.75), with Australia (4.65) and Costa Rica (4.10) next: see Donald Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006) at 170. Applying Lutz's methods to Canada, one scholar posited that the unanimity procedure would have scored 5.00, ranking Canada as the second on the list in terms of amendment difficulty. Measuring the unanimity procedure plus the requirements of the Regional Veto Act plus the provincial referenda required by some provinces prior to approving an amendment would have generated a score of 8.00, well above the United States, thought by most to be the world's most difficult constitution to amend: see Albert, "The Difficulty of Constitutional Amendment in Canada," above at 94–100.

Does it matter that our Constitution is difficult to amend? Recall from Section I of this chapter that one of the reasons why constitutions contain amendment procedures is to distinguish the constitutional text from an ordinary law, the former made harder to amend than the latter. But is it possible for the rules of constitutional amendment to be *too* difficult? What are the consequences of having a constitution that cannot be amended when it is necessary to make changes to the polity? Are there advantages to having a rigid constitution? One of the world's most difficult constitutions ever to amend—perhaps *the* most difficult—was the Articles of Confederation, the first constitution the United States adopted after its declaration of independence. The Articles of Confederation required the agreement of each of the 13 states to make any amendment. Many attempts were made, but all of them failed. After years of failed efforts to amend the Articles of Confederation, the people of the United States decided to start afresh by ratifying a new constitution in defiance of the Articles. That constitution has survived to this day: see Richard S Kay, "The Illegality of the Constitution" (1987) 4 Const Commentary 57.

B. FORMAL AND INFORMAL AMENDMENT

Our discussion of constitutional amendment has so far implicitly involved what we can identify as "formal" constitutional amendment as opposed to "informal" constitutional amendment. A formal constitutional amendment alters the text of the constitution, the term "formal" being roughly though not completely analogous to "written." In contrast, an informal constitutional amendment changes the meaning of the constitution without altering its text. The term "informal" here is, again, roughly though not completely analogous to "unwritten." Both these kinds of constitutional changes—written and unwritten—are evident in Canada, although the terminology is not uniformly accepted. A complicating factor is that Canada has no single master-text constitution in which we would expect to find most of our most important constitutional rules.

A constitution can change informally in many ways. It can change informally as a result of a new constitutional convention that is integrated, without any change to the text, into the larger body of constitutional commitments. It can change when a statute of some particular significance becomes more important than an ordinary statute and achieves what we might call quasi-constitutional status. A constitution can also change informally by executive action, by implicit repeal, and also by treaty, to name a few methods of informal constitutional change.

The most common way the Constitution of Canada has changed informally is by judicial interpretation. As Allan Hutchinson has observed, the courts "have become the preferred site for effecting important changes in the constitutional order." Hutchinson moreover argues that

this method of constitutional change is "less democratic" than the set of procedures established in part V to update the Constitution: see Allan Hutchinson, "Constitutional Change and Constitutional Amendment: A Canadian Conundrum" in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abington, UK: Routledge, 2013) 51 at 56-57. Hutchinson is not alone in taking this view of informal constitutional change by judicial interpretation in Canada. Dale Gibson has expressed what seems to be an even stronger view on what he has called "judicial amendment" in Canada.

Dale Gibson, "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution"

(1992) 55 Law & Contemp Probs 261 at 261-62, 266-68, 271-72, 276-80
(footnotes omitted)

[In *The Prince*] Machiavelli [warned] that constitutional amendment is "dangerous to carry through." Judicial amendment is as dangerous as formal amendment, though the danger lies chiefly in the consequences rather than in the implementation. No nine people, however wise and well informed, possess the individual or collective powers of imagination necessary to foresee fully the ramifications of major alterations to the constitutional norms upon which their nation's legal and governmental structures are founded. Even if they did, they would lack the range of experience and the moral authority required for sound determinations as to the direction such alterations should take. This is not to say that the democratic process necessarily produces better results, but only that there is danger in entrusting constitutional change to the unaided judicial process. . . .

Judicial amendment of the Canadian Constitution was not invented by the Supreme Court of Canada. Its predecessor as Canada's court of last resort, the Judicial Committee of the British Privy Council, began the process. One of the Privy Council's most audacious amendments concerned the power bestowed on the Parliament of Canada by section 91(2) of the Constitution Act, 1867, to make laws in relation to "the regulation of trade and commerce."

The fact that it was listed second among the enumerated heads of federal jurisdiction, immediately after "the public debt and property," and ahead of such vital matters as taxation, postal service, defence, navigation and shipping, currency, coinage, and banking, must say something about the significance of federal regulation of trade and commerce in the eyes of those who negotiated, drafted, and debated the 1867 Constitution. The fact that it was expressed in more expansive language than the equivalent provision to the United States Constitution was certainly no accident. But a relentless progression of restrictive Privy Council rulings between the 1880s and the 1920s pared the power to the point where it could be described by Justice Idington of the Supreme Court of Canada as "the old forlorn hope, so many times tried, unsuccessfully."

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The Privy Council did not admit that it was "amending" the Constitution. . . Viscount Haldane claimed that the Judicial Committee's duty "now, as always, is simply to interpret the British North America Act." . . . To classify an "interpretation" of section 91(2) that lacked any textual support, deprived the provision of any independent application . . . as anything less than outright amendment serves only to obfuscate constitutional realities . . .

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I do not contend that every major constitutional ruling by the courts involves amendment. The amending decisions with which this article is concerned are relatively rare. ...

The judicial decisions I classify as amendments ... are those that, whatever the sweep of their impact, are not capable of having been products of a fair construction of the Constitution Acts or of other documents of the Canadian Constitution. In "fair construction" I include not just obvious interpretations, but also imaginative rulings that, while perhaps unexpected, can be shown to flow logically from words or implications in the text.

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It should not be supposed that I necessarily object to judicial amendments of the Constitution. The point of the earlier examples was not to criticize substance but to illustrate process. ... Nor do I find fault in general with the fact that major constitutional amendments are made by courts. Observers of a more populist persuasion than I may consider it inappropriate for judicial appointees, lacking a democratic mandate, to engage in outright alteration of the country's most fundamental legal and political document. I do not—not absolutely, at any rate. There are, indeed, compelling reasons to believe that occasional judicial amendment of the Constitution is positively beneficial, and sometimes unavoidable. [Here Gibson cites the onerous conditions for amendment of the Constitution of Canada.] ...

The fact that judges amend the Constitution is not ... always a problem in itself. It is inevitable in some circumstances, and at times beneficial. The undemocratic nature of the process is a legitimate cause for concern, however. Some think that it is dangerous even to acknowledge publicly that courts sometimes amend constitutions. They seem to fear that the electorate will then insist that the power be taken away. In my view, that is a misplaced concern. The public already knows what the courts are doing, and I think its respect for the judiciary is less likely to be damaged by an open acknowledgement of the truth than by a transparent denial that the courts are going beyond mere "interpretation."

It is nevertheless anomalous that a democratic constitution should be capable of outright amendment by an undemocratic institution and undemocratic procedures. Therefore, courts should exercise self-restraint in these matters, permitting themselves to engage in constitutional amendment only when it is either inevitable that they do so, or when it would clearly be detrimental to the nation to leave the matter to the formal amendment process. In all other circumstances, judges should restrict their interpretation to the (rather generous, after all) forms of judicial review that fall within the scope of fair construction.

Hutchinson and Gibson are making two different claims, though each claim is related to the other in an important way at its core. Both are pointing to a particular phenomenon of constitutional change in Canada—that courts have changed the meaning of the Constitution in a way that suffers from a democratic deficit. But whereas Hutchinson stops short of identifying this kind of constitutional change by judicial interpretation as an "amendment," Gibson in fact labels it a "judicial amendment." What is at stake in calling a change an amendment? Do you agree with Gibson's critique of the Court? Taking Gibson's critique as well-founded, is there a way to prevent "judicial amendment"?

Lest we conclude that judicial "amendment" is something to be discouraged, it is worth nothing that courts are often compelled to act in the face of legislative inaction, delay, or stalemate. If courts do, in fact, amend the Constitution in an informal way, it may be because political actors are unable or unwilling to do so using the formal methods that part V offers.

As Adrian Vermeule has observed, the alternative to formal constitutional amendment, where it is difficult for whatever reason, is “judicially developed constitutional law, which itself changes over time in response to political, social, and cultural shifts”—what we might describe as a “judicial updating” of the Constitution if we are not comfortable with the idea of “judicial amendment”: see Adrian Vermeule, “Constitutional Amendments and the Constitutional Common Law” in Richard W Bauman & Tsvi Kahana, eds, *The Least Dangerous Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 229 at 243, 245.

Another method of informal amendment in Canada may be described as “para-constitutional.” This informal method of constitutional change is quite common in Canada, though has yet to be well-theorized until recently. As you read the excerpted passages to follow, consider the relative ease or difficulty of para-constitutional engineering alongside other forms of informal amendment: how would you rank the many methods of informal amendment on an ascending scale of difficulty? And does this ascending scale of difficulty map onto an ascending or descending scale of democratic legitimacy? What criteria do you use to evaluate democratic legitimacy?

Johanne Poirier & Jesse Hartery, “Para-Constitutional Engineering and Federalism: Informal Constitutional Change Through Intergovernmental Agreements”

(forthcoming 2021)

[W]e use the concept of para-constitutionality to explore the impact of intergovernmental agreements on federal constitutional orders. The reason is twofold.

First, the concepts of “para-constitutionality” or “para-constitutional engineering,” adapted from legal sociology, have been used in the past to describe the function played by intergovernmental agreements in federal systems. Both ICC [Informal Constitutional Change] and para-constitutionality are umbrella concepts sharing a similar objective: accounting for constitutional alterations that take place without recourse to amendment procedures. The two theoretical frameworks developed somewhat in parallel, partly in different “epistemic communities.” One mostly interested in constitutional change writ large, and largely in English language literature. The other in federal studies. We suggest that bringing para-constitutionality into conversation with ICC—and its more specific theories—is a worthwhile comparative law exercise. These two lines of scholarship might overlap, but they also use different examples, terms and experiences to enrich the analysis.

In addition, we believe there is added-value to the theory of para-constitutionality, particularly when we consider the two distinct etymologies of the prefix “para.”

Borrowed from the Greek *παρά*, “para” means “beside” (as in “parallel”). Of Latin descent, the prefix *paro* has a more aggressive connotation and signifies “against” or to “ward off.” Political actors can therefore act “para-constitutionally” in two inter-related ways ...

The Greek “para” entails creating norms “beside”—in parallel to—official law. Para-constitutional instruments and processes circumvent the (“big C” or “small c”) constitution without necessarily contradicting it. ... This dimension of “para” points to the fact that, irrespective of the formal constitutional/unconstitutional status in positive constitutional law, instruments of public policy may have the effect of modifying the constitution, sometimes deliberately, sometimes not. And often, this will be achieved in incremental, and rather opaque, ways.

By contrast, "para-constitutionality" in the Latin sense is concerned with another set of questions. It is essentially a synonym of "unconstitutional." It describes instruments and processes that go *against* the Constitution. ...

Rules and practices that are constitutionally invalid can enjoy undeniable effectiveness for long periods of time. This will be the case until they are declared unconstitutional by a judge, to the extent that there is a judicial conduit for their constitutional review, or until political actors bring them into compliance with the Constitution. ... In other words, they may play a Greek style para-constitutional function, while the verdict on their para-constitutionality in the Latin sense is suspended or unknown.

The Greek/Latin distinction of para-constitutionality has the advantage of constantly reminding us of what we are concerned with in discussions on ICC. ...

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Constitutional politics in Canada have always been executive-led. ... Through agreements, federal partners can circumvent the constitution "Greek-style," whether or not the result is actually consistent with the constitution ("Latin style").

Intergovernmental agreements ("IGAs") are pragmatic instruments negotiated between federal partners. These malleable contract-like instruments perform a wide range of functions, both explicit and implicit. ...

In most cases, the avowed objective of IGAs is to coordinate the exercise of exclusive—but interrelated—powers or to clarify the respective responsibilities of distinct orders of government in the context of concurrent or shared jurisdiction. ... The purpose of these agreements is not usually to amend the constitution, but to operationalize it in a context where the implementation of coherent public policies requires intergovernmental collaboration.

That being said, IGAs can also play a role in restructuring federal constitutions, on the margins of their formal architectures. They can: (1) distort the distribution of legislative powers; (2) serve as alternatives to formal constitutional reforms; and (3) contribute to gradually transforming, in an *ad hoc* fashion, largely dualist federal systems into integrated federal ones, without providing them with the legal and institutional safeguards that are usually associated with integrated federations [such as ...] Australia, Brazil, Canada, India, Spain, and the United States.

In Canada, [the status of IGAs] is particularly blurry. Depending on the way they are drafted and their content, some may generate binding "contractual" obligations between the executives who enter into them. However, they cannot generate law of general application

And yet, in Canada, the vast majority of IGAs are not incorporated at all. Under traditional norms of public law, they do not feature in the hierarchy of legal norms. In positive law, they do not even trump unilateral regulations of either order of government. Nevertheless, in practice, they can be highly effective in structuring relations between orders of government. Moreover—and perhaps more surprisingly—courts have occasionally treated non-incorporated IGAs as binding on third parties "as if they were law," generally in the name of cooperative federalism. In other words, courts can discretely turn a blind eye to public law orthodoxy to safeguard complex negotiated schemes. [Here Poirier and Hartery note that IGAs remain subject to legislative abrogation.]

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Hence, IGAs in Canada are often at the centre of administrative inter-delegation The constitutionality of this type of "oblique" delegation has long been recognized by the Supreme Court of Canada. And yet, as mentioned above, these agreements have the effect of transforming, in an *ad hoc* manner, the dualist architecture of the Canadian federation whereby each order of government has its own

legislative and executive institutions. We do not necessarily decry this constitutional creativity, which can rationalize public action, but wish to underscore its Greek-style para-constitutional impact.

In Canada, IGAs can also serve as a substitute for constitutional reforms that are deemed unattainable. This was the case, for example, with a series of IGAs adopted in the mid-1990s in the wake of the failed Meech Lake and Charlottetown Accords. Faced with the impossibility of constitutional reform, the federal government undertook to demonstrate that the federation could be modernized "administratively" through agreements that did not require formal constitutional amendments (sometimes even without the assistance of legislative bodies). The goal was clearly to achieve some form of constitutional renewal by "contract." In other cases, constitutional mutations proceed incrementally, pragmatically, arguably not even intentionally. The long-term effect, however, is to transform the Constitution as it is lived.

Intergovernmental agreements therefore represent parallel mechanisms of public action, which bypass or restructure the federal constitution

C. AN UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT?

It has become common for courts around the world to rule that a formal constitutional amendment is unconstitutional. How can that be? Imagine that amending actors follow all of the rules outlined in the Constitution to pass an amendment, with all required majorities or supermajorities properly assembled to approve an amendment. Further, imagine that the amendment is approved by all relevant bodies and that it is promulgated and subsequently entered into the text of the Constitution. This is often the kind of constitutional amendment that courts have invalidated as unconstitutional.

The seeds for finding an amendment unconstitutional were planted in India in 1951, only one year after the Constitution came into force when the Indian Supreme Court was asked whether the amendment power admitted of any limits. The Court answered no: see *Sri San-kari Prasad Singh Deo v Union of India*, 1951 AIR 458, 1952 SCR 89. Subsequently, however, the Court held that the power to amend the constitution could not be used to violate fundamental rights: see *Golaknath v State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762. Shortly thereafter, the Court again narrowed the power holding that it could not be used to violate the "basic structure" of the Constitution: see *Kesavananda Bharati Sripadagalvaru v Kerala*, 1973 AIR 1361, 1973 SCC (4) 225 at para 1198. This basic structure of the Indian Constitution is not laid out anywhere in the Constitution; it is instead a judicially constructed notion of constitutional coherence that seeks to defend the Constitution from changes that are inconsistent with its own foundations.

A key case in the modern history of the Indian Constitution is *Minerva Mills Ltd v Union of India & Ors*, 1980 AIR 1789, 1981 SCR (1) 206. For our purposes, the relevant part of the case concerned an amendment to the amendment formula in the Indian Constitution. Section 55 of the *Constitution (Forty-second Amendment) Act, 1976* inserted two new subsections into art 368, which authorizes the two Houses of Parliament to amend the Constitution with a simple majority, subject to a few exceptions for amendments that require the approval of at least half of the states. The 42nd amendment introduced subss 4 and 5 into art 368:

(4) No amendment of this Constitution ... shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The effect of the amendment was to shield all constitutional amendments from the Supreme Court's power of judicial review. In *Minerva Mills*, the Indian Supreme Court declared this amendment unconstitutional.

Minerva Mills Ltd & Ors v Union of India & Ors

1980 AIR 1789, 1981 SCR (1) 206

CHANDRACHUD CJ:

In *Keshavananda Bharati* this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this group of petitions ... is whether [s 55] of the Constitution (42nd Amendment) Act, 1976 transgress[es] that limitation, on the amending power.

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... The Preamble [to the Constitution] assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship, and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation." The newly introduced clause 5 of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever." No constituent power can conceivably go higher than the sky-high power conferred by clause 5, for it even empowers the Parliament to "repeal the provisions of this Constitution," that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. ... The power to destroy is not a power to amend.

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and, therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

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Since, for the reasons above mentioned, clause 5 of Article 368 transgresses the limitations on the amending power, it must be held to be unconstitutional.

The newly introduced clause 4 of Article 368 must suffer the same fate as clause 5 because the two clauses are inter-linked. Clause 5 purports to remove all limitations on the amending power while clause 4 deprives the courts of their power to call in question any amendment of the Constitution. ... The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power

Clause 4 of Article 368 is in one sense an appendage of Clause 5, though we do not like to describe it as a logical consequence of Clause 5. If it be true, as stated in clause 5, that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as unconstitutional. Clause 4, therefore, says nothing more or less than what clause 5 postulates. If clause 5 is beyond the amending power of the Parliament, clause 4 must be equally beyond that power and must be struck down as such.

The idea of an unconstitutional constitutional amendment has migrated across the globe. Although the doctrine has yet to reach Canada, it is prominent in its neighbour, the United States. To date, there has yet to be a federal invalidation of a federal constitutional amendment, but federal and state courts have often invalidated state constitutional amendments. Consider one example, below, in which the United States Supreme Court, in a 6–3 decision, held unconstitutional an amendment to the Colorado Constitution that infringed the fundamental rights of gays and lesbians to participate in the political process.

Romer v Evans

517 US 620, 116 S Ct 1620 (1996)

KENNEDY J (Stevens, O'Connor, Suter, Ginsberg, and Breyer JJ concurring):

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 ... (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. ... [T]he cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. ... What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. ... Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const., Art. II, 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

"No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority

status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." *Ibid.*

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Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

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Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference ... that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. ...

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The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. ...

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

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It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. ... Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. ...

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A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ... Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

• • •

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

Consider a third instance of a court exercising the power to invalidate a constitutional amendment. In 2000, the Constitutional Court of Taiwan issued an extraordinary judgment that found both procedural and substantive grounds upon which to invalidate constitutional amendments.

Constitutional Court of Taiwan

Interpretation No 499, 2000/03/24

A constitutional amendment as a state act pertaining to the constitution is null and void inasmuch as a manifest and gross flaw occurs in the amendment procedure. A procedural flaw is considered manifest where the facts of the flaw can be determined without further investigation, whereas it is gross where the facts of the flaw alone render the procedure illegitimate. With such procedural flaws, a constitutional amendment violates the basic norm that underpins the validity of constitutional amendments. The amendment process for the disputed Additional Articles, which passed the third reading by the National Assembly on September 4, 1999, contravenes the principle of openness and transparency as set out above and is not in conformity with Article 38, Paragraph 2 of the Rules of the National Assembly (now defunct). Due to disputed procedural irregularities in which manifest flaws transpired without any further inquiry, the general public was not informed of how the Delegates of the National Assembly (hereinafter "Delegates") exercised their amending power. Thus, the constitutional principle that requires the Delegates to be accountable to both their constituents and their nominating political parties ... was not adhered to. With such a manifest and gross flaw, the act of disputed constitutional amendment violates the basic norm that underpins the validity of constitutional amendments.

The National Assembly is a constitutionally-established organ with its competence provided for in the Constitution. The Additional Articles, enacted by the National Assembly via the exercise of its amending power, are at the same level of hierarchy as the original texts of the Constitution. Some constitutional provisions are integral to the essential nature of the Constitution and underpin the constitutional normative order. If such provisions are open to change through constitutional amendment, adoption of such constitutional amendments would bring down the constitutional normative order in its entirety. Therefore, any such constitutional amendment shall be considered illegitimate, in and of itself. Among various constitutional provisions, Article 1 (the principle of a democratic republic), Article 2 (the principle of popular sovereignty), Chapter II (the protection of constitutional rights), and those providing for the separation of powers and the principle of checks and balances are integral to the essential nature of the Constitution and constitute the foundational principles of the entire constitutional order. All the constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded.

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Article 1, Paragraph 3, Second Sentence of the Additional Articles provides, "The term of office of the Third National Assembly shall be extended to the day when the term of office of the Fourth Legislative Yuan expires;" Article 4, Paragraph 3, First Sentence provides, "The term of office of the Fourth Legislative Yuan shall be extended to June 30, 2002." Thereby, the term of office of the Third National Assembly will be extended by two years and forty-two days, and the term of office of the Fourth Legislative Yuan by five months, respectively. Pursuant to the principle of popular sovereignty, the power and authority of political representatives originate directly from the authorization of the people. Hence, the legitimacy of representative democracy lies in the adherence of elected political representatives to their social contract with the electorate. Its cardinal principle is that the new election must take place at the end of the fixed electoral term unless just cause exists for not holding the election. Failing that, representative democracy will be devoid of legitimacy. ... The just cause for not holding the election alluded to above must be consistent with the holdings of J.Y. Interpretation No. 31, which stipulated, "The State has been undergoing a severe calamity, which has made the election of both the Second Legislative Yuan and the Second Control Yuan de facto impossible." In this case, no just cause for not holding re-elections can be found to justify the disputed extension of the terms of both the Third National Assembly and the Fourth Legislative Yuan. ...

The amendment process of Articles 1, 4, 9, and 10 of the Additional Articles, adopted by the Third National Assembly by secret ballot in its Fourth Session, Eighteenth Meeting on September 4, 1999, is in contravention of the principle of openness and transparency and also violates the then-governing Article 38, Paragraph 2 of the Rules of the National Assembly, to the extent of constituting manifest and gross flaws. It therefore violates the basic norm that underpins the validity of constitutional amendments. Among the disputed Additional Articles, Article 1, Paragraphs 1 to 3 and Article 4, Paragraph 3 are in normative conflict with those provisions of the Constitution that are integral to its essential nature and underpin the constitutional normative order. Such conflict shall be proscribed under the constitutional order of liberal democracy. Hence, the disputed Articles 1, 4, 9, and 10 of the Additional Articles shall be null and void from the date of announcement of this Interpretation. The Additional Articles promulgated on July 21, 1997, shall continue to apply. It is so ordered.

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The primary function of legal interpretation is to resolve the issues of concurrence of norms (Normenkonkurrenz) and conflict of norms (Normen-konflikt), including doubts as to the gaps resulting from conflicting norms enacted at different times (which is considered an axiom in legal theory. See Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed., 1991, S. 313ff.; Emil[ilo] Betti, *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*, 1967, S. 645ff.). This is also the province and duty of any constitutional court. As regards the petitioners' claim that manifest and gross flaws existed in the disputed amendment process, it raises the question as to whether the constitutional amendment in question was faithfully carried out in accordance with the procedural requirements laid down in the Constitution and the Rules of the National Assembly. The answer to that question involves the choice of various standards of constitutional review and will be addressed separately. The other four claims are formed around the inter-provisional conflict or contradiction arising from the newly amended Additional Articles vis-à-vis the provisions of the Constitution and the Additional Articles. They also concern the petitioners' exercise of their powers. It is noted that even the supplementary written statement of the authority concerned dated January 19, 2000, submits that "the Constitutional Court can make

interpretations on petitions to resolve the conflicts among, or ambiguities about, constitutional provisions, as long as such provisions are in effect." As the present petitions request this Court to resolve the conflicts or ambiguities caused by the newly amended Additional Articles, the jurisdiction of this Court is beyond question. ...

The Constitution is the supreme law of the land. Constitutional amendment greatly affects the stability of the constitutional order and the welfare of the people and must be therefore faithfully carried out by the designated body in accordance with the principle of due process. [Under the Constitution as it stood] on July 21, 1997, the National Assembly, on behalf of the people, is the sole constitutional organ that has the power to amend the Constitution. ... Accordingly, it is imperative that the National Assembly observe the requirements of due process in the exercise of its power of amendment and fully reflect the will of the people. In the enactment and amendment of the Additional Articles, the process of the National Assembly must be open and transparent Considering that constitutional amendment is the direct embodiment of popular sovereignty, the fact that the National Assembly never used a secret ballot in the previous nine rounds of constitutional amendments, including during the enactment and amendment of the Temporary Provisions and the Additional Articles, speaks to the principle of popular sovereignty. When the Delegates and their political parties are accountable to their constituents through such open and transparent amendment process, the constituents are able to hold them accountable through recall or re-election. Thus, the provision for the secret ballot in Article 38, Paragraph 2 of the Rules of the National Assembly shall not be applied to voting on any constitutional amendment. Not only must the readings for the adoption of a constitutional amendment comply with the Constitution strictly, but their procedures also need to conform to the constitutional order of liberal democracy (see J.Y. Interpretation No. 381).

[The Court then addressed numerous procedural flaws, including the fact that a secret ballot was used at second and third reading.]

Among the ... procedural flaws, the use of a secret ballot is a manifest and gross one. Within the bounds of the Constitution and legislation, the National Assembly may make its rules of procedure ex officio to carry out its powers on such matters as the quorum, the majority threshold, the introduction of bills, and methods of voting. Article 38, Paragraph 2 of the Rules of the National Assembly provides, "The chairperson shall have the prerogative in deciding the method of voting stated in the last paragraph, be it a show of hands, standing, electronic voting, or balloting. The vote shall remain to be cast by open ballot provided that more than one-third of the Delegates present request to do so, notwithstanding the chairperson's ruling on a secret ballot." While this rule is applicable to voting about general matters, adopting a constitutional amendment by secret ballot is in contravention of the above-stated principle of openness and transparency The said Records indicate that a secret ballot had been proposed as the voting method for all the constitutional amendment bills in the second and third readings before the second reading started. Out of the 242 Delegates present, 150 voted in favor of this proposal. In the meantime, a counterproposal was submitted in accordance with Article 38, Paragraph 2 of the Rules of the National Assembly, demanding that all the constitutional amendment bills be voted on by open ballot. Eighty-seven out of the 242 Delegates present, more than one-third of the Delegates present, voted in favor of this counterproposal [Contrary to Article 38, Paragraph 2 of the Rules of the National Assembly, the secret ballot was adopted by a simple majority as the voting method for the constitutional amendment bills. This also deviated from the voting method used for constitutional amendment bills in constitutional practice. The general public was thus left uninformed as to how the

Delegates exercised their power of amendment ... In conclusion, the petitioners' claim that the process of amendment in question had manifest and gross flaws is sustained. To this extent, this amendment of the Constitution violates the basic norm that underpins the validity of constitutional amendments.

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In response to the argument of the authority concerned for the secret ballot on the basis of free mandate, it is noted that most modern democracies adopt free mandate vis-à-vis imperative mandate, under which political representatives are not merely the delegates of their constituents but are rather elected to represent the entire nation. Although political representatives are privileged from being questioned in any other place about their speeches and the votes they cast in the parliament and are not subject to recall under free mandate, it does not follow that political representatives are completely unconstrained by public opinion or their political parties. More importantly, in contrast to the constitutions of most Western democracies, our Constitution explicitly provides that political representatives at all levels are recallable (see Article 133 of the Constitution and J.Y. Interpretation No. 401). Against such a backdrop, the current system is not purely one of free mandate. Hence, free mandate cannot justify the deviation of the authority concerned from the Rules of the National Assembly to adopt a secret ballot.

... All constitutionally-established organs must adhere to the constitutional order of liberal democracy, as emanating from the said constitutional provisions, on which the current Constitution is founded (see Article 5, Paragraph 5 of the Additional Articles and J.Y. Interpretation No. 381). The power of the National Assembly, being a constitutionally-established organ, is conferred by the Constitution and thus must be governed thereby. ... [I]n the event that a constitutional amendment contravenes the constitutional order of liberal democracy, as emanating from the said foundational principles, it betrays the trust of the people, shakes the foundation of the Constitution, and thus must be checked by other constitutional organs. Such a check on the designated body that makes amendments is part of the self-defense mechanism of the Constitution. Thus, a constitutional amendment that contravenes the foundational principles of the Constitution and therefore causes normative conflict within the constitutional order shall be denied legitimacy.

Can you imagine a constitutional amendment being ruled unconstitutional in Canada? The Canadian experience with judicial pronouncements on constitutional amendments may be described as "pre-ratification amendment review."

Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions

(Oxford: Oxford University Press, 2019) at 223-26

The Canadian Supreme Court has a long history of advising lawmakers through its reference jurisdiction on how and whether to amend the constitution. In current practice, lawmakers will ask the Court for its opinion on whether an amendment bill or proposal is constitutional. Although the Court has the power to decline to answer, the Court generally agrees to give guidance to lawmakers—and lawmakers typically follow the Court's advice.

In the Patriation Reference, the essence of the question before the Court was whether the federal government was bound by law to secure the consent of none,

some, most, or all of the provinces before undertaking a major constitutional reform. The Court ultimately advised by a margin of 7–2 that there was no judicially enforceable law requiring the federal government to secure the agreement of the provinces. The Court also advised, by a margin of 6–3, that the federal government was bound by a legally unenforceable constitutional convention requiring it to secure substantial provincial consent before seeking to amend the constitution on a significant matter affecting federal-provincial relations. The Court's advisory opinion exercised what seems to have been binding political effect on lawmakers despite its formally advisory legal function.

In the high stakes involved in constitutional renewal at the time—especially with the continuing risk of Quebec's secession—we might have expected the force of political will to overrun a mere advisory opinion. Then prime minister Pierre Trudeau had threatened to go over the heads of the provinces directly to the people in a national referendum that would have legitimated the new constitution as the people's own. Yet the Court's Solomonic answer to the question whether the federal government was required to secure the consent of the provinces for this major reform compelled the federal government to drop its plan to proceed unilaterally without provincial consultation and consent, and instead to proceed multilaterally in conformity with the Court's declaration that "a substantial measure of provincial consent is required."

The federal government's initial preference for a referendal route to Patriation echoed the core of its proposal for an amendment formula. Trudeau had proposed in his "People's Package" that the constitution would be amendable in one of two ways: according to the Victoria Formula or by referendum in the face of provincial stalemate on a proposed amendment. But ultimately the chosen path followed the Court's advice in the Patriation Reference. Bruce Ackerman and Robert Charney are right that Trudeau missed an opportunity when he relented in the face of the Court's advisory opinion. Trudeau could have—and in their view should have—called a national referendum on the new constitution, both to break the stalemate among premiers and to give Canada its democratic moment—a moment that Canada, decades later, has yet to live.

The prime minister's choice at the time to take the non-referendal path to Patriation and instead to accept the Court's advice had three important consequences for making and remaking the constitution in Canada. First, it set an important precedent that the Court would be consulted on major questions concerning constitutional reform. Second, the political choice to consult the Court using the reference procedure and to abide by the Court's ruling entailed the collateral consequence that the Court's advice on constitutional reform would [be] followed in all but the most extraordinary circumstances. And, third, the prime minister's choice to accept the Court's advice bolstered the legitimacy of Court as an institution properly involved in overseeing the process of constitutional amendment in Canada. When Trudeau ceded his ground, the Court grew in status and importance, both real and perceived. No major national constitutional change to Canada's Constitution involving the federal and provincial government could henceforth be made without the Court weighing in on how the change could be made if indeed it could be made at all.

In 1998, sixteen years after Patriation, lawmakers returned to the Court in another case of constitutional change in Canada. In the Secession Reference, lawmakers asked the Court for its advice on whether and how Quebec could leave Confederation. The Court constructed a legal-political framework within which lawmakers could negotiate the terms of a province's exit from Canada. With notable exceptions, lawmakers on both sides of the secession debate have found victory in the Court's judgment—evidence that lawmakers recognize, if not accept, the Court's role in

giving advice on a fundamental matter of political self-understanding and constitutional change.

Another sixteen years later, in 2014, lawmakers again turned to the Court to resolve two disputes on the meaning and scope of the amendment rules in the constitution. Both the Senate Reform Reference and the Supreme Court Act Reference confirmed that lawmakers will go to the Court for answers on whether, how, and by whom the constitution may be amended—even where that amendment affects the Court’s own powers. Both of the 2014 references locate enormous interpretive authority within the Court on future constitutional amendment in Canada. ... The lesson from these 2014 references is that political actors cannot today make an amendment that affects either of these open-textured concepts without the approval of the Supreme Court of Canada.

We can understand what the Court did in each of these periods of constitutional change since and including Patriation as directing political decision-making on both procedural and substantive grounds in a pre-ratification review of constitutional change. The Court’s advisory opinion in the Patriation Reference was a pre-ratification procedural review on the process lawmakers could lawfully and legitimately use to patriate the constitution. The Court also engaged in a form of pre-ratification substantive review because the procedure the Court suggested lawmakers should follow was dictated by the content of the constitutional changes lawmakers wished to make. Had the constitutional changes not involved federal-provincial relations as they did, the Court would not have given the same instructions on how lawmakers should proceed. The Court’s pre-ratification review of the Patriation package was therefore both substantive and procedural.

The same is true of the Secession Reference, the Senate Reform Reference, and the Supreme Court Act Reference. In each of these, the Court was asked for advice on how lawmakers could make major changes to the constitution before the changes had been promulgated. How a province can secede from the country, how to reform the Senate, and how to change the structure of the Court—these constitutional questions were the heart of the matter in each of these three references, and for each question the Court laid out the process the constitution requires lawmakers to follow.

Pre-ratification review of constitutional amendment gives the Supreme Court of Canada considerable power. It allows the Court to achieve the same result that foreign courts achieve when they invalidate a duly-passed constitutional amendment. Yet the Canadian Court avoids having to nullify the expressed will of the people and their elected representatives. This makes it less likely that the Court will fear the consequences of defying popular will and more likely that the Court will feel liberated to review the amendment question on the merits without worrying about the fallout from undoing an amendment that has already been promulgated with the support of the people. Pre-ratification review in Canada relieves the Court of the pressure it might otherwise feel to approve a popularly supported amendment—one that has survived the veto gates in the amendment process and by the fact of its survival enjoys a considerable measure of legal and sociological legitimacy. Put another way, pre-ratification review frees the Court to do what other courts do when they invalidate an amendment, but without confronting the strongest version of the counter-majoritarian critique that faces any court daring to invalidate a promulgated constitutional amendment.

Conceivably, a constitutional amendment could one day be proclaimed that would only later be challenged in court. If it were, how would Canadian courts respond? Could the Canadian Supreme Court follow the path of the Indian Supreme Court and adopt an equivalent to the basic structure doctrine? For discussion and comparison, see Vivek Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34 Yale J Int'l L 207.

We know that superior and appellate courts in Canada have weighed in on the constitutional validity of a constitutional amendment: see *Hogan v Newfoundland (AG)*, [2000 NFCA 12](#), leave to appeal to SCC refused, [2000] SCCA No 191 (QL); *Potter c Québec (Procureur général du)*, [2001 CanLII 20663](#), [\[2001\] RJQ 2823 \(CA\)](#), leave to appeal to SCC refused, [2002] CSCR No 13 (QL). But the Supreme Court of Canada has not yet faced this question. Scholars have nonetheless explored the possibility of an unconstitutional amendment in Canada: see Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (2015) 41 Queen's LJ 153.

The judicial power to invalidate a constitutional amendment raises a similar problem of legitimacy as that raised by the institution of judicial review: see the discussion in Chapter 2, Judicial Review and Constitutional Interpretation. The problem is magnified in the case of constitutional amendment. In Section I of this chapter, it was suggested that the power of constitutional amendment is an incident of democracy and a marker of sovereignty. You will recall that the context for this discussion was a question concerning who should possess the power to amend the Constitution of Canada—the Parliament of the United Kingdom, or Canada itself. Today Canada possesses the power of constitutional amendment, settling the question whether Canada is a sovereign state. But on the horizon may await another question concerning sovereignty. Which institution or institutions possess the power of constitutional amendment as a final matter in Canada—the institutions authorized by part V of the *Constitution Act, 1982* to amend the Constitution, or the Supreme Court, which could one day be presented with an occasion to declare a constitutional amendment unconstitutional? Only if that day ever comes will we know with certainty where in Canada the ultimate power of constitutional amendment resides.



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